Flughafen Zurich Ag, Bangalore vs Ddit International Taxation , ... on 10 March, 2017

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH " B "

BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER

Appeal No. & Asst.Year	Appellant	Respondent
I.T.(I.T) A. No.1525/ Bang/ 2010 (Asst. Year : 2007-08)	M/s. Flughafen Zurich AG, C/o Bangalore International Airport Limited, Administrative Block, Bengaluru International Airport, Devanahalli, Bangalore-560 300 PAN AABCF 0195M	Dy. Director of Income Tax, (International Taxation) Circle 1(1), Bangalore.
I.T.(I.T) A. No.1437/ Bang/ 2013 (Asst. Year : 2008-09)	-do-	Addl. Director of Income Tax, Range 1, Bangalore.
I.T. (I.T) A. No.1438/Bang/ 2013 (Asst. Year : 2009-10)	-do-	Addl. Director of Income Tax, Range 1, Bangalore.
I.T.(I.T) A.No.244/Bang/ 2015 (Asst. Year: 2011-12)	-do-	Asst. Director of Income Tax, Circle 1(1), Bangalore.

Appellant By : Shri Sampath Raghunathan, Advocate.
Respondent By : Ms. Neera Malhotra, CIT -2 & Smt. Swapna Das, JCIT-2

Date of Hearing : 23.01.2017.
Date of Pronouncement : 10.03.2017.

O R D E R

Per Shri Vijay Pal Rao, J.M. :

These four appeals by the assessee pertaining to the Assessment Year 2007- 08 one appeal is directed against the assessment order dt.23.10.2010 passed under Section 143(3) r.w.s. 144C of the

Income Tax Act, 1961 (in short 'the Act') in pursuant to the directions of the Dispute Resolution Panel (in short 'DRP') dt.21.09.2010; The other three appeals are directed against three separate orders of CIT (Appeals) dt.28.8.2013 for the Assessment Years 2008-09 and 2009-10 and dt.22.1.2015 for the Assessment Year 2011-12 respectively.

2. The assessee has raised common grounds in these appeals except an extra ground for the Assessment Year 2007-08 regarding the jurisdiction of DRP in enhancing the total income therefore the grounds raised for the Assessment Year 2007-08 are reproduced as under :

> 1 " Treatment of re-imbursement of certain expenses as fees for technical services
>
> a) On the facts and in the circumstances of the case, the learned AO has erred in proposing and the Honourable DRP has further erred in confirming the treatment of certain reimbursement of expenses of Rs. 7,854,745 by Bangalore International Airport Limited ('BIAL') to Flughafen Zurich AG ('FZA') as fees for technical services and thus chargeable to tax.

b) On the facts and in the circumstances of the case, the Honourable DRP has erred in holding that the reimbursement towards salary costs by BIAL to FZA of IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 Rs. 18,553,973 is taxable as fees for technical services and thereby enhancing the total income.

However, in the draft assessment order passed by the AO, the AO has treated the aforesaid salary cost as reimbursement not chargeable to tax since the same was taxed as salary in the hands of employees.

2 Directions issued by the Honourable DRP

a) The Honourable DRP has erred in law and facts in not taking cognizance of the objections filed by the Appellant in relation to the draft assessment order issued by the AO.

b) The Honourable DRP erred in facts and law in confirming the draft order of the AO and further enhancing the total income.

3 Relief

a) The Appellant prays that Directions be given to grant all such relief arising from the above grounds and also all relief consequential thereto.

b) The Appellant craves leave to add to or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal."

3. For the purpose of considering the facts of the case the Assessment Year 2007-08 is taken as lead year. The assessee is a non-resident incorporated and tax resident of Switzerland and filed return of income dt.22.10.2007 by declaring NIL income. The assessee is engaged in providing operations and management services to airports. The assessee is engaged in providing operations and management services to airports. The assessee had entered into an agreement with Bangalore International Airport Ltd. (in short 'BIAL') inter alia Expatriate Remuneration Reimbursement Agreement dt.1.7.2005 IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 for secondment of skill personnel. The assessee claimed that the seconded personnel work under the direct control and supervision of BIAL as it has the right to issue directions to the seconded employees. Therefore the seconded employees satisfy the test of employee-employer relationship and the payment of salary to these employees through the assessee cannot be considered as Fees for Technical Services ('FTS'). The DRP did not accept this contention of the assessee and asked the Assessing Officer to decide this issue. The Assessing Officer consequently held that the payment received by the assessee from BIAL is in the nature of Fees for Technical Services and accordingly chargeable to tax in the year as per the provisions of Section 9(1)(vii) as well as Indo-Swiss Double Tax Avoidance Agreement ('DTAA').

4. Before us, the learned Authorised Representative of the assessee has submitted that as per the Expatriate Remuneration Reimbursement Agreement dt.5.7.2005, the employees were asked to work for BIAL on full time exclusively during the assignment period. He has referred to the recitals of the preamble of the agreement and submitted that the purpose of secondment is to assign the employees with the BIAL on full time basis and IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 exclusively for BIAL therefore there was a relationship of employer-employee between the BIAL and the seconded employees. The parties have understood and agreed upon that the assessee shall not be considered to have rendered any services whatsoever to BIAL by the assignment of assignees and that the assessee shall not be held responsible for any act or omission of the assignees during the assignment with BIAL. It is also understood and agreed between the parties to the agreement that in addition to any local currency remuneration paid to the assignee directly by the BIAL, the assignee would be entitled to remuneration in foreign currency delivered to him outside India by the assessee. Therefore the payment of BIAL in question is nothing but only a reimbursement of the salary which was paid by the assessee to the assignees in foreign currency outside India as per the terms of the agreement. He has also referred to the separate correspondence between the assessee and assignee as well as between the BIAL and the assignees wherein the parties have accepted the terms and conditions of the assignment as well as the terms and conditions of the Expatriate Remuneration Reimbursement Agreement. Therefore the assignee accepted the terms and conditions of their employment with the BIAL.

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1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 The learned Authorised Representative has thus submitted that the terms and conditions of the employment/assignment as set out in the

agreement and communication with the parties are distinguishable from the cases of M/s. Intel Corporation Vs. DDIT (I.T) in IT(TP)A No.1486/Bang/2013 Dt.30.09.2016 as well as in the case of M/s. Food World Supermarkets Ltd. Vs. DDIT (I.T) 174 TTJ 859 wherein this Tribunal has decided this issue against the assessee by following the decision of Hon'ble Delhi High Court in the case of Centrica India Offshore Pvt. Ltd. Vs. DCIT 364 ITR 336; The learned Authorised Representative has referred to the decision of Centrica India Offshore Pvt. Ltd. Vs. DCIT (supra) and submitted that in the said case the Hon'ble High Court has taken note of fact that the seconded employees came to India on deputation for a short period and therefore the decision of the Hon'ble High Court is distinguishable when the term of assignment in the case of the assessee is not a short period but it varies from one year to several years. He has then referred to the Explanation 2 to Section 9(1)(vii) as well as Article 12(4) of Indo-Swiss DTAA and submitted that in Section 9(1)(vii) of the Income Tax Act, 1961, the definition of Fees for Technical Services is defined as in consideration for rendering of any IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 managerial, technical or consultancy including the provisions of services of technical or other personnel whereas as per Article 12(4) of the DTAA the term used is rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel. Thus the learned Authorised Representative has submitted that there is a difference in the definition used in the DTAA as far as the supervision of services as per the DTAA has to be rendered by technical or other personnel whereas as per the section 9(1)(vii) it is the provision of services of technical or other personnel. In the case on hand it is not a case of the revenue that the services are rendered by technical personnel and therefore it cannot be treated as Fees for Technical Services. In support of his contention, he has relied upon the decision of Hon'ble Supreme Court in the case of National Agricultural Co-operative Marketing Federation of India Vs. Union of India dt.25.3.2013 and submitted that the Hon'ble Supreme Court has observed that the substitution of word 'by' in Section 80P of the Act cannot be considered prior to the amendment and therefore the provision has to be read as it exists in the statute at the relevant time and nothing more can be read into.

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5. On the other hand, the learned Departmental Representative has submitted that the relationship of employee and employer between the assignee and BIAL does not exists in this case as the assignee would be entitled to remuneration in foreign currency outside India by the assessee. Thus the assessee as an employer was under obligation to pay the assignee remuneration in foreign currency outside India even after the secondment of these personnel to BIAL. The relationship between the assessee and assignee has not ceased to exist. She has referred to the various terms of the expartiate agreement dt.1.7.2005 and submitted that the remuneration was required to be first paid by the assessee and then it was to be reimbursed by the BIAL. Further this amount was net of income after tax paid in India under the Income Tax. The learned Departmental Representative has referred to the Schedule 2 of the Agreement and submitted that gross salary (-) social security, insurance, contribution approximately 24.9% of gross salary and performance bonus and 13% of the

basic salary and social security towards tax was to be borne by the BIAL as per the terms and conditions of the agreement to be paid in foreign currency along with another 3% towards administration and overhead charges.

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1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 Thus the learned Departmental Representative has submitted that the assignees were employees of the assessee and the assignment with BIAL is only a temporary arrangement and has not changed the status and relationship between the assessee and assignee. She has relied upon the orders of the authorities below as well as decisions of Hon'ble Supreme Court in the case of CIT Vs. Eli Lilly and Co. (India) Pvt. Ltd. reported in 312 ITR 225 (SC) and Hon'ble High Court in the case of Karnataka Urban Infrastructure Development Bank Corporation Vs. CIT 308 ITR 297 (Kar).

6. We have considered the rival submissions as well as the relevant material on record. There is no dispute that the secondees in this case at the time of agreement dt.1.7.2005 were under the employment of the assessee and therefore it was not an employment or recruitment by the BIAL. The secondment was as per the requirement of the BIAL and in respect of the existing employees of the assessee. It is also not in dispute that all the assignees/secondees are holding high managerial position as per the details given in Schedule 2 of the agreement. Thus it is clear that the secodees were holding the position in the management as CEO and CCO which clearly establish IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 the fact that they were not ordinary employees but having the expertise in the field of management and therefore the purpose of assignment is to avail the services of these highly qualified and expertise service of these personnel. An identical issue was considered by the co-ordinate bench of this Tribunal in the case of Intel Corporation Ltd. Vs. DDIT dt.30.9.2016 in IT(TP)A No.1486/Bang/2013 in para 7 as under :

" 7. We have considered the rival submissions as well as the relevant material on record. The payment in question was received by the assessee as per the agreement dt.1.4.2007. The nomenclature of the agreement is immaterial but the substance and contents of the agreement are relevant to decide the issue under consideration. The recital as well as other relevant terms and conditions of the agreement are reproduced as under :

> IT(IT)A No.1525/Bang/2010;
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> 1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 IT(IT)A No.1525/Bang/2010;
>
> 1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 As per the business need of ITIPL the assessee to transfer from time to time certain expatriates based on such need and for such duration as may be agreed between the parties. Therefore duration of secondment was to be mutually agreed by the parties and not an exclusive discretion of ITIPL. Further there is no dispute that the expatriates remained the

legal employees of the assessee and the assessee was to pay the salary and other benefits to the persons on secondment with ITIPL. The salary and other benefits of the personnel were protected and payable by the assessee and in turn claimed the said payment from ITIPL. As per the Clause B of Article III of the agreement the assessee shall disperse the salary and other benefits to the expatriates. Much stress was given by the ld. AR on the submission that expatriates are in the economic employment with ITIPL during the assignment period and only due to commercial requirement the salary and other benefits are to be disbursed to the employees overseas bank accounts. He has also forcefully contended that ITIPL had the administrative control over the expatriates during the period of employment. It is pertinent to note that the salary was not remitted to the bank account of the expatriates but the payment was made to the assessee therefore it is the nature of payment and not the quantum which is relevant. The payment in question was received by the assessee under the expartite agreement. It is not the ordinary working class people who were transferred IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 but all the personnel are experts in their specific field and holding managerial posts. The details of the persons are as under :

Thus it is clear that all the expatriates are holding managerial position and are experts of their respective fields of managerial skills. Therefore the seconded are rendering the managerial and highly expertise services the ITIPL for which the assessee received the payment in question. An identical issue was considered by the co-ordinate bench of this Tribunal in the case of M/s. Food World Supermarkets Ltd. Vs. DCIT (supra) in paras 10 to 13 as under :

" 10. As it is clear that all 5 secondees are not ordinary employees or workers but they are deputed the high level managerial/executive positions which shows that they are deputed because of expertise and managerial skills in the field. This fact is also reflected in the agreement. It is pertinent to note that the secondment agreement is between the assessee and DFCL and these secondees assigned to the assessee are not party to the agreement. Further the secondees are assigned by DFCL and there is no separate contract of employment between the assessee and the secondees. The secondees are under the legal obligation as well as employment of DFCL and assigned to the assessee only for a short period of time. In the absence of any contract between the assessee and the secondees, the parties cannot enforce any right or obligation against each other. The IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 secondeess can claim their salary only from the parent company i.e DFCL and not from the assessee. Thus, the expatriates were performing their duties for and on behalf of the DFCL. Once it is found that the secondees were rendering the marginal and highly expertise services to the assessee the payment for such services is in the ambit of FTS defined in explanation 2 to sec. 9(1)(vii) of the Act, which read as under:-

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'.

11. An identical issue has been considered and decided by the Hon'ble Delhi High Court in the case of Centrica (Supra). The Hon'ble High Court while dealing with the definition of FTS under Article 13(iv) of Indo UK DTAA has held that the services of the personnel deputed under the secondment agreement were in the nature of managerial consultancy services to the assessee. It is pertinent to note that the definition under Article 13(4) of the Indo UK DTAA as well as the definition under Explanation 2 to sec. 9(1)(vii) are almost identical except the word 'managerial' is missing in the definition provided under tax treaty. For ready reference we quote the definition of FTS under Article 13(4) of Indo-

UK DTAA which has been reproduced by the Hon'ble High Court in para 25 as under:-

"ARTICLE 13 - Royalties and fees for technical services-"4. The definitions of fees for technical services in paragraph 4 of this Article shall not include amounts paid :

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

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

(c) for teaching in or by educational institutions;

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

(e) to an employee of the person making the payments or to any individual or partnership for professional service as defined in Article 15 (Independent personal services) of this Convention.

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12. The Hon'ble High Court while deciding the issue has observed that the assessee filed the provision of services of other personnel.

The term including the provision of services of technical or 'other personnel;' is common in both definition provided under Explanation 2 to sec. 9(1)(vii) of the Act as well as in the Article 13(4) of the India UK DTA. Moreover the definition of FTS under sec. 9(1)(vii) Art 13(iv) of Indo UK DTA has similar except one extra word 'marginal deed' to the definition under Income-tax Act. The Hon'ble High Court while dealing with the issue as held in para 28 to 31, 37, 38 as under:

> 28. CIOP relies on the concept of economic employment as opposed to legal employment and submits that the formal jural or legal relationship of employer and employee as between the seconded employee and the overseas entity is of no significance. It is argued that for all practical purposes, CIOP is the real employer, because the content of the work or employment, the entire direction and supervision over the seconded employees work and the pay and emoluments are borne by it. For convenience, the pay is disbursed by the overseas entity, but that amount is reimbursed to the overseas entity.

Reliance is firstly placed on the concept of Economic employer, discussed by Klaus Vogel in 'Double Taxation Conventions', especially the following extracts:

> - "8. International hiring out of labour Paragraph 2 has given rise to numerous case of abuse through adoption of the practice known as International hiring out of labour. In this system, a local employer wishing to employ foreign labour for one or more periods of less than 183 days recruits through an intermediary established abroad who purports to be the employer and hires the labour out to the employer. The worker thus fulfills prima facie the three conditions laid down by paragraph 2 and may claim exemption from taxation in the country where he to temporarily working. To prevent such abuse, in situation of this type, the term "employer" should be interpreted in the context of paragraph 2. In this respect it should be noted that the term "employer" is not defined in the convention but it is understood that the employer is the person having rights on the work produced and bearing the relative responsibility and risks. In cases of international hiring out of labour, these functions are to a large extent exercised by the user. In this context, substance should prevail over form, i.e. each case should be examined to see whether the functions of employer were exercised mainly by the intermediary or by the user. It is therefore up to the contracting states to agree on the situations in which the intermediary does not fulfill the conditions required for him to be considered as the employer within the meaning of paragraph 2. In setting this question, the competent authorities may refer not only to the above mentioned indications but to a number of circumstances enabling them to establish that the real employer is the user of the labour (and nor the foreign intermediary); The hirer does not bear the responsibility or risk for the results produced by the employee's work;

- The authority to instruct the worker lies with the user;

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- The work is performed or a place which is under the control and responsibility of the user;

- The remuneration to the hirer is calculated on the basis of the time utilized, or there is in other ways a connection between this remuneration and wages received by the employer;

- Tools and materials are essentially put at the employee's disposal by the user :

- the number and qualifications of the employees are not solely determined by the hirer....."

The Court also notes that the Model Tax Convention on Income and on Capital (Condensed Version, July 2010) in this context, states as follows:

- "8.14 Where a comparison of the nature of the services rendered by the individual with the business activities carried on by his formal employer and by the enterprise to which the services are provided points to an employment relationship that is different from the formal contractual relationship, the following additional factors may be relevant to determine whether this is really the case: Who has the authority to instruct the individual regarding the manner in which the work has to be performed.

- Who controls and has responsibility for the place at which the work is performed;

- Remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided (see paragraph 8.15 below)

- Who puts the tools and materials necessary for the work at the individuals' disposal

- Who determines the number and qualifications of the individuals performing the work;

- Who has the right to select the individual who will perform the work and to terminate the contractual arrangements entered into with that individual for that purpose;

29. The issue which arises for the consideration of the Court in this case is whether the secondment of employees by BSTL and DEML, the overseas entities, falls within

Article 12 of the India-Canada and Article 13 of the India-

UK DTAAs, which embody the concept of a service permanent establishment (a "service PE"). In terms of those articles, the Court must determine whether the overseas entities rendered "technical services" under Article 13 of the India-UK DTAA and "included services" under Article 12 of the India-Canada IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 DTAA. In essence, the inquiry is whether any tax liability of the overseas entity arises for the provision of services to CIOP in India, such that the trigger in the DTAAs comes into play. This must necessarily depend on the phrasing of each DTAA, construed on its own terms, in light of general principles as determined by the Courts. Since the question of technical services has been considered by the DTAA, this takes precedence over the taxing regime under Section 9 of the Act.

30. The India-UK DTAA defines 'fees for technical services' as "payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel)". In this case, the overseas entities have, through the seconded employees, undoubtedly provided 'technical' services to CIOP, especially since that expression expressly includes the provision of the services of personnel. The seconded employees, who work, so to say, for CIOP are provided by the overseas entities and the work conducted by them thus, i.e. assistance in conducting the business of COIP of quality control and management is through the overseas entities. The nature of the services - cast as "business support services" by CIOP - as also clearly within the hold "technical or consultancy. These services envisage the provision of quality service by vendors to the overseas entities, which CIOP, and the secondees, are to oversee. This requires the secondees to draw from their technical knowledge, and falls within the scope of the term. This reading of 'technical' services does not limit itself only to technological services, but rather, extends to know-how, techniques and technical knowledge. This is supported by clause 4 of Article 12 itself, which lists these various sub-categories. Indeed, the term 'technical' has not been defined in the DTAA, and must be accorded its broader dictionary meaning, unless limited by the parties to the instrument. The AAR in Intertek Testing Services India (P.) Ltd, In re [2008] 307 ITR 418/175 Taxman 375 (AAR), considered this question in detail, and rightly held that "What is meant by the expression 'technical'? Should it be confined only to technology relating to engineering manufacturing or other applied sciences? We do not think so. The expression 'technical' ought not to be construed in a narrow sense."

This reading was supported by the Supreme Court, in the context of Section 9(1)(iv) of the Act in Continental Construction Ltd. v. CIT [1992] 195 ITR 81/60 Taxman 429. Further, the Court notes that the distinction to be drawn by CIOP between the provision of services by the overseas entities themselves and the 'mere' secondment of employees does not make a difference, since the services provided the overseas entities is the provision of technical services through the secondees - an instance envisaged under Article 13 itself.

31. The issue of Article 12 of the India-Canada treaty involves a more nuanced inquiry. Article 12 also incorporates fees for "included services". Whilst this includes "technical services or consultancy

service" under clause 4, it states that 'fees for included services' "means payments of any kind to any IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 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 ... make available technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design." This second qualification for the technical knowledge etc. to be 'made available' is an essential, and additional, requirement under the India-Canada DTAA. This phrasing also finds mention in Article 13 of the India-UK DTAA, this requirement is disjunctive from the rest of the provision, unlike in the India-Canada DTAA. The India-UK DTAA states that 'fees for technical services' "means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which ... or make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design." In order for the amounts paid to the overseas entities in the transaction covered by the India-Canada DTAA, thus, it must not only be showed that technical services were performed, but that such knowledge etc. was 'made available'.

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37. This brings the Court to the next issue, concerning reimbursement and the doctrine of diversion of income by overriding title. This Court notices that a case with almost identical circumstances, in In Re: AT & S India (P.) Ltd. (supra), also came up before the AAR. There, an agreement between AT&S India and its parent, AT& Austria was entered into, by which AT&S Austria undertook to assign or cause its subsidiaries to assign its qualified employees to the AT&S India. These individuals were to work for AT&S India and receive compensation substantially similar to what they would have received as employees of AT&S Austria. They were engaged by AT&S India on a full time basis. The question before the AAR was identical to this case:

> "Whether pursuant to the secondment agreement entered into by the applicant with AT&S Austria, the payment to be made by the applicant to AT&S Austria, towards reimbursement of salary cost incurred by AT&S Austria in respect of seconded personnel, would be subject to withholding tax under Section 195 of the IT Act, in view of the facts that (1) the payments are only in the nature of reimbursement of actual expenditure incurred by AT&S Austria. (2) AT&S Austria is not engaged in the business of providing technical services in the ordinary course of its business, (3) AT&S Austria is not charging the applicant any separate fee for the secondment and (4) the seconded personnel work under the direct control and supervision of the applicant?"

In holding that the obligation under Section 195 would be triggered, the AAR held as follows:

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1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 'From the above analysis of both the agreements it is clear that pursuant to the obligation under the FCA, the AT&S Austria has offered the services of technical experts to the applicant on the latter's request and the terms and conditions for providing services of technical experts are contained in the secondment agreement which we have referred to above in great details. Though the term "reimbursement" is used in the agreements, the nature of payments under the secondment agreement has to satisfy the characteristic of reimbursement and that the term "reimbursement" in the agreement will not be determinative of nature of payments. The term "reimbursement" is not a technical word or a word of Article In Oxford English Dictionary, to reimburse means--to repay a person who has spent or lost money--and accordingly reimbursement means to make good the amount spent or lost. However, under the secondment agreement the applicant is required to compensate AT&S Austria for all costs directly or indirectly arisen from the secondment of personnel and that the compensation is not limited to salary, bonus, benefits, personal travel, etc. though salary, bonus, etc. and the amounts referred to in para 4.2 of the secondment agreement form part of compensation. The premise of the question that the payments are only in the nature of reimbursement of actual expenditure incurred by AT&S Austria is not tenable for reasons more than one. First it is not supported by any evidence as no material (except the debit notes of salaries of seconded personnel) is placed before us to show what actual expenditure was incurred by AT&S Austria and what is being claimed as reimbursement; secondly, assuming for the sake of argument that the debit notes represent the quantum of compensation as the actual expenditure, it would make no difference as the same is payable to the AT&S Austria under the secondment agreement for services provided by it. It would, therefore, be not only unrealistic but also contrary to the terms of the agreement to treat payments under the said agreement as mere reimbursement of salaries of the seconded employees who are said to be the employees of the applicant.

To show that the real employer of such employees is the applicant and not the AT&S Austria, Mr. Chaitanya invited our attention to various employment agreements entered into between the applicant and the seconded employees and also the certificate of deduction of tax at source on their global salary. All the employment agreements are similarly worded. We have carefully gone through the employment agreement between the applicant and Mr. Markus Stoinkellner. The duration of the employment is from 1st Sept., 2005 till 30th Aug., 2008. In Article 3 thereof salary of the employee is noted as the remuneration, perquisites and other entitlements as detailed in Appendix-A. However, Appendix-A does not specify any amount. All that it says, is that the salary will be as fixed and agreed between the employee and the company from time to time and that such salary may be paid either in India or outside India but the total salary shall not exceed the salary fixed as above, but no fixed salary is mentioned in the employment agreement. Other perquisites and entitlements are : travel expenses, transport, boarding, lodging; and annual leave of 30 days per year; and home leave which the employee will be entitled to once. The

applicant shall have to organize an economic class return IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 flight tickets to go on home leave. The employment agreement also provides that the employee will be responsible for meeting all requirements under Indian tax laws including tax compliance and filing of returns and the applicant is authorized to deduct taxes from the compensation and benefits payable.'

38. The mere fact that CIOP, and the secondment agreement, phrases the payment made from CIOP to the overseas entity as 'reimbursement' cannot be determinative. Neither is the fact that the overseas does not charge a mark-up over and above the costs of maintaining the secondee relevant in itself, since the absence to markup (subject to an independent transfer pricing exercise) cannot negate the nature of the transaction. It would lead to an absurd conclusion if, all else constant, the fact that no payment is demanded negates accrual of income to the overseas entity. Instead, the various factors concerning the determination of the real employment link continue to operate, and the consequent finding that provision of employees to CIOP was the provision of services to CIOP by the overseas entities triggers the DTAAs. The nomenclature or lesser-than-expected amount charged for such services cannot change the nature of the services. Indeed, once it is established, as in this case, that there was a provision of services, the payment made may indeed be payment for services - which may be deducted in accordance with law - or reimbursement for costs incurred. This, however, cannot be used to claim that the entire amount is in the nature of reimbursement, for which the tax liability is not triggered in the first place. This would mean that in any circumstance where services are provided between related parties, the demand of only as much money as has been spent in providing the service would remove the tax liability altogether. This is clearly an incorrect reasoning that conflates liability to tax with subsequent deductions that may be claimed.

13. The SLP filed against the judgment of Hon'ble Delhi High Court has been dismissed by the Hon'ble Supreme Court in 227 Taxman 368. Therefore the view taken by the Hon'ble High Court has attained finality. The concept of income includes positive as well as negative income or nil income. In the case of payment being FTS or royalty as per sec. 9(1) of the Act it is irrelevant whether any profit element in the income or not. It is not only a matter of computation of total income when the concept of profit element in payment is relevant. If the payment being FTS or royalty is made to nonresident, then the concept of total income becomes irrelevant and the provisions of sec. 44D recognize the gross payment chargeable to tax. Thus all the payment made by the assessee to non- resident on account of FTS or royalty an chargeable to tax irrespective of any profit element in the said payment or not. However, there is an exception to this Rule of charging the gross amount when the non-resident is having fixed place of business or PE in India and the amount is earned through the PE, then the expenditure incurred in the relation to the PE for earning said amount is allowable as per the provisions of sec. 44DA of the Act. Therefore, in view of the judgment of Hon'ble Delhi High Court in the case of Centrica (Supra), the payment made to foreign company DFCL partakes the character of FTS as per the definition under explanation 2 to sec . 9(1)(vii) of the Act. The decisions relied upon by the assessee in the case of IDS Software Solutions (Supra) and Abbey Business Solution (Supra) would not help the case of the assessee when there is a

direct judgment of Hon'ble Delhi High Court on this point."

IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 We find that the ratio of the decisions of Hon'ble Delhi High Court in the case of Centrica India Pvt. Ltd. Vs. CIT (supra) as well as the decision of the co-ordinate bench of this Tribunal in the case of Foodworld Supermarkets Ltd. Vs. DCIT (supra) is applicable to the facts of the case on hand. The decisions relied upon by the ld. AR are on the point of double deduction of tax at source under Section 192 and further under Section 195 of the Act whereas the issue in the case of the assessee is taxability of the income in the regular assessment and not in the proceedings under Section 201(1) & 201(1A) of the Act. Therefore the TDS deducted by the ITIPL would not change the nature of the payment and chargeability of the same to tax in India. In view of the above facts and circumstances, the decisions of the Hon'ble Delhi High Court as well as co- ordinate bench of this Tribunal, we do not find any error or illegality in the order of authorities below."

7. So far as the fact of the case as well as the terms and conditions of the expartiate agreement is concerned, we do not find any material variations in the terms and conditions of the secondment in the case of the assessee as well as in the cases which were considered by the Tribunal while giving the finding. The learned Authorised Representative has referred to the communication with the assignees by the assessee and submitted that the assignees would not get any right of a continuous employment with the assessee after termination or on expiry of the present assignment. In our view even if there is a restriction of the right to continue in the employment with the assessee the IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 same would not prove that the relationship between the BIAL and the assignees is employer and employee. The terms and conditions of the employment of the assignees with the assessee cannot determine the relationship between the assignees and the BIAL. Further even if the assignment tenure is relatively longer that would not amount to cessation of the existing employment of the assignees with the assessee. As regards the definition provided under Section 9(1)(vii) Explanation 2 as well as the definition of Fees for Technical Services provided under Article 12(4) of Indo- Swiss DTAA, we find that there is no significant difference between the definition and the language employed under the provisions of the I T Act as well as the Treaty. For ready reference, we quote the Explanation 2 to Section 9(1)(vii) as well as Article 12(4) of DTAA as under :

> Section 9(1)(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 that nothing contained in this clause shall apply in relation to any income IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.] [Explanation 1.--For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.] 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".] " Article 12(4) For purposes of this Article the term "fees for technical services" means payments of any kind to any person in consideration for the rendering of any managerial, technical or consultancy services, including the provision of services by technical or other personnel."

8. The learned Authorised Representative has given much stress to a particular word that the provision of services as per the definition under the DTAA has to be rendered by technical and other personnel as against the definition under Section 9(1)(vii), it is the provision and service of technical or other personnel. Thus he has emphasized that there is a difference in the language used in the DTAA. We find that the definition of Fees for Technical Services as per the first limb as provided under Section 9(1)(vii) of the IT Act as IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 well as Article 12(4) of DTAA means payment to any kind in consideration for rendering of any managerial, technical or consultancy services and to that extent, the definition of Fees for Technical Services under IT Act as well as DTAA is identical. In this case, when the payment is considered for managerial service then it becomes irrelevant to go into second aspect of provision of service by technical or other personnel as used in Article 12(4) of the DTAA. In view of the above discussion as well as in the facts and circumstances of the case, we do not find any distinguishing facts or circumstances in the case of the assessee to take a different view as taken by this Tribunal in the earlier decision. Hence, by following the earlier decisions of this Tribunal, we decide this issue against the assessee.

9. For the Asst. Year 2007-08, the assesse has also raised the objection against the jurisdiction of the DRP for enhancing the total income as per Ground No.2 (b).

10. The learned Authroised Representative of the assesse has submitted that the A.O. did not made any addition on the issue of reimbursement of secondment remuneration by treating the same as FTS whereas the DRP has IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 enhanced the total income by directing the A.O. to consider the same as FTS. He has referred to the provisions of Section 144C(8) and submitted that prior to the insertion of the Explanation by Finance Act, 2012 w.e.f. 1.4.2009, the DRP had no jurisdiction or power to enhance the assessment. In support of his contention, he has relied upon the Hon'ble jurisdictional High Court in the case of Wipro Ltd. 338 ITR 411.

11. On the other hand, the learned Departmental Representative has submitted that the DRP while deciding the objections raised by the assesse has directed the A.O. to consider the entire payment as FTS instead of a part of the payment was considered by the A.O. while passing the draft assessment order. He has referred to the relevant part of the DRP direction and submitted that when this was the subject matter of the objections filed by the assesse before the DRP then the jurisdiction of DRP cannot be challenged.

12. We have considered the rival submissions as well as relevant material on record. The assesse has challenged the jurisdiction of DRP in enhancing the total income when the A.O. has not considered the entire payment in foreign IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 currency as FTS. We find that while challenging the draft order the assesse filed objections before the DRP which are reproduced in para 2 of the DRP as under :

> "2. Objections to the Draft assessment order before the Dispute Resolution Panel :
>
> 1. The draft assessment order made under Section 143(3) read with section 144C of the Act is bad on facts.
>
> 2. Grant of lower refund by virtue of treating reimbursement of expenses as fees for technical services.
>
> 2.1 The Assessing Officer erred in computing the refund due to the assessee at Rs.18,55,431.
>
> 2.2 Without prejudice to the generality of the above, the Assessing Officer has erred, inter alia, in :
>
> a. Not appreciating the fact that certain expenses were incurred by the assessee on behalf of Bangalore International Airport Limited, and such expenses were reimbursed by BIAL to the assessee at cost.

b. Treating the reimbursement of expenses received by the assessee as fee for technical services liable to be taxed in India at the rate of 10%."

Thus it is clear that in the objection 2.2(b) the assesse has raised a specific objection before the DRP in respect of the treatment of reimbursement of expenses received by the assesse as FTS liable to be taxed in India. While deciding these objections, the DRP found that instead of the amount which was treated by the A.O. as FTS, the entire payment received by the assesse from the IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 BIAL under the Head "Reimbursement of Expenses" should be treated as FTS.

Accordingly, the DRP issued a show cause notice to the assesse. The assessee duly contested this issue before the DRP. Thus it is clear from the record that this issue of treating the reimbursement of expenses as FTS was a subject matter of adjudication before the DRP and therefore while deciding the issue which was a subject matter before DRP, the question of jurisdiction cannot be raised even if the outcome of the adjudication of the subject matter may result enhancement of total income as held by the Hon'ble Supreme Court in the case of Hukumchand Millls Ltd. Vs. CIT 63 ITR 232 as well as Hon'ble Bombay High Court in the case of Ahmedabad Electricity Co. Ltd. Vs. CIT 199 ITR 351.

The full bench of Hon'ble Bombay High Court while deciding the issue of the powers and jurisdiction of the Tribunal to enhance the tax liability has held that the Tribunal while dealing with an appeal enhance the tax liability of the assesse if it accept the contention of the Department. Thus it is clear that while deciding an issue before the authority even if no express power of enhancement is provided under the Act it has inherent power to decide the IT(IT)A No.1525/Bang/2010;

1437 & 1438/Bang/2013 & IT(IT)A No.244/Bang/2015 issue which may result enhancement of tax liability. In view of the above facts, we do not find any substance in the objections raised by the assesse.

13. In the result, the assessee's appeals are dismissed.

Order pronounced in the open court on 10th Mar., 2017.

Sd/-	Sd/-
(A.K. GARODIA)	(VIJAY PAL RAO)
Accountant Member	Judicial Member

Bangalore,
Dt. 10.03.2017.

*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

By Order

Asst. Registrar, ITAT, Bangalore