Johnson Matthey Public Ltd. Company, ... vs Dcit (International Taxation), New ... on 6 December, 2017

ITA No.-1143/Del/2016

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

BEFORE SHRI G.D.AGRAWAL, HON'BLE PRESIDENT
&
SHRI K.N. CHARY, JUDICIAL MEMBER

ITA No.-1143/Del/2016
(Assessment Year: 2011-12)

Johnson Matthey Public Ltd. Company, C/o-Johnson Matthey Chemicals India Pvt. Ltd., 11 Floor, Building No.8C, DLF Cyber City, Phase-II, Gurgaon-122002. PAN-AACCJ3586F	vs DCIT (International Taxation), Circle 2(2)(1), Room No.411, 4th Floor, Block-E-2, Pratyaksh Kar Bhawan, Civic Centre, New Delhi.
Assessee by	Sh. Kanchan Kaushal, CA & Sh. K.M.Gupta, Adv.
Revenue by	Sh. T.M. Shiv Kumar, CIT DR

Date of Hearing	21.09.2017
Date of Pronouncement	06.12.2017

ORDER

PER K. N. CHARY, JUDICIAL MEMBER

Challenging the additions made in the final assessment order dated 17 December 2015 passed under section 144C(13) read with section 143(3) of the Income-tax Act, 1961 ('the Act'), assessee preferred this appeal on the following grounds:

1. "On the facts, in the circumstances of the case and in law, the Ld. AO erred in assessing the total income of the Appellant at Rs.25,10,69,882 as against Rs.24,59,90,022 declared by the Appellant in the return of income.

2. On the facts, in the circumstances of the case and in law, the Ld. AO as well as Dispute Resolution Panel (Ld. DRP') has erred in holding that guarantee fee of Rs.1,49,15,090 is taxable as "Other Income" in terms of ITA No.-1143/Del/2016 Article 23 of the India UK Double Taxation Avoidance Agreement ("Tax Treaty").

3. On the facts, in the circumstances of the case and in law, the Ld. AO/ Ld. DRP failed to appreciate that the income arising to appellant providing guarantee for its Associated Enterprises ('AEs') is under the normal course of business and thus could not be held taxable as "Other Income" in terms of Article 23 of the India UK Double Taxation Avoidance Agreement ('India UK Tax Treaty').

4. On the facts, in the circumstances of the case and in law, while coming to the aforementioned conclusion, the Ld. AO/ Ld. DRP erred in:

4.1 not appreciating that the guarantee fee is arising from debt raised by the principal debtors and that the Appellant's liability vis-

a-vis the debt raised by the principal debtors is coextensive and hence, the guarantee fee is in the nature of "Interest Income" under Article 12 of the India UK Tax Treaty, as claimed by the Appellant.

4.2 mechanically relying upon Technical Explanation to US Model Tax Convention 2006 without appreciating that the Appellant has provided the guarantee in the normal course of business to its AEs.

4.3 not appreciating the fact that where a specific provision under the Act or the Tax Treaty deals with a specific kind of income, the same could not be taxed under any other general provisions of the Act or the Tax Treaty.

5. On the facts, in the circumstances of the case and in law, the Ld. AO as well as Ld. DRP grossly erred in making an adjustment of Rs. 50,79,860/- to the returned income of the Appellant, treating the same as Fee for Technical Services ('FTS') both as per the provisions of section 9(1)(vii) of the Act as well as Article 13 of the India UK Tax Treaty.

6. On the facts, in the circumstances of the case and in law, Ld. AO/ Ld. DRP, merely by relying upon the Hon'ble Delhi High Court judgment in Centrica India Offshore Pvt. Ltd.', grossly erred in concluding that by seconding an expatriate employee (as the Managing Director of the Indian AE), the Appellant has satisfied the restrictive 'make available' criteria in terms of Article 13(4) of India UK tax treaty thereby treating the same as FTS, without appreciating the fact that: -

6.1 mere secondment of employee does not tantamount to rendition of service by the Appellant to the Indian AE.

6.2 even if it is assumed that the Appellant has rendered a service to the Indian subsidiary, the restrictive 'make available' criterion of Article 13(4) of India UK tax treaty is not satisfied.

7. On the facts, in the circumstances of the case and in law, the Ld. AO as well Ld. DRP failed to appreciate the fact that the payment of Rs.

50,79,860/- was received by the Appellant as a mere reimbursement ITA No.-1143/Del/2016 without any income element towards salary of expatriate employee disbursed by it, as a facilitator, and therefore cannot be subject to tax as FTS.

8. On the facts, in the circumstances of the case and in law, the Ld. AO erred in levying consequential interest under section 234B of the Act on the disallowance made in the assessment order.

9. On the facts, in the circumstances of the case and in law, the Ld. AO erred in initiating penalty proceedings under section 271(1)(C) of the Act.

That the above grounds of appeal are mutually exclusive and without prejudice to each other.

That the Appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal. Any consequential relief to which the Appellant may be entitled under law in pursuance of the aforesaid grounds of appeal, or otherwise may be granted."

2. Relevant facts are that the assessee i.e., JM Plc is the ultimate parent company of both Johnson Matthey India Private Limited (JMIPL) and Johnson Matthey Chemicals India Private Limited (JMCIPL). JM Plc provides various types of guarantees in relation to the business of its subsidiaries companies. In the relevant previous year JM Plc provided guarantees to support credit facilities extended to JMIPL and JMCIPL by banks in India. Guarantees provided to HSBC and Citibank on a global basis outside India include guarantee for the facilities extended to JMIPL and JMCIPL. While filing its return of income for Assessment Year ('AY) 2011-12, the assessee treated the Guarantee fees received from Indian subsidiaries to be in the nature of Interest Income under Article 12 of India UK tax treaty and offered it to tax @ 15%. So stated that a sum of Rs. 50,79,860/- was reimbursement is on account of disbursement of salary of a seconded employee on behalf of AE. and accordingly not offered to tax. However, during the scrutiny assessment by the Learned Assessing Officer (Ld. AO), the Ld. AO vide final assessment order dated 17 December 2015 passed under section 144(3) read with section 143(3) of the Act, assessed the income of the assessee at Rs. 25,10,69,882 making the addition of Rs. 1,49,15,090/- treating alleged guarantee fee ITA No.-1143/Del/2016 as taxable under Article 23 - Other Income of India UK Double Taxation Avoidance Agreement (India UK Tax Treaty) @ 40% (plus surcharge and education cess) as against the above sum offered to tax under Article 12

- Interest income of India UK tax treaty by the Appellant, and Rs.50,79,860 received from Indian AE on account of disbursement of salary on behalf of AE as taxable as Fee for Technical Services ('FTS') @ 15% in terms of Article 13 of India UK tax Treaty.

3. Aggrieved by these two additions, the assessee preferred this appeal before us on as many as nine grounds. Ground No. 1 being general and Ground No. 8 and 9 being consequential in nature, do not need to be adjudicated specifically. Ground No. 2, 3 & 4 are in respect of characterisation of Guarantee fee recharge (Bank guarantee recharge/Corporate guarantee recharge)amounting to Rs.1,49,15,090 as 'Other Income' under Article 23(3) of India UK Double Taxation Avoidance

Agreement (India UK DTAA or Tax Treaty),taxed @ 40% (plus surcharge and education cess) in the final assessment order, whereas Ground No. 5, 6 & 7 Relate to tax on reimbursement of salary cost of a seconded employee disbursed on behalf of Indian Associated Enterprise (AE) amounting to Rs.50,79,860 [received from Indian AE] as Fee for Technical Services ('FTS') @ 15% in terms of Article 13(4) of India UK tax treaty. However, during the course of this appeal, assessee raised an additional ground which is to the effect that, since the source of guarantee fee, received for providing guarantee for its Associated Enterprises (AEs) to foreign banks, is outside India and cannot be held taxable in India.

4. Firstly, insofar as the additional ground i.e., Ground No 10 is concerned, it is the argument of the Ld. AR that in terms of Art. 265 of the Constitution of India, no tax shall be levied or collected except by authority of law and the Hon'ble Supreme Court of India also held that ITA No.-1143/Del/2016 the purpose of assessment proceedings is to assess correctly the tax and consequently, the tribunal has the power to grant relief if it is found that a non-taxable item is taxed or a permissible deduction is denied and thus an assessed income can be lesser than the returned income. He placed reliance on the decision of the Apex Court in NTPC Vs. CIT, 229 ITR 383 wherein it was held that since the purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law, the assessee should not be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. He also placed reliance on the decisions reported in the case of Capgemini S.A. vs ADIT (International Taxation) for the Assessment Years 2009-10 & 2012-13 rendered by the Mumbai Tribunal in ITA Nos. 7198/Mum/2012 and 888(Mum) of 2016 respectively for the principle that when the Indian subsidiaries avail credit facilities pursuant to the corporate guarantee agreement entered into by the foreign parent outside India with a financial institution, the guarantee commission received by the foreign parent does not accrue nor does it deem to have been accrued in India and, therefore, not taxable in India under Income Tax Act, 1961. Per contra, Ld. DR submitted that the additional ground cannot be admitted because at no point of time the authorities below had an opportunity to examine this issue, inasmuch as the only issue that was only under consideration was whether the receipt was in the nature of interest or other income. According to him, the benefit of the decision in NTPC (supra) is not available to the assessee since all the facts necessary for deciding a new ground are not available on record. Insofar as the categorization of the receipt of guarantee commission as the income from other source, Ld.DR placed reliance on the orders of the authorities below.

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5. We have carefully gone through the record. In the case of the NTPC (supra), the Hon'ble Supreme Court observed that, -

The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction denied, we do not see any reason why the assessee should be prevented from

raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item.

6. In this matter, there is no dispute that in the return of income, the assessee had declared the receipts on account of the guarantee commission treating it as interest within the meaning of section 2(22A) of the Act and before the authorities below, the assessee placed reliance on a decision reported in Viswapriya Financial Services and Securities Limited [2002] 258 ITR 496 (Madras) and CIT vs Vijay Ship Breaking Corporation [2003] 261 ITR 113 (Gujarat). It is, therefore. Clear that there is no dispute as to the facts involved in this matter insofar as Ground Nos.2 to 4 are concerned but only question is in respect of the taxability of such a receipt in India, and if so, under what category whether interest or other source, such a receipt falls. We, therefore, find that no new facts are necessary to deal with this issue as such while respectfully following the ratio laid down in the case of NTPC (supra), we admit the additional ground, and proceed to decide the same.

7. In support of the contention that the guarantee commission received by the foreign parent pursuant to the availment of the loan by the Indian subsidiary basing on the global guarantee agreement entered into by the foreign holding company with a banker outside India, is not taxable in India, Ld.AR placed reliance on the decision of the Mumbai Tribunal in Capgemini SA Vs. DCIT (International Taxation) for ITA No.-1143/Del/2016 Assessment Year 2009-10 vide ITA No. 7198/Mum/2012 dated 28.3.2016, which needs to be extracted hereunder:-

> "3. Rival contentions have been heard and record perused. Facts in brief are that the assessee is a resident of France and does not have a permanent establishment in India. During the year assessee has given a corporate guarantee BNP Paribas, a French Bank in France, on behalf of its various subsidiaries worldwide. During the year under consideration, in India, two subsidiaries of the assessee M/s.Capgemini India Pvt. Ltd. and Capgemini Business Services (India) Ltd. were sanctioned credit facilities by the Indian Branches of BNP Paribas, which credit facilities to the extent of USD 15 million4and 2 million respectively, were secured by the said corporate guarantee given by the assessee. The assessee has charged guarantee commission @ 0.5% per annum for the corporate guarantees given on behalf of its subsidiaries in India. The AO has taxed the same by holding it to be "Other Income" under Article 23 of the DTAA between India and France.
>
> 4. The assessee is before us against the said addition.
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> 5. We have considered rival contentions and found that the AO taxed the guarantee commission on the plea that guarantee has been provided for the purpose of raising finance by an India company. As per the AO finance was raised in India. The AO further observed that finance requirement is met by a Indian branch of the bank, the benefits of guarantee are shared by the Indian entity with the assessee by making a compensatory payment. Accordingly the AO held that fees for guarantee arise in India. From the record we found that guarantee commission received by France company did not accrue in India nor it can be deemed to be accrued in India,

> therefore, not taxable in India under Income Tax Act. Furthermore, as per Article 23.3, income can be taxed in India, only if it arises in India. In the instant case, the income clearly arises in France because the guarantee has been given by the assessee, a French company to BNP Paribas, a French Bank, in France and, therefore, Article 23.3 has no applicability as income does not arise in India."

8. On this aspect, Ld. DR vehemently contended that the taxability has to be tested with reference to the domestic law u/sections 4, 5 & 9 and it is only when it passes through this threshold then the Treaty provisions have to be looked into. He submitted that Capgemeni case relates to Indo-French treaty whereas the present case has to be dealt with under the provisions of Indo-UK treaty. According to him in this matter, occasion for the rise of guarantee commission is only the ITA No.-1143/Del/2016 Indian entity availing loan, but not merely on the foreign parent company entering into the global corporate guarantee agreement, as such consideration of the matter in the light of the provisions under section 5(2) of the Act is necessary.

9. At the outset, it is needless to say that while according to Section 4 of the Act income-tax shall be charged in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of the Act in respect of the total income of the previous year of every person, Section 5(2) of the Act says that, the total income of any previous year of a person who is a non-resident shall include all income from whatever source derived which is received or is deemed to be received in India in such year by or on behalf of such person; or accrues or arises or is deemed to accrue or arise to him in India during such year. It is, therefore, clear that in cases covered under section 5(2) of the Act, there are no escapes for the receipts from being included in the total income of the Non-resident Indian. In the case on hand, though it is contended by the assessee that they have entered into the global corporate guarantee agreement with the banker outside India, fact remains that on that account alone, no receipts would accrue to the assessee in the jurisdictions where the loan facility is not availed by the subsidiaries. It is not the entering of the global corporate agreement outside India that occasions the assessee to charge the guarantee commission, but it is the act of the subsidiary in availing the loan that accrues the guarantee commission to the assessee. So long as there is no denial that the loan transaction took place in India, it is not open for the assessee to contend that no income accrued to them in India. We are fortified in our this opinion, by the decision of the Hon'ble Apex Court in Kanchanganga Sea Foods Pvt. Ltd. vs. CIT [2010] 325 ITR 540 (SC) where the Hon'ble Court held that in cases of the receipts created by legal fiction under section ITA No.-1143/Del/2016 5(2) of the Act, there is no escape from the conclusion that the income earned by the non-resident company had received the same in India.

10. In these circumstances, in view of the legal fiction followed by the Hon'ble Supreme Court in the above decision while considering section 5(2) of the Act, we are of the considered opinion that the parental/bank guarantee commission was accrued to and received by the assessee in India as such the assessee cannot succeed in their plea that such a receipt is not taxable in India.

11. Having said so, now we shall proceed to consider the rival contentions relating to the nature of this receipt, whether it amounts to interest as contended by the assessee or income from other source as contented by the Revenue. It is argued on behalf of the assessee that the Appellant is a tax

resident of UK and in absence of any PE in India, the income earned in the form of fees charged for providing Bank Guarantee/ Corporate Guarantee, in the normal course of business, would not be chargeable to tax in India. However, out of utmost caution, the Appellant has offered the guarantee fee to tax as Interest in terms of the provisions of the Act and Article 12(5) of the India UK Tax Treaty. He objected authorities below placing reliance on the US - MTC Technical Explanation 2006 on the ground that even the US Tax Court has not supported the view given in US MTC 2006 for a ruling given in the context of US, as such the same certainly not be applied in the case of the Appellant, which is a resident of the UK. He submits that the term Interest has been defined under Article 12(5) of India UK tax treaty to include debt-claims of every kind, which is exhaustive and covers all kinds of income regarded as "interest" in domestic law, whereas under

> the domestic law Section 2(28A) of the Income Tax Act, 1961 (the Act) defines "interest" to include any moneys borrowed or debt incurred including a deposit, claim or other similar right or obligation and also ITA No.-1143/Del/2016 any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised."

12. He also placed reliance on a decision of Gujarat High Court in the case of CIT vs Vijay Ship Breaking Corporation [2003] 261ITR 113 (Gujarat), and Madras High Court in the case of Viswapriya Financial Services and Securities Limited [2002] 258 ITR496 (Madras), in support of his argument that the statutory definition under section 2(28A) of the Act regards such amounts which may not otherwise be regarded as interest to be treated as interest for the purpose of the statute and that too even in cases where there is no relationship of debtor and creditor or borrower and lender, if payment is made in any manner in respect of any moneys received as deposits or on money claims or rights or obligations incurred in relation to money, such payment is, by this statutory definition, regarded as interest." Basing on these provisions and decisions, he contends that the payments by Indian AEs to Appellant in respect of guarantee provided to support credit facilities obtained by them from banks in India could be classified as "Interest" for tax purposes in India UK Tax Treaty as well as under provisions of the Act, and the tax offered on the guarantee fee treating it as interest is proper.

13. He further argued that in this case the essential characteristics of business are being fulfilled to enable the transaction to get covered under the definition of business, as the Appellant is providing guarantees to Indian AEs and its other subsidiaries on a regular basis and as a continuous activity, that the said activity has been carried out with a motive to earn profits, as such it is pertinent to analyse if the Guarantee fees would qualify to be taxable as business profits in terms of Article 7 of the India UK tax treaty. According to him, in view of the facts involved, the guarantee fee income partakes the nature of business income which could be chargeable to tax as per Article 7 of India UK tax ITA No.-1143/Del/2016 treaty. However, he further argued that as per the provisions of Article 7 of India UK tax treaty, the income is taxable in India only if the recipient carries on business through a Permanent Establishment ('PE') in India. In the absence of any PE in India, the business profits of an enterprise are taxable in the country in which the recipient is resident.

14. In the alternative he pleaded that if at all the fees charged by Appellant under the Agreement is not considered as interest, may be regarded as Fee for Technical Services ('FTS') in terms of section 9(i)(vi) of the Act, as the same is of wider connotation, inasmuch as the term FTS, defined under the Act includes any payment received for providing any managerial or consultancy services, but such receipt cannot certainly be treated as Income from Other Sources. For these reasons he prayed that the orders of the authorities below may not be sustained.

15. For better appreciation of facts on this issue, Article 12(5) of the India U.K. DTAA and section 2(28A) of the Act needs to be referred:-

> Article 12(5) of India UK reads as follows:
>
> 5. The term "interest" as used in this Article means income from debt-

claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from Government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures but, subject to the provisions of paragraph 9 of this Article, shall not include any item which is treated as a distribution under the provisions of Article 11 (Dividends) of this Convention.

Section 2(28A) of the Income- Tax Act, 1961 reads as follows:

> (28A) " interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised;] ITA No.-1143/Del/2016

16. According to the Ld. AR as is evident from the above, Article 12(5) of the India U.K. DTAA speaks of "income from debt claims of every kind"

> whereas Section 2(28A) says that the term "interest" includes a deposit claim or other similar right or obligation which shall further include service fee or other charge in respect of moneys borrowed or debt incurred or in respect of any credit facility which has not been utilized, therefore, the guarantee/bank commission is also covered in such definition; whereas According to the authorities below, this definition of interest is not wide enough to cover corporate guarantee recharge and bank guarantee recharge because there is no relationship of lendor- borrower in this transaction.

17. A bare reading of these provisions indicate that either the debt claims of any kind or the service fee or other charge in respect of moneys borrowed or debt incurred, refer to the payments relating to the debt proper, whether or not there is any relationship of debtor-creditor or borrower-lender. At this juncture, we would like to observe that words and phrases employed in any provision of Statute or Treaty have to be understood in the context of their usage and with reference to the company of

other words or phrases they keep in. Too much of expansion of the literal meaning, in disregard to the context or privity of contract would lead to absurdity or negation of the purpose of the provisions. The word "interest" as found in Article 12(5) of the Treaty and section 2(28A) of the Act, shall have be understood contextually and with reference to the other words and phrases in whose company it is to be found. Though the words "claims of any kind", or "service fee or other charge" are to be found either in the Treaty or in the Act, with reference to interest, every periodical payment or remuneration for service in the context of a loan can not be treated as "interest". The term interest, with its widest connotations, indicate the payments, whatever may be the name that is called with, relate to the payments made by the receiver of some amount, ITA No.-1143/Del/2016 pursuant to a loan transaction. Loan transaction is also a species of contract. Art 12(5) of the DTAA and Section 2(28A) of the Act extend the scope of such payments. However, payment or re-payment pursuant to any loan to be qualified as "interest", necessarily have to be within the context of loan and shall relate to the parties to the privity of contract. In this context only, the expressions "claims of any kind", "service fee or other charge" have to be understood. So also the expression "whether or not there is the relationship of creditor-debtor or lender-borrower exists". It is only in the context and privity of contract, the payments covered by Article 12(5) of the India U.K. treaty or 2(28A) of the Act would be qualified to be treated as interest, even if there is no semblance of relationship between the parties like that of creditor-debtor exists. However, it does not take into its fold any payments made to stranger to the privity of loan transactions, though such payments have to be made incidentally in relation to such loan. Undoubtedly, assessee is a stranger to the privity of loan transactions inasmuch as the contract of loan is a different from the contract of guarantee, as such in our considered opinion, the expression of "debt claims of any kind" or "the service fee or other charge in respect of moneys borrowed or debt incurred" does not stand extended to the payment of guarantee commission received by the assessee in India. The payments relating to debt claims, service fee or other charge, could be categorized as interest provided they is privity of such contract. Lest we are afraid that the thin line that separates the payment of interest from other payments will be missing and the payments towards consultancy charges, expenditure incurred for the purpose of pre-loan documentation and the host of expenditure incurred with third parties and not relatable to the loan transaction proper, will have to be treated as "interest". Certainly it cannot be the intention of the legislature or treaty-makers. We are, therefore, of the considered opinion that, so long as the assessee is a ITA No.-1143/Del/2016 stranger to the privity of contract of loan between the Indian entity and the banker, they cannot categorize the corporate/bank guarantee recharge amount as interest for the purpose of taxation.

18 Alternative request of the assessee is that, if for any reason the Tribunal reaches a conclusion that this Corporate/Bank guarantee recharge cannot be treated as interest, then the question as to whether it amounts to business income may be considered. On this aspect, we find from the record that admittedly the assessee is manufacturing technologically advanced chemicals known as catalysts used in automobile and other industries, it manufactures a variety of precious metal containing catalysts and chemical products which are used in a wide range of industrial applications. Further, it is nobody's case that the assessee also does the business of providing corporate/bank guarantee recharge to earn income on regular basis. The global corporate guarantee that was entered into by the assessee is only for the limited purpose of securing loans to its subsidiaries and the recharge income is only an incidental one. In these circumstances, we find it

difficult to accede the argument that the corporate/bank guarantee recharge would be business profit, for application of Article 7 of the India UK DTAA.

19. Adverting to the contention of the assessee that this corporate/bank guarantee recharge could be regarded as FTS, we find that this contention is also devoid of any merit inasmuch as this payment does not relate to the tendering of any technical or consultancy service and the question of making available any knowledge, experience, skill know-how or process or consist of any development or transfer of a technical plan or a technical design. At the same time, it does not also meet the requirement of explanation to section 9(1)(vii) of the Act. We, ITA No.-1143/Del/2016 therefore, are not inclined to place this guarantee recharge amount in the category of FTS.

20. Having examined the issue of corporate/bank guarantee recharge with reference to Article 12(5) of the Indo U.K. Treaty and Section 2(28A) of the Act, we are of the considered opinion that the authorities below are perfectly justified in concluding that this payment does not fall within the expression of interest and in view of Clause 3 of Article 23 of the Treaty, in the absence of any specific provision dealing with corporate/bank guarantee recharge, the same has to be taxed in India as per the provisions of the Income tax Act, 1961. We do not find any illegality or irregularity in the reasoning given or conclusions reached by the authorities below. We, therefore, dismiss Ground Nos. 2 to 4 & 10.

21. Now, turning to Ground Nos. 5 to 7, is an admitted fact that the assessee received a sum of Rs.55,80,855/- from JMIPL on account of charges received for the services rendered by senior management employee seconded by the assessee to India. However, the assessee's case is that such an amount represents the expenditure incurred by them on the employee and was reimbursed by the Indian entity. Ld.AO did not accept the contention of the assessee and observed that considering the overall sphere of activities and overall availability of technical and skilled personnel with them in U.K., there remains no doubt that this seconded person was rendering specialist consultancy services for the benefit of India AE, as such these services are fee for technical services u/s 9(1)(vii) of the Act and Article 13 of the DTAA. LD. DRP found that there is similarity of facts between the case of the present assessee and the case in Centrica India Offshore Pvt. Ltd. and the broad principles laid down by the Hon'ble Delhi High Court is that where the employees are seconded and continue to retain their lean with their parent organization, on terms where they transfer and make ITA No.-1143/Del/2016 available their technical knowledge then the reimbursement of salaries of seconded employees are in the nature of FTS in the hands of the parent organization taxable on source basis.

22. According to the Ld. AR, for the year under consideration, the Assessee had received a sum of INR 50,79,860 from Indian AE, being reimbursement of amount of salary paid to Indian AE's Managing Director (MD) - Mr. Dhananjay Tapasvi who had been appointed and seconded to India, and such payment was subject to withholding tax under section 192 of the Act, as salary paid to the said MD was chargeable to tax in India. According to the assessee, said arrangement was done for administrative convenience only and to meet the requirements of expatriate employee in his home country. The Assessee agreed to disburse the salary of such employee to his designated overseas account. In order to recover the above salary, the Assessee had raised invoice towards claim of

reimbursement of salary expense of seconded employee. The Indian AE has also been duly undertaking withholding tax compliances on the salary of the MD. Ld. AR further submitted that it is an undisputed fact that the Indian AE had deducted tax at source on salary paid to Mr. Dhananjay Tapasvi, thus the income is chargeable to tax in India as salary income of the individual by virtue of section 9(1)(ii) of the Act and could not fall under section 9(1)(vii) of the Act i.e. Fees for Technical Services or equivalent to Article 13(4) of the DTAA. In support of this contention, reliance is placed on the decision of Burt Hill Design (P.) Ltd. v. DDIT (International Taxation), Ahmedabad [2017] 79 taxmann.com 459 (Ahmedabad - Trib.), wherein it was held that, -

> "Whether the seconded employees continue to be in employment of the foreign enterprise or not is wholly irrelevant for this purpose. What is relevant is that the income embedded in these payments in question is taxable in India under the head 'Salaries' and if that be so, there are no tax withholding obligations under section 195."

ITA No.-1143/Del/2016 In view of the above decision, it is submitted that the sum received by the Appellant could not be brought to tax separately in the hands of Appellant under the deeming provisions of 9(1)(vii) i.e. FTS. Thus, the action of the Ld. AO / Ld. DRP taxing the same as FTS is erroneous and deserves to be quashed on this point alone.

23. Per contra, Ld. DR submitted that the assessee is manufacturing technologically advanced chemicals known as catalysts used in automobile and other industries, it manufactures a variety of precious metal containing catalysts and chemical products which are used in a wide range of industrial applications, one Mr. Dhananajay Tapasvi was an employee of the assessee for over 20 years, that he was appointed as new General Manager of Emission Control Technology Plant (ECT Plant) in India and made the Director on the Board of Jhonson Matthey India Pvt. Ltd. (the subsidiary). This person has been seconded to the India to oversee the Emission Control Technology Plant of the subsidiary. He is an employee of the assessee and the services rendered by him to the Indian entity are Fees for Technical Services. Ld. DR further submits that the assessee did not furnish the necessary documents before the authorities below. Ld. DR further submitted that the issue as to whether the amount paid towards secondment of employees amounts to 'Fees for Technical Services' under India -UK DTAA, is no more res-integra, inasmuch as it was held to be FTS by the jurisdictional High Court in the case of Centrica India Offshore (P.) Ltd. v. CIT (2014) 364ITR 336 (Del)) and the SLP filed against the said decision has been dismissed by the Hon'ble Apex Court in Centrica India Offshore (P.) Ltd. v. CIT (2014)151 taxmann.com 386 (SC).

24. Further argument of the Ld. DR is that there was no real employee- employer relationship between Indian subsidiary and the Mr.Tapasvi as he was appointed by the Assessee and continued to be the employee of the Assessee who was also paid salary in UK, that he would continue to be Assessee's employee till his services are terminated by Assessee, but ITA No.-1143/Del/2016 not by Subsidiary where he is seconded. Ld. DR, therefore, submits that so long as one of the important parameters to establish the real nature of his relationship, namely authority to hire and fire, was only with the Assessee and not with the Indian Subsidiary, there is no substance in the stand of the assessee on this point.

25. In reply, Ld. AR submitted that since the Ld. DR has submitted that Mr. Dhananjay Tapasvi was an employee of the Assessee for over 20 years., and was appointed as new General Manager of Emission Control Technology Plant (ECT Plant) in India and made the director on the board of Johnson Matthey India Pvt Ltd (the subsidiary), as such it amounts that the revenue clearly admitted the position that Mr. Dhananjay Tapasvi was appointed as an employee of Indian AE in its capacity of MD. Referring to the stand of the Revenue that Mr. Tapasvi (Seconded employee) has been seconded to India to oversee the Emission Control Technology Plant of the subsidiary, that he is an employee of the Assessee and accordingly the services rendered by him are FTS and the Ld. DR's placing reliance on the decision the case of Centrica India Offshore (P) Ltd. V. Commissioner of Income-tax-I, New Delhi [2014] 364 ITR 336 (Del) in support of their contention that there was no real employer employee relationship between the Indian subsidiary and Mr. Tapasvi, it is the submission of the Ld. AR that the person being MD / employee of the Indian AE exercised his employment with the Indian AE and it cannot be construed that the Assessee was providing services to Indian AE by appointing MD of Indian AE. According to the Ld. DR, the decision of the Hon'ble Delhi High Court in the case of Centrica India Offshore (P.) Ltd vs CIT [2014] 44 taxmann.com 300 (Delhi) is very fact specific, for the reasons that, Centrica India having been newly constituted, was presumably not in a position to render help to the various vendors in the matter of fulfilling their obligations or in the matter of ensuring compliance with the processes and practices ITA No.-1143/Del/2016 employed by the overseas entities, and to provide support for the initial years of operation, till the necessary skill set is acquired by the resident employees, the assessee entered into secondment agreement with overseas group entities. He, therefore, submitted that in this set of facts, it was inferred that the expatriate employees were seconded to Centrica India to essentially oversee the "business functions of the overseas entities", thus advancing the business functions of the overseas entities and thereby resulting into profit generation of the overseas entities in Indian territory. However, according to him, in the case of the Assessee, the Indian AE of the Assessee was incorporated in India on 16 January 1998, that the Indian AE was not in the initial set-up phase, that the MD who was on secondment to India was the brain of the Indian AE taking forward the business of the Indian AE, that the MD was not imparting any skill set to the resident employees. The MD was not advancing the business functions of the Assessee which is evident from the job description. Accordingly, he submits that, inasmuch as the facts in the Assessee case are substantially different from the facts in case of the aforesaid ruling, those facts renders it inapplicable to the instant case. The seconded employee (MD of the Indian AE) in the case of the Assessee works exclusively for the Indian subsidiary in India and exercise its employment in India for the period during which the assessee has released such person from its employment. The MD was working for the direct benefit of Indian subsidiary. According to the Ld. AR if the seconded employee is working for the Indian subsidiary and taking forward it's business then the question of FTS does not arise. If not so, and the seconded employee is working for the Assessee's business in India in that case also there is no income chargeable to tax in India, as the payment made by the Indian AE to the Assessee on account of reimbursement of salary cost of the seconded employees will have to be seen and examined under Article 7 - Business Profits only, i.e., while ITA No.-1143/Del/2016 computing the profits under Article 7 payments received by the Assessee is to be treated as revenue receipt and any cost incurred has to be allowed as deduction because salary is a cost for the Assessee which is to be allowed, as such, on account of the aforesaid there can be no sum chargeable to taxable in India. In this regard, reliance is placed in the decision of Mumbai Tribunal

in the case of Morgan Stanley International Incorporated v. Deputy Director of Income-tax, (IT)(4)(1) [2015] 53 Taxmann.com 457 (Mum. Trib), which has duly considered the case of DIT(A) v. Morgan Stanley & Co. [2007] 292 ITR 416 (SC) and Centrica India Offshore (P.) Ltd. v. CIT [2014] 364 ITR 336 (Delhi HC).

26. While enumerating the services performed by the said seconded employee as mentioned in Page No.118 of the Paper Book, Ld.AR submitted that the nature of such activities make it evident that the MD was working as an employee of the Indian subsidiary, managing and overseeing the overall operations, as expected from the role of a MD for the India subsidiary and the AO has grossly erred in taxing the same as FTS relying on decision of the Hon'ble Delhi High Court in the case of Centrica India Offshore (P.) Ltd vs CIT [2014] 44 taxmann.com 300 (Delhi). It was only for administrative convenience to meet the requirements of the expatriate employee in his home country that his salary was disbursed to his designated overseas account. The Indian AE was not in the initial set up phase as it was incorporated in India on 16 January 1998 and had substantial number of local employees who are well qualified and capable of rendering services in their own capacity.

27. Last limb of the arguments on behalf of the assessee is that even if is said that the MD was rendering services on behalf of the Assessee, since the skill involved in rendering the subject services does not get transferred to the recipient of services, since the authorities below failed to demonstrate that how a MD of an Indian AE make available or ITA No.-1143/Del/2016 transfer the technical knowledge to another, such services do not satisfy the available criteria and accordingly cannot be taxed as FTS under the provisions of the India UK DTAA. He submitted that an identical arguments were dealt by the decision of Burt Hill (Supra) in its order Relevant extract of the decision is reproduced hereunder:

> "9. ..... As for the payments made by the assessee being in nature of the fees for technical services, this stand of the Assessing Officer is equally frivolous. There is not even an effort to show as to how any technical knowledge, skills, knowhow or processes etc are "made available" by these services inasmuch as these services can be performed by the assessee without any recourse to the service provider. Unless this condition, under make available clause under article 12(4)(b), is satisfied the fees for technical services cannot be brought to tax in India in the hands of entities fiscally domiciled in United States. It is even more elementary that once these payments cannot be brought to tax under the provisions of the India US DTAA, there cannot be any occasion to invoke Section 9(1)(vii) of the Act either because it cannot be more beneficial to the assessee- as is the condition precedent, under section 90(2), for invoking the same."

28. He, therefore, submits that since the services do not make available any technical knowledge, experience or skill which can be used by the Indian AE of its own in future, it does not satisfy the available criteria and accordingly cannot be taxed as FTS under the provisions of the India UK DTAA.

29. It is, therefore, clear that while admitting the receipt of Rs.55,80,855/- from JMIPL on account of the charges received for the services rendered by senior management employee seconded by the assessee to India, the assessee pleads that it is only the reimbursement of the salary payable by the Indian entity to Mr. Dhanjay Tapaswi but remitted to his account by the assessee only for administrative convenience, as such there is no element of income involved in this transaction and consequently is not liable to any tax.

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30. We are in agreement with the submission of the Ld.AR that applicability or otherwise of the ratio of the Hon'ble Jurisdictional High Court in the case of Centrica (supra), is a fact specific question to be determined with reference to the functions performed and the conduct of the duty of the seconded employee with reference to the business of the assessee and the Indian entity. As a matter of fact, Ld.DRP in his order stated that in order to test the case of the assessee on the touchstone of the principles laid down by the Hon'ble Jurisdictional High Court in the case of Centrica (supra), the secondment agreement was required to be examined by the DRP. DRP felt the following questions, namely, -

i. Who bears the responsibility or risk for the results produced by the employee's work?

ii. Who has the authority to instruct the worker regarding the manner in which the work has to be performed?

iii.

Who has control and responsibility over the place where the work is performed?

iv. Who puts the tools and materials necessary for the work at the employee's disposal?

v. Who determines the number and qualifications of the employees?

vi. Who has a right to terminate the contractual arrangements entered into with that individual?

vii. Whether there is a right to impose disciplinary sanctions related to the work of that individual?

viii. Who determines the work schedule of that individual?

are to be answered with reference to the secondment contract, secondment agreement, employment contract and salary reimbursement agreement, which, when read together point out either points of similarity or distinction between these two cases and more particularly, whether the employees have been released from their work and subsequently they entered into a separate local employment agreement ITA No.-1143/Del/2016 with Indian A.E. He observed that the documents filed by the assessee do not shared any light on these questions. He recorded a finding that the inference that could be drawn from the documents filed by the assessee scarcely distinguish this case from

Centrica (supra) and the documents produced by the assessee are no substitute for the secondment contract and secondment agreement, and for failure of the assessee in discharge of its burden of proof, the unsubstantiated bald statements of the assessee do not enure to their benefit. Precisely for this reason, Ld. DRP concluded that the attachment of the secondees was not fleeting as concluded by the Hon'ble High Court in Centrica and that employees seconded continued to retain their lein with their parent organization on terms where they transferred and made available their technical knowledge and the reimbursement of salaries of seconded employees was thus in the nature of FTS in the hands of the taxpayer on source basis.

31. There is no change in this factual situation before us. None of the documents that were felt necessary by the Ld.DRP are before us. Both the authorities below recorded a finding that the secondment contract, secondment agreement, the employment contract and salary reimbursement agreement are not made available by the assessee. Statement of Ld. DR that the assessee failed to furnish these documents before the authorities below, by forcing them to consider only such documents as are produced by the assessee and referred to in the order of the AO at page No.17, stood uncontroverted. No administrative convenience or inconvenience is proved before us with reference to any evidence whatsoever. The need of assessee remitting the amounts to the account of the employee is not brought out. It is not known whether it is the regular practice with the assessee to remit the salaries of the seconded employees to their overseas accounts and to claim reimbursements. However, record does not reveal that either the Ld. AO ITA No.-1143/Del/2016 or the Ld. DRP directed the production of these documents and in spite of such direction the assessee failed to produce the same, thereby permitting the authorities to draw an adverse inference against the case of the assessee. However, we feel that in order to appreciate the contention of the Ld. AR as to the nature of this particular receipt in the hands of the assessee on account of the services rendered by the seconded employee - whether it is reimbursement or FTS or business income and the existence or otherwise of the PE - these consideration of these documents is absolutely necessary. It is only on such consideration this aspect could be conclusively decided. We find it difficult to give any finding on this aspect without looking into such documents. In these circumstances, we deem it just and proper to direct the assessee to produce such documents before the Ld. AO and to set aside the issue to the file of the AO to give a fresh finding after looking into the documents to be produced by the assessee. We, therefore, restore Ground Nos. 5 to 7 to the file of the AO for considering the nature of receipt of Rs.55,80,855/- with reference to the above documents and other material to be filed by the assessee.

32. In the result, the appeal of the assessee is allowed in part for statistical purpose.

Order pronounced in the open court on 06.12.2017.

Sd/-	Sd/-
(G.D.AGRAWAL)	(K. NARSIMHA CHARY)
HON'BLE PRESIDENT	JUDICIAL MEMBER

Dated: 06.12.2017
Amit Kumar

ITA No.-1143/Del/2016

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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ITAT NEW DELHI