Vsnl Broadband Ltd, Mumbai vs Department Of Income Tax on 3 September, 2013

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

. . , . ,
BEFORE SHRI B.R. MITTAL, JM AND SHRI D. KARUNAKARA RAO, AM

./I.T.A. No.7696/M/2010 (AY: 2005-2006)
./I.T.A. No.1676/M/2010 (AY: 2006-2007)

DCIT-1(3), / M/s. VSNL BroadBand Ltd .,
R.No. 540/564, 5 t h Floor, Vs. Surakhsa', Lokmanya Vide sh
Aayakar Bhavan, M.K. Road, Sanchar Bhavan, Kashinath
New Marine Lines, Dhuru Marg, Opp.Kirti Collag
Mumbai. Praphadevi, Mumbai - 400 028

¢ ./ PAN : AABCT 9945 R
(¢ /Appellant) .. (£ ¢ / Respondent)

¢ / / Appellant by : Mrs. Neeraja Pradhan, DR
£ ¢ / / Respondent by : Mr. Kanchun Kaushal

/Date of Hearing : 3.9.2013
¥ƒ /Dat e of Pronouncement : 25. 9.2013
/ O R D E R

PER D. KARUNAKARA RAO, AM:

There are two appeals under consideration. Both the appeals are filed by the Revenue against the separate orders of CIT (A)-2, Mumbai for the assessment years 2005-06 and 2006-07 respectively. Since, the issue raised in both the appeals is identical, therefore, for the sake of convenience, these two appeals are clubbed, heard combined and are disposed of in this consolidated order. Appeal wise adjudicated is given in the following paragraphs.

2. The effective grounds raised in both the appeals are identical with the exception of figures. For the sake of convenience, we shall take up the ground raised in ITA No.7696/M/2010 for the AY 2005-which reads as under:

> On the facts and in the circumstances of the case and in law, the Ld CIT (A), erred in deleting the disallowance of Rs. 23,73,621/- (sic 213,73,621'/-) being the payment towards annual maintenance charges paid to Sycamore Networks Inc., USA violating the provisions of section 40(a)(i) of the IT Act.

3. Briefly stated relevant facts of the case are that the assessee was earlier named as Tata Power Broadband Company Ltd and engaged in the business of providing broadband services under category IP-1, IP-II, ISP-VPN Licenses'. Assessee filed the return of income declaring the total loss

at Rs. 8,78,20,100/-. Assessment was completed u/s 143(3) of the Act and the assessed loss under the normal provisions was determined at Rs. 3,48,32,052/-. AO also computed the book profits u/s 115JB of the Act determining the books profits at Rs. 11,64,67,098/-. While computing the income under normal provisions, AO made disallowance u/s 40(a)(ia) amounting to Rs. 23,73,621/- and the same was deleted by the CIT(A). Regarding this disallowance of Rs. 23,73,621/-, during the assessment proceedings, AO noticed that the assessee made payment to foreign parties towards 'Annual Maintenance Charges' (AMC) amounting to Rs 23.74 lacs without making TDS. In this regard, AO called for details and informed the assessee that the said amount was classified as 'repairs and maintenance'. AO is of the opinion that the said payment of Rs. 23.74 lacs constitutes 'Fee for Technical Services' (FTS) on which TDS should have been deducted as per the provisions of section 195 of the Act and remitted to the Government Treasury. Accordingly, AO invoked the provisions of section 40(a)(i) of the Act and made disallowance of Rs. 23,73,621/-. Aggrieved with the same, assessee filed an appeal before the first appellate authority.

4. During the proceedings before the first appellate authority (ie the 'CIT(A)'), assessee submitted that the assessee paid the said amount to Sycamore Networks Inc, USA as part of the payments towards annual maintenance charges. It is the finding of the CIT (A) that under the provisions of Article 12(4) of the India-US Treaty, such payments made by the assesssee do not constitute FTS. Therefore, there is no need for making TDS when such payments are made by the assessee. In the process, he relied on his order for the AY 2006-2007, wherein the identical issue was decided in favour of the assessee. Referring to the said order of the CIT (A), Ld Counsel brought our attention to para 2 to 7 that order of the CIT(A) and mentioned that the CIT (A) discussed the agreement between the assessee and the Sycamore Networks Inc, USA and extracted the relevant provisions dealing with the details/nature of services rendered by the Sycamore Networks Inc, USA (ie 'payee) to the assessee for which impugned amount of Rs. 23,73,621/- was paid in the year under consideration. In fact, in the subsequent assessment year 2006- 2007, assessee paid an increased sum of Rs. 51,81,097/-, which was disallowed by the AO for the identical reasons. The increase on account of payments towards the repairs and the assessee paid the said in accordance with the ameded/revised Service Agreement. In the order of the CIT (A) for the AY 2006-2007, it was evident that the assessee made various submissions to suggest that the services rendered to the assessee does not involve any transfer of technical knowledge or imparting of technical knowledge, technical skills etc to the employees of the assessee. However, there is no discussion on the issues like 'processes' specified in Article 12(4)(b) of the Treaty. These are merely 'annual maintenance charges paid which are of routine nature. In para 6 of the CIT (A)'s order, there is reference to the decisions of the ITAT, Mumbai in the case of Raymonds Ltd reported in 86 ITD 791 and in the case of Invensys Systems Inc. reported in 317 ITR 438 for the proposition that the payments of this kind do not constitute FTS. Finally, CIT (A) held that these payments are not for imparting of technical knowledge or 'make available' of technical services to the assessee. Para 7 is relevant in this regard and the same reads as under.

'7. I have perused the facts of the case including the agreement under consideration and the various services to be provided in terms of the agreement. I find that as far as the AMC is concerned, it is only restricted to online facility being provided to appellant, either telephonic or through the Internet. Further, as far as repairs are concerned, the repairs are undertaken only in USA and no

portion of the technical service is □made available' to appellant. Consequently, Article 12(4) of the India-US Treaty suggests that the payments made by appellant are not in the nature of fee for technical services requiring deduction of tax at source. Consequently, the action of the AO is not justified and the disallowance made by him cannot be upheld and is deleted.

5. Aggrieved with the above order of the CIT (A), Revenue filed these two appeals involving AYs 2005-2006 and 2006-2007.

6. During the proceedings before us, Mrs. Neeraja Pradhan, Ld AR for the Revenue, at the outset, mentioned meekly that the figure of Rs.213,73,621/- appearing in the ground no.1 for the AY 2005-06 is required to be read as Rs.23,73,621/-. Before us, she put forward various arguments and pleaded for setting aside the conclusion of the CIT (A). Bringing our attention to the para 3 of the CIT (A), Ld DR read out the nature of the services offered by Sycamore Networks Inc, USA for which assessee received the sum of Rs. 23,73,621/- for the AY 2005-2006 and Rs. 51,81,097/- for the AY 2006-2007. She mentioned that the services offered are of technical support in nature therefore, said services constitutes technical services. She also emphasized that the technical assistance shall be at the single point in diagnosis and resolving the technical issues relating to operations, performance, reliability etc. In case the diagnosis reveals that fault is with the CORD, the same is sent to the M/s Sycamore for repairs, if any. She also mentioned that the services rendered are not limited to the ones specified in the last paragraph of the extract relating to the nature of services enlisted in the agreement. She further mentioned that the services are connected to Indian Territory and therefore, the on territorial nexus rule, the payments should suffer TDS. She is critical of the fact that the order of the CIT(A) should not categorized as a speaking order considering the cryptic few lines extracted above. Further, bringing to our attention to the order of the CIT (A), ld DR mentioned that the CIT (A) adjudicated the issue and granted relief to the assessee without realizing the settled position that there is need for examining the impugned issue from various angles and not merely referring to argument relating to □make available . She is critical of the fact the CIT(A) has not adequately examined the provisions of Article 12(4)(b) of the Treaty too. He completely left the applicability of the provisions of Article 12(4)(a) of the Treaty. Subsequently, she filed a copy of the order of the ITAT Mumbai Bench in the case of Ashapura Minichem Ltd. Vs. Asst. Director of Income Tax (International Taxation) [2010] 40 SOT 220 and mentioned that the fee paid for the technical services rendered in India should be taxed in India. Further, relying on the decision of the Authority for Advance Rulings (A.A.R) in the case of Perfetti Van Melle Holding B.V., Netherlands, Ld DR mentioned that □payments of any kind to any person in consideration for the rendering of the any technical or consultancy services constitutes FTS . Ld DR also read out the last segment of para 7 appearing at page 7 of the said A.A.R decision which reads as under:

> □7.....The applicant submits that Perfetti India □will not get equipped with the knowledge or expertise and would not be able to apply it in future, independent of Perfetti BV . This submission cannot be accepted. When one party provides support to the other through provision of knowledge and experience and assists the employees of the other, how can it be accepted that the recipient will not apply this knowledge and skill after the termination of the said agreement.

7. Further, Ld DR filed a copy of another ruling of the A.A.R in the case of AREVA T&D India Limited, Chennai and mentioned that the □support services offered constitute FTS.

8. Per contra, Mr. Kanchun Kaushal, Ld Counsel for the assessee explained that the impugned payments were made as part of Annual Maintenance Charges (ie AMC) and repairs only.Further, he made a categorical statement that no employee of the assessee was trained during these years as part of the AMC. Training of the employees of the assessee implies the transfer of the technical knowledge and therefore, the payments may constitute the FTS/Royalty, which is not the case here.

There was no imparting of the technical knowledge or technical skills in any form either to the assessee or its employees. Further, the assessee has not become owner of any such technical knowledge or skills for which the impugned payments were intended from the assessee's point of view. Mr Kaushal explained that the assessee is owner of equipment procured from said Sycamore Networks Inc, USA and the impugned payments were made as part of the maintenance of the same. The dependent customers of the assessee receive the services from the Sycamore Networks Inc, USA as and when the trouble shooting is reported. In fact, the services are offered online and the troubleshooting are attended by the Sycamore Networks Inc, USA and there is no involvement of the employees of the assessee in the process of sorting out the problems reported online. Technical information, skills or knowledge are not transferred to the assessee or its employees directly or indirectly, therefore, the payments made by the assessee do not constitute FTS within the meaning of the Treaty with USA. He mentioned that the AO has not brought out any incidents to show that the Sycamore Networks Inc, USA has transferred ownership rights of any technical information or skills of the assessee. Bringing our attention to the contents of the agreement of the services vide para 3 of the impugned order for the AY 2006-2007, Ld Counsel stated that the said list of services mentioned in the agreement do not indicate transmission or imparting of technical knowledge. Referring to the case laws cited by the Ld DR, Ld Counsel mentioned that the issues in the said cases are related to the provisions of section 9 of the domestic law which do not apply to the facts of the case, where assessee is opted for beneficial Treaty provisions and not the provisions of section 9 of the Domestic law of India. He also mentioned that the A.A.R Rulings are distinguishable on facts i.e., the issues of □support services' in the case of AREVA T&D India Limited (supra) and the □imparting of technical knowledge' to the employees of the assessee in the case of Perfetti Van Melle Holding B.V (supra). Further, Ld Counsel filed an order of the ITAT, Hyderabad Bench in the case of ADIT vs. M/s. BHEL-GE-Gas Turbine Servicing (P) Ltd vide ITA Nos. 976 to 981/Hyd/2011 for the AYs 2001-02 to 2006-07 dated 31.7.2012 and brought our attention to the paras 15 & 16 and mentioned how the repair services cannot constitute technical services. As per the assessee, AMC services are one kind of technical services rendered by the foreign companies without imparting of technical knowledge to the assessee or its employees and therefore, they do not constitutes technical services or included services. In this regard, Ld Counsel filed a write up detailing particulars of purchase of MULTIPLEXUR and the service agreements as amended from time to time. Further, he stated that there is no issue about the applicability of the provisions of Article 12(4)(b) of the Treaty to the impugned payments to constitute FIS/FTS.

Decision of the Tribunal:

> 9. We have heard both the parties, perused the orders of the Revenue Authorities and the material placed before us as well as the precedents cited by the Ld Representatives. We have also examined the list of the services promised vide the agreement between the parties under consideration involving India and USA. For AY 2005-06, the AMC Payment is for the period of 6 months from October, 2004 to March, 2005and the amount is Rs.23,73,621/- (equalant of USD 48,025/-). For AY 2006-07, the AMC payment is Rs. 42,84,949/- (equalant of USD 96,050/-) and the payment on account of Repair & replacement of CORDs, is Rs 8,96,147/- . The total payment made in this year works out to Rs. 51,81,096/-. Therefore, we have deal with the situations ie (i) AMC payments and (ii) payments for repairs and replacements. We shall take up the AMC payments and they constitute chargeable payments and therefore the applicability of the provisions TDS and the section 40a(ia) of the Act. Considering the discussion in the orders of the revenue, we restrict ourselves to the applicability of the provisions of the Treaty with USA in general and the provisions of the Article 12 of the DTAA with USA, in particular. To start with we shall examine the nature of services enlisted in the extended Service Agreement. The extraction of the said list from impugned order, vide para 3, is inserted and the same read as follows,-

□3. .....During the extended term of the agreement, the following services shall be provided to customer.

Services:First Line Telephone Technical support via Sycamore's Technical Assistance Center (TAC) as described below. Technical Support - 7x24x365 access to Technical Assistance Center.

Tata Power Company Ltd [Tata] shall be entitled telephone access to Sycamore's Technical Assistance (TAC) which provides technical assistance related to problem diagnosis and trouble shooting of Sycamore's hardware and software products.

Tata shall have telephone access to the TAC twenty-four hours a day, seven days a week, including Sycamore holidays with no restriction on the number of qualification of Tata's personnel who are eligible to place telephone calls to ask products related questions report or report problems with Sycamore's products.

The TAC shall be the single point of contract for diagnosing and resolving technical issues related to operations, performance, reliability and support of Sycamore products covered within the Service Description. Sycamore may at its sole discretion, dispatch a field service engineer (or its authorized representative) to Tata site in order to facilitate Sycamore's diagnosis and resolution.

Web-based Services via Sycamore's Online Assistant Resources (SOLAR): Tata shall be entitled to access Sycamore's problem reporting database (SOLAR) twenty four hours per day, seven days a week. Depending on the product, information available to Tata may include but not be limited to (i) problem case submittal and status, (ii) access to online technical documentation, (iii) status review

of know defects and workarounds: and (iv) Return Material Authorization (RMA) processing. The above list of services refers to TAC, telephone access 24 hours for all 7days including holidays, single point contact, web-based SOLAR, etc and they constitutes the catchwords. There is provision for dispatch of AR/Field Service Engineers too in suitable cases. Now we shall take up the written submissions filed by the assessee's representative before us and the relevant portions read as follows, namely-

□

1. Tata Power Co. Ltd had purchased Dense Wave Division Multiplexing Equipment from M/s. Sycamore Networks Inc., USA (Sycamore, USA)

2. The service agreement was entered between Sycamore, USA and Tata Power Co. Ltd effective from April 2003 to March, 2004, with the option of automatic extension from April 2004 to March 2008 after the consent given by Sycamore USA. Exhibit B to the agreement dealt with the nature of the services to be provided Sycamore, USA for the extended period of service from April 2004 till March 2008.

3. For extended period of service Sycamore, USA will charge sum of USD 96,050 p a.

4. As per the agreement, the invoices will be raised two times in a year, first on or about March 1 and second on or about September, 1.

5. In AY 2005-06, the Tata Power Ltd., and Tata Power Broadband Co. Ltd. Entered into a Business Transfer Agreement dated 16th August, 2004 for transfer of broadband division with effect from 1 July, 2004.

6. For the AY 2005-06, the first invoice was raised by Sycamore, USA on the Tata Power Co. Ltd. And the second invoice was raised by Sycamore on the Tata Power Broadband Co. Ltd. It is the subject matter of dispute in AY 2005-06 which dealt with the services rendered from October, 2004 till March, 2005.

7. On 16th November, 2004, Tata Power Broadband Ltd and Sycamore, USA amended the terms of the service agreement. Under the amended agreement, Sycamore, USA apart from the services that are mentioned in the revised Exhibit B-1 also agreed that the Tata Power Broadband Ltd can send the defective part of the machine to Sycamore, USA in USA on repaid and return basis. Sycamore will charge separately for the repaid services provided in USA.

8. Thus, the disallowance for the two years is an under.

a. AY 2005-06: AMC Payment for October, 2004 to March, 2005 as per agreement Rs.23,73,621/- (i.e., USD 48,025)..

b. AY 2006-07: AMC payment as per agreement Rs. 42,84,949/- Plus Repair and replacement Rs 8,96,147/- ..Total= Rs. 51,81,096/-□

10. From the above, it is evident that the assessee purchased an equipment (ie Dense Wave Division Multiplexing Equipment from M/s. Sycamore Networks Inc., USA) and there must exist some Warranty provided by the supplied. Of course, there are no details mentioned in the orders. There is some reference to □Service Agreement , which is claimed to have been amended and revised time to time. Revision was done to accommodate the undertaking of the repairs by the supplier of the equipment on repayment basis. No such repairs reported in the AY 2005-06. Whereas in the AY 2006-07, assessee paid to the M/s Sycamore, USA amounting to Rs 8,96,147/- towards such repairs. To start, we shall take up the issue relating to repairs payments made by the assessee to Sycamore, USA and if they need to be subjected to TDS.

11. Allowability of the payments of Rs 8,96,147/- towards such repairs:

> As discussed in the paragraphs of this order where the arguments of the AR are discussed, it is the case of the assessee that the payments for the repairs should not be subjected to TDS as the said payments outside the scope. We have examined the cited decision of the Tribunal in the case of M/s. BHEL-GE-Gas Turbine Servicing (P) Ltd (supra) and find such payments do not constitutes FTS and relevant paragraph 16 is reproduced here as under:
>
> □16.....Thus, the above decisions of the Tribunal are relevant for the proposition that the routine repairs do not constitute □FTS' as they are merely repair works and not technical services. Technical repairs are different from □echnical services'. Thus, the payments made for □echnical services' alone attract the provisions of section 9(1)(viii) of the Act and its Explanation 2. Further, it is also a settled issue at the level of the Tribunal that every consideration made for rendering of services do not constitute income within the meaning of section 9(1)(viii) of the Act and for considering the same, first of all the said consideration is for the FTS. Therefore, considering the above decision of Delhi Bench of the Tribunal, which explained the scope of the provisions, we are of the view that the impugned orders of the CIT (A), for the years under consideration, on this aspect of the matter, do not call for interference. Accordingly, the grounds raised in these appeals of Revenue are dismissed.

12. Therefore, so far as the repairs related payments are concerned, the claim of the assessee needs to be allowed and in favour of the assessee.

Ann Maintenance Charges - if they are to be subjected to TDS provision:

13. We shall now take up the issue relating to AMC and it the payments made to M/s Sycamore, USA, the supplier of the equipment, for rendering the annual maintenance services - AMC in connection with the operation/functioning of the said equipment, vide the Service agreement,

amended from time to time in succession of the said services rendered during the Warranty period. For this purpose, we need to examine the relevant provisions of the domestic law as well as the Treaty provisions. The provisions subsection (1)(vii) and the Explanation to section 9 of the Act are relevant and the same read as follows.

(vii) income by way of fees for technical services payable by--

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

Provided .....

Explanation [1...

Explanation [2].--For the purposes of this clause, "fees for technical services"

means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".] .....

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 (vii) 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.

14. The above provisions details the meaning of the □fee for technical services' and also the provisions of Explanation to section 9 which is inserted with retrospective amendment provides for including in total income on the deemed basis and 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. Now we shall deal with the relevant Treaty provisions, which is opted by the assessee as stated before us. The provisions of the Article 12 of the Treaty with the USA are relevant.The same is also reproduced here for completeness of the order,-

ARTICLE 12 ROYALTIES AND FEES FOR INCLUDED SERVICES

1. Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

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

.....

.....

3. .....

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

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

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

5. Notwithstanding paragraph 4, "fees for included services" does not include amounts paid :

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

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

(c) for teaching in or by educational institutions ;
(d) for services for the personal use of the individual or individuals making the payments ; or
(e) to an employee of the person making the payments or to any

individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services).

6. ....

7. .....

8. .... "

15. Article 12 of the Treaty relates to the Royalty and the fee for included services (in short □FIS'). Any technical and consultancy services constitutes such included services vide paragraph 4 of the said Article of the Treaty. Provisions of the said paragraph 4 provide that the payments of any kind to any person in consideration for rendering of any technical or consultancy services constitutes FIS. These services include the services rendered through the provision of technical personnel or other personnel too. This paragraph 4 has two sub paragraph. As per sub paragraph (a), all the ancillary and subsidiary services of that nature to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 in connection with royalty is received. Surprisingly, there is no whisper in the order of the CIT(A) on the applicability of these provisions. Further, as per sub paragraph (b), the services of □make available of the technology, experience, skill, know-how, or processes etc. M/s Sycamore USA allows the assessee to reach him through the online/webbased processes developed and owned by it and on acquiring the equipment, the customers like the present assessee acquires the □right to use' such processes of M/s Sycamore. CIT(A) has not gone into these issues, which he should have, when the assessee has chosen to opt for the Treaty provisions. Further, it is evident, the paragraph 5 of the Article 12 enlists the list of services which do not amount to FIS. Thus, there is a need for analyzing if the services rendered by the assessee do not fall in sub-paragraphs (a) or (b) of Article- 12 of Indo-USA DTAA. It is the case of the CIT(A), the impugned payments do not come under the □make available' provisions vide sub-paragraph (b) of Article 12(4) of the Treaty. But, it is a fact that CIT(A) has not gone into the applicability of the provisions clause (a) of the Article 12(4) of the Treaty.

16. Divergent Stands of the parties in dispute: The case of the assessee is that the payments made by the assessee towards Annual Maintenance Charges do not constitute Fees for included/Technical Services (FTS) both under domestic law or under the Treaty provisions as there is no transfer relevant technical knowledge, skills, information etc to either to the assessee or to its employees. The services rendered by M/s Sycomore supra are merely attending to the trouble shootings relating to the use of the technology already supplied to the assessee.

17. Per contra, the case of the Revenue is that with no body examining the applicability of the domestic law and the provisions of paragraph 4(a) of the Treaty, it is too early to adjudge that the impugned payments do not constitute FIS/FTS. The Service Agreement also provide for sending of the □representatives' by M/s sycamore, who is the supplier of the equipment ie Dense Wave Division Multiplexing equipment to the assessee. Impugned services vide the Service Agreement w e f April 2003 onwards with the clause of automatic extension, are rendered. Considering the

examples given under the MOU annexed to the Treaty, the impugned payments shall constitute chargeable income includible in the total income of the assessee. There is need for examining the purchase deed, added on warranty provisions, service agreement, modified agreements, revised agreements etc in the light of the provisions of the paragraph 4 of the Treaty. Obviously, the CIT(A), who considered only the provisions of paragraph 4(b) of the Treaty, has not examined this aspect of the impugned Article 12 of the Treaty.

18. Applying to the present case: Keeping the above scope and legal position, we have perused the orders of the AO and the CIT (A) for both the AYs under consideration. Prima facie, we find that the Revenue's objections were discussed at length in connection with the applicability of sub-clause (b) of clause-4 of the Article which relates to □make available provisions. If the online facilities are available to the assessee through which technical troubles are sorted out by using such processes. There is no whisper about this □processes' which should be done considering the nature of sub-clause (b) of Article-12(4). Further, we also find that there is no discussion about the applicability of the Article- 12 (4)(a) which deals with ancillary and subsidiary services. As such, it is an undisputed fact that the assessee obtained purchased machinery and the payments were made in accordance with the Article-12(3) of the Treaty. We do not have access to the relevant agreement for purchase of the machinery if the so called AMC services rendered constitute □included services in the sense of Article-12(4)(a) of the Indo- USA DTAA.

19. In this regard, we have also examined the judgmental laws cited before us. Regarding the precedents cited by the Ld DR, we find that they are distinguishable on facts. As already discussed, the Ruling of the A.A.R in the case of Perfetti Van Melle Holding B.V (supra), the DTAA with Netherlands and the interpretation thereto, they have no application to the present case. As such, the said decision was taken basing on the undisputed fact that the assessee's employees were trained and there was transfer of knowledge and experience by the service providing company. Further, the decision in the case of in the case of AREVA T&D India Limited (supra) on the applicability of provisions of section 9 of the Act; but not on the treaty provisions between India and France. Thus, these cases law are distinguishable.

20. Conclusions: Therefore, we find the CIT(A) restricted his enquiry and adjudication inadequately to the provisions of Article 12(4)(b) of the Treaty and left the issues to like □processes' and further of course, he ha not considered the provisions of Article 12(4)(a) of the Treaty entirely. He completely ignored the fact that the service agreements have real genesis in the purchase agreement qua the equipment ie Dense Wave Division Multiplexing equipment. The impugned Service agreements, as amended from time to time, are required to be studied in conjunction with the purchase agreement of the equipment if the services which are rendered constitutes extended warranty with additional payments by way of AMC. Regarding the finding of the CIT(A) on the applicability of the provisions of Article 12(4)(b) of

the Treaty, to the extent he adjudicated, the same do not need any interference subjected to the likely finding of the CIT(A) in the ensuing remand proceedings on if the □processes' are not made available to the assessee and the online and web-based services do not constitutes making available to the assessee. As such, on perusal of the agreement between the assessee and Sycamore Networks Inc, USA in isolation, we found that the said provisions do not imply the transfer of technical knowledge or skills to the assessee or to its employees. However, considering the peculiar facts of this case, there is need for analysing the Purchase Agreement of the equipment if any and related clause on warranty and services enlisted therein and the subsequent service agreements as amended subsequently. We find the subsequent service agreements are merely the □automatic extensions' and therefore, there is need for examining the applicability of the provisions of Article 12(4)(a) if these services constitute □ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received'. As such there is no finding of fact of the stand of the revenue in the AY prior to the ay 2005-06 and later after the AY 2006-07. Otherwise, the annual maintenance charges paid by the assessee to the Sycamore Networks Inc, USA do not involve any deputation of its employees to the assessee for equipping them with the technical knowledge, technical skills etc imparted by the Sycamore Networks Inc, USA. There is also no imparting of such knowledge as of technical nature for which assessee needs any rights of ownership or expertise. Therefore, from the point of view of the provisions of Article 12(4)(b), it is a case of mere attending to the services by the Sycamore Networks Inc, USA to the complaints / troubleshooting of the assessee/assessee's customers through online requests. As such nothing is brought on record by the DR to counter the findings of the CIT (A) with regard to his conclusions on the applicability of the provisions of Article 12(4)(b) to the extent analysed and adjudicated. Thus, for the limited purpose of examining the (i) applicability of Article 12(4)(a); and (ii) the Article 12(4)(a) to the extent of □make available' of the □processes' mentioned therein, we remand the matter to the files of the CIT(A) for fresh examination and adjudication after obtaining the relevant facts. Assessee is directed file relevant information in this regard. Accordingly, grounds raised by the Revenue in both the appeals are remanded pro-tanto.

21. In the result, both the appeals of the Revenue are allowed for statistical purpose.

Order is pronounced in the open court on 25th September 2013.

Sd/-	Sd/-
(B.R. MITTAL)	(D. KARUNAKARA RAO)
/ JUDICIAL MEMBER	/ ACCOUNTANT MEMBER

Mumbai; Dated 25.9.2013

. . ./ OKK , Sr. PS

£ §¤' £§ “ £§§/Copy of the Order forwarded to :

1. ¢ / The Appellant

2. £ ¢ / The Respondent.

3. ( ) / The CIT(A)-

4. / CIT

5. « “ £ , , / DR, ITAT, Mumbai

6. “ £ / Guard file.

£ //True Copy// / BY ORDER, ‹ §/ › § ☐ (Dy./Asstt. Registrar) § ' § , / ITAT, Mumbai