Filtrex Technologies Pvt. Ltd.,, ... vs Assessee on 28 April, 2009

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

ITA Nos. 654 & 655/Bang/2009
Assessment years : 2005-06 & 2006-07

M/s. Filtrex Technologies
Pvt. Ltd.,
No.36/4, 4th Cross, HRBR Layout,
Near Ring Road,
Raghavendra Nagar,
Bangalore - 560 043, : APPELLANT

Vs.

The Asst. Commissioner of
Income Tax,
Circle 11(3),
Bangalore. : RESPONDENT

AND

ITA Nos. 658 & 659/Bang/2009
Assessment years : 2005-06 & 2006-07

The Asst. Commissioner of
Income Tax,
Circle 11(3),
Bangalore. : APPELLANT

Vs.

M/s. Filtrex Technologies
Pvt. Ltd.,

No.36/4, 4th Cross, HRBR Layout,
Near Ring Road,
Raghavendra Nagar,
Bangalore - 560 043, : RESPONDENT

Assessee by : Shri T. Banusekar, C.A.
Revenue by : Smt. Meera Srivastava, Jt.CIT(DR)

ORDER

Per A. Mohan Alankamony, Accountant Member

These four appeals instituted by - (i) Filtrex Technologies P.Ltd in ITA Nos: 654 & 655/09 and (ii) the Revenue in ITA Nos: 658 & 659/09 - are directed against the impugned order of the Ld. CIT (A)-I, Bangalore, in ITA NO:240/88/DC 11(3)/AC-11(3)/A-1/07-08 dated: 28.4.2009 for the assessment years 2005-06 and 2006-07.

ITA Nos: 654 & 655/09 (by the assessee):

> (i) For the AY 2005-06, the assessee company ('the assessee' in short) had raised eight grounds, out of which ground No.1 being general with no ITA No.654,655,658 & 659/B/09 specific issue involved, it doesn't survive for adjudication. In ground No.2, the assessee had alleged that the order of the AO was without jurisdiction.

However, no argument was forth-coming as to how the order of the AO was without jurisdiction and, hence, this ground is dismissed as not substantiated. Ground No.8 being a prayer, the same will be kept in view while disposing of the appeal. In the remaining grounds, the crux of the issue was confined to the effect that -

> "the CIT (A) erred in upholding the disallowance of fees for technical services paid to M/s. Filtrex Holding Pvt. Ltd., Singapore of Rs.32.23 lakhs u/s 40(a) (ia) of the Act."

(ii) Likewise, for the AY 2006-07, the assessee had raised nine grounds, out of which, ground No.1 being general with no specific issue involved, it doesn't survive for adjudication. In ground No.2, it was alleged that the order of the AO was without jurisdiction. As already pointed out, no argument was put-forth as to how the order of the AO was without jurisdiction and as such, this ground of appeal is dismissed as not substantiated. In Ground No.8, the assessee objects to charging of interest u/s 234B and 234D of the Act. In this regard, it is pointed out that, (a) charging of interest u/s 234B of the Act is mandatory and consequential in nature and, therefore, this ground is not maintainable; and (b) with regard to charging of interest u/s 234D of the Act, levy of interest u/s 234D is purely a legal ground and is chargeable from the AY 2004-05 consequent to the findings of the Hon'ble Delhi E Special Bench in the case of ITO v. Ekta Promoters P. Ltd. reported in (2008) 113 ITD 719-ITAT and that Ground No.9 being a prayer, the same will be kept in view while ITA No.654,655,658 & 659/B/09 disposing of the appeal. In the remaining grounds, the crux of the issue

raised was to the effect that -

> "the CIT (A) erred in upholding the disallowance of fees for technical services paid to M/s. Filtrex Holding Pvt. Ltd., Singapore of Rs.79.98 lakhs u/s 40(a) (ia) of the Act."

ITA Nos: 658 & 659/09 (by the Revenue):

> (i) For the AY 2005-06, the Revenue had raised nine grounds, out of which, ground Nos: 1, 8 and 9 being general with no specific issues involved, they have become non-consequential. In the remaining grounds, the substance of the issue was that -
>
> "the CIT(A) was not justified in deleting the addition of Rs.26.47 lakhs made u/s 40(a)(i) being disallowance of expenditure concerning the payment to M/s. Final Touch Grafix of Singapore as payments were not made for technical/managerial or consultancy services."

(ii) For the AY 2006-07, it had raised thirteen grounds in an illustrative manner, in which, ground Nos: 1, 12 and 13 being general in nature with no specific issues involved, they do not survive for adjudication. In the remaining grounds, the issues raised were two-fold, namely -

(i) the CIT(A) was not justified in deleting the addition of Rs.24.34 lakhs made u/s 40(a)(i) being disallowance of expenditure concerning the payment to M/s. Final Touch Grafix of Singapore since payments were not made for technical, managerial or consultancy services; &

(ii) Also was not justified in deleting the addition of Rs.91.27 lakhs made u/s 40(a)(i) being disallowance of expenditure concerning the payment to M/s. Filtrex International Pvt. Ltd. of Singapore since payments were not made for technical, managerial or consultancy services.

ITA No.654,655,658 & 659/B/09

2. As the issues raised by the rival parties were identical and inter- linked pertaining to the same assessment years, these appeals were heard, considered together and disposed off, for the sake of clarity and convenience, in this common order.

Let us now address to the grievances of the assessee.

3. Briefly stated, the assessee was engaged in the manufacture of carbon blocks used in water filters for residential use. While concluding the assessment proceedings for the AYs under dispute, the AO had resorted to make certain additions for the reasons recorded in their respective impugned orders in respect of (i) fees for technical services paid to Filtrex Holdings Pte Ltd., Singapore, (ii) professional fees paid to Final Touch Grafix, Singapore; and (iii) consultancy fees paid to Filtrex International Pte Ltd., Singapore due to non-deduction of TDS on the amounts paid towards technical, professional and consultancy services rendered by the non- resident companies in violation of the provisions of s.40(a)(i) of the Act.

4. Aggrieved, the assessee took up the issues with the Ld. CIT (A) for solace. After due consideration of the assessee's forceful submissions, diligent perusal of (i) Technology Transfer agreement entered into between the assessee and Filtrex Holdings Pte Ltd., (ii) the definition of 'fee for technical services under I.T. Act and DTAA between India and Singapore,

(iii) finding of the Hon'ble Tribunal in the case of ITO v. De Beers India Minerals Pvt. Ltd. (2008) 113 TTJ 101 (Bang) relied on by the assessee; and also (iv) reasons recorded by the AOs in their impugned orders, the ITA No.654,655,658 & 659/B/09 Ld. CIT (A) had analyzed the issues elaborately, the relevant portions of which, for the appreciation of facts, are extracted as under:

> 4.1. While taking cue from the clarifications and also the principles laid down by the Hon'ble ITAT, Mumbai Bench in the case of Raymond Ltd. v.

DCIT reported in 86 ITD 791, the Ld. CIT (A) had observed thus:

> "3.6. in the instant case, it is evident that the appellant manufactures carbon blocks used in water purifiers and the technology transfer by M/s. Filtrex Holdings Pte. Ltd., Singapore, the technology provider was with regard to the three stage gravity water purification for home use in its entirety which was inclusive of sediment filtration, organic & inorganic removal, removal of microbiological contaminates, cartridge designs, information relating to testing and laboratory assistance. It is also crystal clear that though the agreement entered into on 1.4.04 was for one year, it continued to be in effect in the subsequent years as well. In other words, though the agreement was technically in place for one year, this was obviously merely a formality in view of its renewal year after year. Hence, the appellant's claim that no technology was 'made available' by the Technology Provider since the knowledge could be used by the appellant only during the currency of the agreement with Filtrex Holdings Pte. Ltd. is completely misleading and a blatant distortion of the facts since the same technology was made available to the appellant even in subsequent years.
>
> 3.7. The appellant's claim that one of the main operations is mixing of the raw material being carbon and spraying and that the mixing and spraying had to be done in a particular proportion depending on the purity level of the water and that the Technology Transfer Agreement was mainly to give this mixing level depending on water purity and client requirements is not supported by any incontrovertible evidence. Similarly, the appellant's contention that the formula for mixing was unique to different requirements and normally cannot be re-used and that such formula was given by the technology provider each time depending upon the quality of water as well as the client's requirements appears to be a mere misrepresentation of the factual position not substantiated by any corroborative proof.
>
> 3.8. The appellant has further claimed that the technology provider Filtrex Holdings Pte Ltd. Singapore had subsequently applied for patenting technology on the following:

(i) method for manufacturing carbon blocks, (ii) filter cartridge for gravity fed water treatment device; (iii) universal water purifier unit assembly device; & (iv) method to bond plastics end caps to porous filtration bodies.

ITA No.654,655,658 & 659/B/09 Mere application for patents does not tacitly imply that the said technology is unavailable to others or cannot be shared by the non-resident company with its sister concerns/other group entities.

3.9. In addition, the appellant has drawn attention to the non-disclosure clause contained in Article 6 of the Technology Transfer Agreement which reads as under:

'Each of the parties will be bound to a non-disclosure obligation towards external third parties regarding all information which may have been communicated to this particular party by the other party or which may have been brought to the awareness of this party on the occasion of agreement implementation, and will also undertake to have this obligation respected by its management and employees"

It is the appellant's contention that where there is a confidentiality clause, technology cannot be said to be made available., I am unable to agree with this interpretation. The insertion of the confidentiality clause is clearly meant to ensure that valuable information (and this is obviously mainly directed at the technology being provided) is safeguarded and not made available in any shape or form either by the technology receiver or its employees to external third parties so that the pecuniary and associated benefits of the technology accrue only to Group entities. By implication, in fact, the insertion of the clause points to the technology having been made available to the appellant thus requiring legal protection to ensure that the technology does not go beyond the appellant or its employees.

3.10. Finally, a perusal of the termination clause contained in Article 5 of the Agreement between the parties referred to supra, also points to the conclusion that the technology has in fact been made available to the appellant. The termination clause merely states that the agreement may be terminated in the event of either party not fulfilling its end of the bargain. The consequences of termination are only to the extent of the appellant having to pay the technology fee up-to the termination date. There is no mention of return of any information or documents relating to the technology made available or any conditionality that the appellant, post- termination, is not entitled to use the technology etc. clearly, therefore, one can only conclude from this that the technology has been made available to the appellant.

To sum up, clearly the services listed under the scope of the Technology Transfer agreement reproduced in para 3 above, namely the three-stage gravity water purification system for home use involving sediment filtration, organic and inorganic removal and removal of microbiological contaminates would be tantamount to making technology available to the ITA No.654,655,658 & 659/B/09 payer. The

expertise, knowledge and skill to manufacture carbon blocks using the above technology is obviously available with the appellant for its further use or utilization on a seemingly permanent basis. Further, it is apparent that there is a transmission of the technical knowledge, experience, skills, or processes to the payee and, hence, falls under the category of FTS. Under the circumstances, since the conditions laid down in the MOU to the DTAA have been completely fulfilled in so far as the concept of 'make available' is concerned and the criteria prescribed by the Mumbai Bench of Hon'ble ITAT [80 TTJ 120 & 86 ITD 791] wherein the concept of 'make available' has been elaborately discussed are also satisfied, the AO has rightly concluded that the provision of services rendered by M/s. Filtrex Holdings Pte Ltd., Singapore to the prayer squarely falls within the definition of 'included services' as contemplated in Article 12(4)(b) of the DTAA. In view of the fore-going analysis, I unhesitatingly dismiss the appellant's grounds on this issue for both AYs 2005-06 & 2006-07."

5. Agitated, the assessee has come up with the present appeals. During the course of hearing, the forceful and lengthy arguments coupled with various judicial pronouncements put-forth by the Ld. A.R are summarized as under:

(i) for the purpose of deduction of tax at source u/s 195, the essential point for consideration was whether the sum paid bears the character of income in the hands of the recipient and whether that income was chargeable to tax in India;

relies on the case laws:

(a) Transmission Corporation of A.P.Ltd & anr. v. CIT (1999) 239 ITR 587 (SC)

(b) Vijay Ship Breaking Corpn. & Ors. (2008)219 CTR (SC) 639

(c) CIT v.Eli Lilly & Company (India) Pvt. Ltd.& Ors.

(2009) 312 ITR 225 (SC)

(d) ITO (Intl. Taxn) v.Prasad Productions (2010) 129 TTJ (Chennai)(SB) 641

(e)GE India Technology Centre Pvt. Ltd. v. CIT in Civil Appl.Nos:7541/7542 of

(ii) where there was no requirement to deduct tax at source u/s 195, a disallowance u/s 40(a)(i) could not be made;

relies on the case laws:

(a) CIT v. India Pistons Ltd. (2006) 282 ITR 632 (Mad)

(b) Cairn Energy India Pvt. Ltd. v. ACIT 2009-TIOL-220-ITAT-Mad ITA No.654,655,658 & 659/B/09

(c) DCIT v. Venkat Shoes Pvt. Ltd. 2009-TIOL-2421-ITAT-Mad Filtrex Holdings Pte Ltd:

(iii) the assessee manufactures carbon blocks used in water purifiers and one of the main operations was mixing of the raw material being carbon and spraying which mixing will have to be done depending on the requirements of the client which may include removal of impurities and/or removal of iron or lead content and/or removal of chlorine and/or removal of invisible eggs of frogs/fish etc and/or removal of bacteria and virus and/or removal of residual taste or odour from water;

- the mixing and spraying has to be done in a particular proportion depending on the purity level of water where the filter is to be used as also the requirements of manufacturers of the water purifier;

- the agreement between the assessee and Filtrex Holdings Pte Ltd.

was mainly to give this mixing level depending on water purity and the requirements of the client;

- this formula for mixing was unique to different requirements and normally cannot be reused. This formula will have to be given by Filtrex Holdings Pte Ltd. each time depending on the quality of water as well as the client requirements;

relies on the case laws:

(a) Intertek Testing Services India (P) Ltd. in Re (2008) 307 ITR 418 (AAR)

(b) Cable & Wireless Networks India (P) Ltd. in Re (2009) 315 ITR 72 (AAR)

(c) Anapharm Inc. in Re (2008) 305 ITR 394 (AAR)

(iv) in the case of the assessee, there was as such no technology made available by Filtrex Holdings Pte Ltd to the assessee. Further, assuming without conceding that the knowledge was made available to the assessee by Filtrex Holdings Pte Ltd., the same ca be used by the assessee only during the currency of the agreement with Filtrex Holdings Pte. Ltd.;

- relies on the case of ITO (Intl.Taxn.) v. De Beers India Minerals Pvt.

Ltd. (2008) 113 TTJ (Bang) 101

- Article 6 of the agreement between the assessee and Filtrex Holdings Pte. Ltd also provides for such non-disclosure. Similar view was expressed in the case of Diamond Services International (P)

Ltd. v. Union of India & Ors.(2008)304 ITR 201 (Bom)

- relies on the case laws:

(a) Raymond Ltd v. DCIT (2003) 86 ITD 791 (Mum) ITA No.654,655,658 & 659/B/09

(b) C.E.S.C. Ltd. v. DCIT (2003) 87 ITD 653 (Cal) ™

- Filtrex Holdings Pte Ltd. had subsequently patented this technology on the following:

(i) method for manufacturing carbon blocks;

(ii) filter cartridge for gravity fed water treatment device

(iii) universal water purifier unit assembly device

(iv) method to bond plastics end caps to porous filtration bodies This apparently means that it cannot be used by the assessee after the currency of the agreement:

Final Touch Grafix:

(v) the AO had only looked at the payment from the point of view of s.

9(1)(vii) of the Act, but, not even considered the DTAA between India and Singapore;

- it can be seen that these services were only in the nature of managerial services and not in the nature of technology made available to the assessee, the same would not be taxable in India;

- that the payments to Filtrex Holdings Pte. Ltd. and Final Touch Grafix, Singapore were not in the nature of fees for technical services as contemplated by Article 12(4) of the treaty between India and Singapore and since both the companies do not have a PE IN India, these payments were not taxable in India and, therefore, there was no requirement to deduct tax at source u/s 195 and, consequently, there could be no disallowance made u/s 40(a)(i) in respect of these payments.

5.1. Buttress his view points, the Ld. A.R had furnished voluminous paper books which consist of [copies of] (i) case laws [in three parts] ; (ii) agreements between the assessee and Filtrex Holdings Pte.Limited and also between the assessee and Filtrex Intl. Pte. Limited. 5.2. On the other hand, the Ld. D R equally came up with vigorous and close knitted arguments, the essence of which, are extracted as under:

In this case there were certain basic issues for consideration:

ITA No.654,655,658 & 659/B/09

- Whether the payments made for services rendered in pursuance of an agreement between Filtrex International Private Ltd. and Filtrex Holding Pvt. Ltd. qualify as fee for technical services as per the DTAA between India and Singapore?

- The agreement so stated was a technology transfer agreement which inter alia contains Article 6 relating to non-disclosure clause 'each of the parties will be bound to a non disclosure obligation towards external third parties regarding all information which may have been communicated to this particular party by the other party or which may have been brought to the awareness of this party on the occasion of agreement implementation, and will also undertake to have this obligation respected by its management and employees.' The scope of the agreement as per Article 1 provides for the following:

- A three stage gravity water purification system for home use to include sediment filtration, organic and in-organic removal and the removal of microbiological contaminates:

(a) sediment filtration: Polymeric filter to be hydrophilic to reduce turbidity from 20 NTU to below 1 NTU. Provide the type of polymer with total specification. Proprietary know-how to surface modify to be polymer hydropolic that is not washable in water.

Mold design to make various shapes and forms. Processing parameters to mass produce the filters meeting NSF 42 standards for turbidity reduction;

(b) organic and in-organic removals: Carbon blocks made to activated coconut shell carbons. The binders used with various formulations to achieve different porosities the carbon block to be biostatic to prevent growth of micro bacteria. The total know-how of making carbon surface biostatic using proprietary process and material know-how;

(c) microbiological removal: To remove bacteria and virus using penta loading iodinated resin know-how. Ecoil reduction and MS3 virus reduction to achieve log 3 reduction at gravity flow rate. Scavenger types and design to remove residual taste and odor from water;

Cartridge designs with the above three stages to retrofit into containers will also be included in this technology agreement. Product design will not include the detail of mould making designs;

ITA No.654,655,658 & 659/B/09 With regard to the technology transfer agreement:

- The assessee was engaged in the manufacture of carbon blocks used in water filters for residential use

- The issue here was that the payment was not being made for the knowledge of the design of the project to be manufactured. Since the same was not being parted with, the knowledge being parted with pertains to the other aspects of the product as per the agreement;

- It was highlighted in this case that the skill, information, technical excellence that make up technology for that limited portion of the product that has been defined in the agreement was being passed on which constitutes FTS even if it pertained to the smallest component of the product in question which remains with the recipient. It was the un-divulged technical information which had a non-disclosure clause embedded which was necessary for commercial output which was the most relevant fact. Further, know-how represents what a manufacture cannot know from mere examination of the product and merely knowledge to the places of technique. Therefore, know-how transfers were generally viewed as involving transfer of pre-existing knowledge where such knowledge or experience remains confidential;

- That it was also relevant to note that since both the companies were in same line of business, the information provided was relevant to the extent as much as was the requirement of the recipient, if it does not want the product design there was no requirement for it to make payment for it which was happening in the present case. It cannot, therefore, be the assessee's case that since no product design was being passed on and that there was no transfer of technology. By doing so, the assessee was negating its own legally signed agreement and content's therein and, therefore, contradicting itself since it had already made the payment in pursuance of the said agreement;

- Relies on the case laws:

(a) Bovis Lend Lease (India) P. Ltd. v. ITO in ITA Nos: 636,637 & 665/2008 dt: 28.8.2009 (for the AYS 2003-04 to 05-06);

(b) International Hotel Licensing Co. (2007) 288 ITR 534 - AAR

6. We have carefully considered the forceful contentions of either party, meticulously perused the relevant case records and also the case laws on which the rival parties have placed their respective strong reliance.

ITA No.654,655,658 & 659/B/09 6.1 The assessee, an Indian Company engaged in the manufacture and sale of carbon blocks and water purifier products, had entered into technology transfer agreement with Filtrex Holdings Pte. Limited of Singapore. The scope of the technology transfer was with regard to three stage gravity water purification for home use which was inclusive of sediment filtration, organic and inorganic removal, removal of microbiological contaminates, cartridge designs, information relating to testing and laboratory assistance. As could be seen from the terms and conditions of the agreement entered into on 1.4.2004 which was for a period of one year,

however, it was continued to be in effect in the subsequent years too consequent to its renewal year after year. This implicitly makes it clear and belies the assessee's stubborn claim that no technology was made available by Filtrex Holdings Pte Ltd. and, thus, the knowledge could be used by the assessee only during the validity of the said agreement.

6.2. As a matter of fact, this issue has been analyzed in a comprehensive manner by the Ld. CIT (A) and for the appreciation of facts, we indulge in reproducing the relevant portion of her finding (of course, at the cost of repetition) 3.9. In addition the appellant has drawn attention to the non-disclosure clause contained in Article 6 of the Technology Transfer Agreement which reads as under:

> 'Each of the parties will be bound to a non-disclosure obligation towards external third parties regarding all information which may have been communicated to this particular party by the other party or which may have been brought to the awareness of this party on the occasion of agreement ITA No.654,655,658 & 659/B/09 implementation, and will also undertake to have this obligation respected by its management and employees"
>
> It is the appellant's contention that where there is a confidentiality clause, technology cannot be said to be made available., I am unable to agree with this interpretation. The insertion of the confidentiality clause is clearly meant to ensure that valuable information (and this is obviously mainly directed at the technology being provided) is safeguarded and not made available in any shape or form either by the technology receiver or its employees to external third parties so that the pecuniary and associated benefits of the technology accrue only to Group entities. By implication, in fact, the insertion of the clause points to the technology having been made available to the appellant thus requiring legal protection to ensure that the technology does not go beyond the appellant or its employees.
>
> 3.10. Finally, a perusal of the termination clause contained in Article 5 of the Agreement between the parties referred to supra, also points to the conclusion that the technology has in fact been made available to the appellant. The termination clause merely states that the agreement may be terminated in the event of either party not fulfilling its end of the bargain. The consequences of termination are only to the extent of the appellant having to pay the technology fee up-to the termination date. There is no mention of return of any information or documents relating to the technology made available or any conditionality that the appellant, post- termination, is not entitled to use the technology etc., clearly, therefore, one can only conclude from this that the technology has been made available to the appellant."

6.3. Whereas the Ld. A R, during the course of hearing before us, had concentrated his arguments with regard to the deduction of tax at source u/s 195, the essential point for consideration was whether the sum paid bears the character of income in the hands of the recipient and whether that income was chargeable to tax in India. It was his stand that in the case of the assessee, there was no

technology made available by Filtrex Holdings Pte Ltd to the assessee and that the knowledge were made available to the assessee by Filtrex Holdings Pte Ltd., the same could have been used by the assessee only during the currency of the agreement with Filtrex Holdings Pte. Ltd. By extensively quoting the DTAA between India ITA No.654,655,658 & 659/B/09 and Singapore, the Ld. A R concluded that these services were only in the nature of managerial services and not in the nature of technology made available to the assessee, the same would not be taxable in India; and that the payments to Filtrex Holdings Pte. Ltd. and Final Touch Grafix, Singapore were not in the nature of fees for technical services as contemplated by Article 12(4) of the treaty between India and Singapore and that since both the companies do not have a PE in India, these payments were not taxable in India and, thus, there was no need to deduct tax at source u/s 195 of the Act and, consequently, there could be no disallowance made u/s 40(a)(ia) in respect of these payments. 6.4. To derail the Ld. A R's contentions, the Ld. D R came up with the counter arguments that -

(i) It was highlighted in this case that the skill, information, technical excellence that make up technology for that limited portion of the product that has been defined in the agreement was being passed on which constitutes FTS even if it pertained to the smallest component of the product in question which remains with the recipient. It was the un-divulged technical information which had a non-disclosure clause embedded which was necessary for commercial output which was the most relevant fact. Further, know-how represents what a manufacture cannot know from mere examination of the product and merely knowledge to the places of technique. Therefore, know-how transfers were generally viewed as involving transfer of pre-existing knowledge where such knowledge or experience remains confidential;

(ii) That since both the companies were in same line of business, the information provided was relevant to the extent as much as was the requirement of the recipient, if it does not want the product design there was no requirement for it to make payment for it which was happening in the present case. It cannot, therefore, be the assessee's case that since no product design was being passed on and that there was no transfer of technology. By doing so, the assessee was negating its own legally signed agreement and contents therein and, therefore, contradicting itself since it had already made the payment in pursuance of the said agreement;

ITA No.654,655,658 & 659/B/09 6.5. A glimpse at the termination clause contained in Article 5 of the agreement between the parties concerned, as rightly highlighted by the Ld. CIT (A), reveals, in essence, that the technology had, in fact, been made available to the assessee. The termination clause simply states that the agreement may be terminated in the event of either party not fulfilling its end of the negotiation. The consequences of termination were only to the extent of the assessee having to pay the technology fee up-to the termination date, however, there was no mention of any information or documents with regard to technology made available or any condition whatsoever that the assessee, cessation of the said agreement, was not entitled to use the technology which unambiguously makes clear that the technology had, in fact, been made available to the assessee. 6.6. To conclude, the scope of Technology Transfer as per the agreement entered into w.e.f. 1.4.2004 between the assessee and Filtrex Holdings Pte Ltd. of Singapore, the three stage gravity water purification system for home use involving sediment filtration, organic and inorganic removal and removal of microbiological contaminates would naturally be tantamount to making technology

available to the assessee. The expertise, knowledge and skill to manufacture carbon blocks using the said technology was available with the assessee for its further utilization which has not been repudiated by the assessee with any documentary evidence. 6.7. In view of the above, we are of the firm view that the conditions laid down in MOU to the DTAA have since been fulfilled in so far as the concept of 'make available' was concerned. In this connection, we recall ITA No.654,655,658 & 659/B/09 the findings of the Hon'ble ITAT, Mumbai C Bench in the case of Raymond Ltd. v. DCIT reported in 86 ITD 791: 80 TTJ 120 wherein the Hon'ble Bench had analyzed various issues, among others, the concept of 'make available'. After discussing the issue in a comprehensive manner with regard to the notion of 'make available' in Article 12(4)(b) of DTAA between India and Singapore, the Hon'ble Mumbai Bench had observed thus -

> "95. Article 12.4(b) of the DTA with Singapore was relied on by both sides - by Mr. Dastur to show that the words used therein, viz. "if such services.....make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein..." merely make it explicit what is meant by "make available" while Mr. Kapila contended that these words being absent in the DT A with UK, it indicates that the assessee-company need not be in a position to apply the technology for its own use in future without recourse to the person rendering the services. On a careful consideration of the matter, we are of opinion that the addition of these words in the Singapore DTA merely make it explicit what is embedded in the words "make available"

appearing in the DT A with UK and USA. The MOU under the US DTA and the examples given there-under, to which we have already referred, make it clear. The meaning of those words was expressly incorporated in the Singapore agreement by adding the necessary words. What would be the use of coining the words "make available" if it is not intended, as contended by Mr. Kapila, that the person utilizing the services should be in a position to apply the technology for his own use in his business in future without recourse to the person rendering the services? Would it not be a contradiction in terms to say that though the technical knowledge etc. are "made available", the person to whom they are made available cannot apply the same for his benefit? The treaties, in our opinion, could not have intended such a result. What was therefore implicit in the concerned articles in the UK and US DTAs was made explicit by adding the necessary words in the Singapore agreements. As Mr. Dastur rightly remarked, it is a process of evolution guided by experience and what started in 1990 - the DTA with the US - as a MOU gradually crystallized and got incorporated in the article itself in the DTA with Singapore."

6.8. What the Article 12(4)(b)of DTAA between India and Singapore says explicitly?

ITA No.654,655,658 & 659/B/09 "4. The term 'fees for technical services' as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:

> (a).....

(b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein; or"

6.9. We shall now look at a glance of the case laws on which the assessee had placed strong reliance:

(i) Vijay Ship Breaking Corpn. & Ors. V. CIT (2008) 219 CTR (SC) 639:

Basically the issue before the Hon'ble Apex Court was allowability of deduction under sections 80HH and 80-I of the Act.

(ii) CIT v. Eli Lilly & Co., (India) (P) Ltd. (2009) 312 ITR 225 (SC):

The issue before the Hon'ble Court was primarily with regard to the payment of home salary/special allowance(s) paid abroad to expatriate employees by the foreign company etc.,

(iii) Intertek Testing Services India (P) Ltd., IN RE (2008) 307 ITR 418:

It was ruled by the Authority for Advance Ruling that -

"An analysis of art. 13.4 (c) of DTAA between India and UK shows that FTS is consideration paid for the rendering of technical or consultancy services, provided that those services make available to the other party, the technical knowledge, experience, know-how etc.,-To fit into the terminology 'make available' the technical knowledge, skills, etc., must remain with the person receiving the services even after the particular contract comes to an end-By making available the technical skills or know-how, the recipient of service will get equipped with that knowledge or expertise and be able to make use of it future, independent of the service provider-Definition of FTS in India-UK DTAA is similar to the one contained in India-USA DTAA-Para 4(b) o art. 12 is similar to art. 13.4(c) of Indo-UK Treaty-When a similar expression found in another treaty is interpreted and explained in a particular manner consistent with one shade of meaning that can be attributed to it, there is no reason why that interpretation shall be eschewed-As the assessee has not given the details of services provided by ITM, there is practical difficulty in actual application of the principle-There are some services which can be brought within the ambit of 'make available'-But, most or many of them do not 'make available' to the applicant the technical ITA No.654,655,658 & 659/B/09 knowledge, experience, skill, know-how etc., possessed by the provider of services-As regards 'managerial' services, which were omitted in the new DTAA from the company of 'technical' and 'consultancy' services, no endeavour was made either in the application or during arguments to demonstrate that particular services covered by the agreement fall within the scope of managerial services-Hence no firm view is expressed but broad guidelines given and

> actual classification left to be decided in appropriate proceedings-It is for the applicant to approach the competent authority to determine the issue of TDS by filing an application under s.195."

With due respects, we would like to point out that though the AAR was pleased to advice the applicant to approach the competent authority to determine the issue of TDS, during the course of its conclusion it had held that (at the cost of repetition) "To fit into the terminology 'make available' the technical knowledge, skills, etc., must remain with the person receiving the services even after the particular contract comes to an end-By making available the technical skills or know-how, the recipient of service will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider".

This ruling of the Hon'ble AAR strengthen the Ld. CIT (A)'s concept in the present case that "3.10.....To sum up.....The expertise, knowledge and skill to manufacture carbon blocks using the above technology is obviously available with the appellant for its further use or utilization on a seemingly permanent basis. Further, it is apparent that there is a transmission of the technical knowledge, experience, skills or processes to the payee and hence, falls under the category of FTS..."

(iv) Cable & Wireless Networks India (P) Ltd., IN RE (2009) 315 ITR 72:

> The issue before the Hon'ble AAR was pertaining to the agreement between India and UK. It was held by the Hon'ble AAR that -
>
> "In carrying telecom signals from Marseilles to other countries C&W UK is not providing any managerial, technical or consultancy services, nor is it providing the services of its technical or other personnel to the applicant. C&W UK performs this part of service itself without the involvement of the applicant. The applicant thus rightly urged that the fees paid by it to C&W UK is ITA No.654,655,658 & 659/B/09 not in the nature of fees for technical services under the act. So far as art.13(4) of DTAA is concerned, the first part of it defines 'technical services' in a manner similar to Expln. 2 to s.9(1)(vii), but it further q1ualifies this expression in cls.(a), (b) sand (c). Clause (c) is relevant for the present consideration. This clause requires that the technical service in question should make available technical knowledge, experience, skill, know-how or process, or consist of the development and transfer of a technical plan or technical design. From the description of service presented the requirements of cl. (c) are not fulfilled here. First, no technical service is rendered and secondly, there is no transfer of technology."

As far as the present case is concerned, the case law cited by the Ld. A R has no relevance and clearly distinguishable in the sense that in the referred case there was neither technical service rendered or the transfer of technology.

(v) Anapharm Inc. In Re (2008) 305 ITR 394:

> In this case, the applicant, a tax resident of Canada, providing only final results to its clients by using highly sophisticated bio-analytical know-how without providing any access whatsoever to the client to such know-how and that the handing over tested samples and test compounds to the Indian clients cannot be equated with making available the technology, know-how etc., to them and, therefore, it was concluded after duly analyzed the issue at length by the Hon'ble AAR that -
>
> "Applicant, a resident of Canada, only providing final results to its Indian clients by using highly sophisticated bio-analytical know-how, without providing any access whatsoever to the clients to such know-how, fee received by it is business income and not fee for technical/included services or royalty and applicant having no PE in India, such income would not be taxable in India by virtue of relevant provisions of DTAA between India and Canada."

With due respects to the ruling of Hon'ble AAR, we would like to point out the issue before the Hon'ble AAR was entirely on a different track ITA No.654,655,658 & 659/B/09 to the effect that the applicant, a resident of Canada, was providing only the final results to its clients without letting its clients in India to have an access to its know-how and thus, the fees received by it, as rightly ruled by the Hon'ble AAR, was its business income and not fee for technical services. However, in the instant case, the expertise, knowledge and skill to manufacture carbon blocks using the technology was made available by Filtrex Holding Pte Limited to the assessee for its further use or utilization on permanent basis. We are, therefore, of the firm view that the case law referred by the assessee will not come to its rescue.

7. Taking into account the stand of the AOs, strong rebuttal of the assessee on the conclusion of the AOs, the conclusion of the Ld. CIT (A) who had analyzed the issue comprehensively and diligent perusal of various judicial pronouncements on which rival parties have placed their strong reliance and in conformity with the finding of the Hon'ble Mumbai Bench in the case of in the case of Raymond Ltd. v. DCIT cited supra and especially the Article 12(4)(b) of Double Tax Avoidance Agreement between Republic of India and Republic of Singapore [Reference: P 272 of PB AR], we are of the considered view that the assessee was required to deduct TDS which it had failed to do so and, thus, the assessee's case obviously falls within the ambit of the provisions of s.40(a)(ia) of the Act. Accordingly, the AO was justified in disallowing Rs.32,23,290/- and Rs.79,98,870/- u/s 40(a)(ia) of the Act for the AYs 2005-06 and 2006-07 respectively. It is ordered accordingly.

8. We shall now take up the grievances put-forth by the Revenue.

ITA No.654,655,658 & 659/B/09 Briefly, on a further verification of details furnished by the assessee during the course of assessment proceedings for the AYs under challenge, the AOs have noticed that the assessee had made payments of (i) Rs.26,47,700/- and Rs.24,34,400/- to M/s. Final Touch Grafix, Singapore for the AYs. 2005-06 & 06-07 respectively and (ii) Rs.91,27,959/- to M/s. Filtrex International, Singapore for the AY 06-07. 8.1. The assessee had entered into agreement with Final Touch Grafix [FTG] w.e.f. 1.4.2004, according to which, FTG had to provide the following services:

1. To do all public relation activities to promote Filtrex in the Asean region;

2. to liaison with ad-agencies to finalise all print media advertisements for Filtrex in water mzagazines and journals in USA;

3. to liaison sand co-ordinate filtrex participation to international trade shows, particularly aqua world and WQA;

4. preparation of all power point presentation material for their directors to present filtrex with over-seas companies;

5. to develop cost effective communications media, to promote filtrex capabilities; &

6. to design all brochures and communication leaflets to be used in over-seas markets In addition to the above, the service provider shall provide administrative support services to Filtrex-India either by itself or through third parties.

8.2. With regard to payment made to Filtrex International Pte Ltd. [FIPL], Singapore:

The assessee had entered into an agreement with FIPL w.e.f.

1.4.2005, according to which, FIPL had to provide the following services:

1. to develop a global vision and mission for the assessee;

2. to develop a strategy sand implanting plans to achieve global objectives;

3. to get the products to world class in quality; 4. to have the products tested at WQA and NSF in the USA;

ITA No.654,655,658 & 659/B/09

5. to assist the assessee to be certified by ISO; 6. to facilitate foreign companies to visit Filtrex India;

7. advisory functions with respect to finance & treasury; 8. public relationship and exhibition participation;

9. media relations 10. Corporate communications & Marketing communications policies;

10. leadership training 12. Human resource and manpower planning;

13. Information technology services; &

14. any other service required from time to time by Filtrex - India.

In addition, the service provider shall provide administrative support services to the assessee either by itself or through third parties. 8.3. After analyzing the issues at a greater length as recorded their findings in the respective assessment orders, the AOs have concluded that "Since all the services provided by Final Touch were made available to the assessee company for promoting their business and as the same are covered under management services which has been defined as FTS in the Act, the company was required to deduct tax under the I.T.Act. the assessee's failure to deduct tax at source amounted to violation of the provisions of s.40(a)(ia) of the Act and, hence, the expenditure is not deductible from the profits and gains of business or profession.

Accordingly, the AOs have disallowed the payments made to (i) Final Touch Grafix, Singapore; and (ii) Filtrex International Pte Ltd., Singapore u/s 40(a)(ia) of the Act for the AYs under challenge. 8.4. When the assessee took up these issues with the Ld. CIT (A) for redressal, the CIT (A), after due consideration of the assessee's contentions as well as the reasoning of the AOs in their impugned orders, had conceded to the arguments of the assessee for the reasons that -

ITA No.654,655,658 & 659/B/09 I. Final Touch Grafix:

> "4.....A perusal of the invoice revealed that a payment of SGD 100000 was made to the service provider for 'development of concept drawings, animation and page layouts of the web home page' & 'concept development for the carbon block advertisement' resulting in the AO forming an opinion that services were made available by M/s. Final Touch for promoting their business and that the same was covered under 'managerial services' as defined in the I.T. Act.
>
> 4.1. however, it is apparent from the nature of services rendered being public relations activities, liaison, co-ordination and design of advertising material such as power-point presentation materials and leaflets etc. that they do not even remotely constitute rendering of any managerial, technical or consultancy services. Apart from resorting to sheer conjecture that administrative support services constitute managerial services, there is not even a shred of documentary evidence brought on record to back up the AOs opinion regarding the technical nature of the services rendered by M/s. Final Touch Grafix. I am, therefore, of the view that the AO has at no point established that the foreign company, viz., M/s. Final Touch Grafix, has provided any sort of technical skill or know-how as laid down in para 4(b) of the MOU concerning frees for included services in Article 12 of the US - India DTAA can therefore hardly be considered to arise. For argument sake, even if one were to accept the AO's argument that the non-resident company was rendering managerial services, the AO has nowhere established that technical skill or know-how was made available to the appellant. In the circumstances, I would have to uphold the stance of the appellant on this issue."
>
> II. Filtrex International Pte Ltd., Singapore:

"5.1.....it is pertinent to note that the services rendered being development of a global vision and mission, strategies for achieving global objectives, public relations, media relations, advisory functions, human resource planning, leadership training and IT services etc., are largely marketing and support functions. It is hard to accept that these fall under the categories of managerial, technical or consultancy services. Though the AO has pontificated on how the services made available by M/s. Filtrex International Pte Ltd., were for promoting their business and were therefore covered under 'managerial services' as defined in the I.T. Act, no attempt was actually made to gather any evidence to substantiate the AO's conclusion that M/s. Filtrex International Pte Ltd., has provided any sort of technical, managerial or consultancy services. Even if one were to accept the argument that some of the services provided actually fell under either managerial, or consultancy services, the other limb of the requirement, namely, the making available of technical skill or know-how as laid down in para 4(b) of the MOU concerning fees for included services in Article 12 of US - India DTAA can hardly be considered to be fulfilled. It is essential for an assessing authority to establish both limbs, i.e., the nature of the service provided and the need for 'making available'. The mere fact of a service having been provided does not automatically establish the latter requirement. In my view, the AO has failed to establish either of the requirements, I am, therefore, inclined to uphold the appellant's stand on this issue."

ITA No.654,655,658 & 659/B/09

9. Aggrieved, the Revenue has come up with the present appeals. During the course of hearing, the Ld. D R had Vehemently argued, the substances of which are summarized as under:

Issue of FTS on service agreement between FIPL and FTG:

- the agreement so stated is a service agreement which inter alia contains article 6 relating to non-disclosure clause 'Each of the parties will be bound to a non-disclosure obligation towards external third parties regarding all information which may have been communicated to this particular party by the other party or which may have been brought to the awareness of this party on the occasion of agreement implementation, and will also undertake to have this obligation respected by its management and employees'.

- enlisting the scope Of the assessee had entered into service agreement with FTG, Singapore for the services, reliance was placed on the case laws -:

(a) International Hotel Licencing Co. 288 ITR 534 (AAR)

(b) Bovis Lend Lease (I) Pvt. Ltd. ITA Nos.636, 637 & 665/B/2008

- that these case laws are clearly applicable given the facts that it deals with the issue of FTS and then the first case laws of the Hon'ble Bench to the Indo - Singapore treaty.

There are, however, certain inadvertent issues in the order for which Misc. petition has been moved by the Revenue which, however, have no bearing on this case. 9.1. On the other hand, the Ld. AR reiterated more or less what was portrayed during the course of hearing before the first appellate authority.

10. We have carefully considered the submissions of either party, attentively perused the relevant records, case laws on which both the parties have placed their strong reliance and also the service agreements entered into with (i) Final Touch Grafix dt: 28.2.2002; and (ii) Filtrex International Pte., Limited w.e.f. 1.4.2005.

Final Touch Grafix: On a diligent perusal of the Service Agreement between the assessee and FTG [source: P 8 -10 of PB AR] as also ITA No.654,655,658 & 659/B/09 earnestly highlighted by the Ld. CIT (A), the nature of services rendered by FTG being public relations activities, liaison, co-ordination and also design of advertising material like power-point presentation materials, leaf-lets etc., we are of the considered view that they did not represent of rendering any managerial, technical or consultancy services as advocated by the AOs in their impugned orders. Further, the AOs have not brought any clinching evidence before us to substantiate their conclusions that the services rendered by FTG to the assessee for promoting their businesses which were covered under the managerial services as defined as FTS in the Act. Since, the AO have not established with any discreet proof that technical skill or expertise made available to the assessee were in the nature of managerial services, we are declined to agree with the AOs perceptions, but, fully in agreement with the Ld. CIT (A)'s finding. Accordingly, the stand of the Ld. CIT (A) requires no interference on this issue for both the AYs under challenge. It is ordered accordingly.

With regard to FIPL also, we find that the Ld. CIT (A) had analyzed the issue in a well judged manner and found fault with the AOs in the sense that when the AOs have held that the services made available by FIPL were for promoting their businesses and, thus, fell within the ambit of 'managerial services' as defined in the I.T. Act, but, they have miserably failed to come up with any clinching proof to strengthen their half-baked conclusions.

In a nut-shell, the Revenue had failed to nail the assessee with any corroborative evidence that the services rendered actually were within the ITA No.654,655,658 & 659/B/09 sphere of either managerial or consultancy services. Such being the scenario, we are in agreement with the finding of the Ld. CIT (A) for both the AYs under dispute. It is ordered accordingly.

11. In the result: (i) the assessee's appeals for the AYs 2005-06 & 2006-07 are dismissed.

(ii) the Revenue's appeals for the AYs 2005-06 & 2006-07 are dismissed. Pronounced in the open court on this 28th day of January, 2011.

Sd/- Sd/-

(GEORGE GEORGE K.)
Judicial Member

(A. MOHAN ALANKAMONY)
Accountant Member

Bangalore,
Dated, the 28th January, 2011.

Ds/-

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
ITAT, Bangalore.