IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH ' B ', HYDERABAD

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI AKBER BASHA, ACCOUNTANT MEMBER

ITA.No.1073/Hyd/2004 - A.Y. 2000-2001
ITA.No.1074/Hyd/2004 - A.Y. 2001-2002
ITA.No.720/Hyd/2005 - A.Y. 2002-2003
ITA.No.721/Hyd/2005 - A.Y. 2003-2004

ACIT, Circle 2(2), Hyderabad	Vs	M/s Louis Berger International Inc., Hyderabad **(PAN AAACL4067F)**
Appellant		Respondent

ITA. No.820/Hyd/2005 - A.Y. 1998-99
ITA. No.821/Hyd/2005 - A.Y. 1999-2000

ACIT, Circle 16(1), Hyderabad	Vs	M/s Louis Berger International Inc., Hyderabad **(PAN AAACL4067F)**
Appellant		Respondent

ITA.No.1217/Hyd/2006 - A.Y. 1998-99
ITA.No.1218/Hyd/2006 - A.Y. 2000-01

DCIT, Circle 16(1), Hyderabad	Vs	M/s Louis Berger International Inc., Hyderabad **(PAN AAACL4067F)**
Appellant		Respondent

Appellant by **:** Smt. Vasundhara Sinha, DR
Respondent by : Shri S. Rama Rao

O R D E R

Per N.R.S. Ganesan, JM:

All these appeals of the Revenue are directed against the independent orders of the CIT(A)-III, Hyderabad and pertains to the assessment years 1998-99, 1999-2000, 2000-01, 2001-02, 2002-03. Since common issues arise for consideration in all these appeals, we have heard the same together and disposing off the same by this common order.

2. The learned departmental representative submitted that during the course of assessment proceedings, the assessing officer disallowed Rs.8,55,58,000/- towards expenditure claimed as reimbursable. According to learned departmental representative the assessing officer also disallowed a sum of Rs.16,69,069/- under the Article 12 of Double Taxation Avoidance Agreement between Govt. of India and USA. Referring to the agreement between the assessee and National Highway Authority of India , the learned departmental representative pointed out that the agreement has two parts. The first part contains General Clauses and the second part contains Special Clauses. In the agreement, there was no difference between reimbursable expenditure and the fee payable for technical services. Referring to Sec.9(1)(vii) of the IT Act, the learned departmental representative submitted that all types of payment constitute fees for technical services, therefore no deduction of any expenses would be allowed in case the assessee receives any amount in the guise of reimbursement of expenditure. Therefore, the entire amount payable including reimbursable expenditure has to be taken as a whole towards fee for technical service, under Article 12 of the Double Taxation Avoidance Agreement with USA. The learned departmental representative further pointed out that for the purpose of claim of deduction u/s 10(6A), the assessee has to get the approval of the Govt. of India. In this case, according to the learned departmental representative, no approval was obtained in respect of agreement entered into between the assessee and the National Highway Authority of India. According to learned departmental representative, the reimbursable expenditure cannot be allowed as deduction. Moreover, the assessee has also not entitled for exemption u/s 10(6A) of the Income Tax Act, 1961. Referring to CIT(A) order, the learned Departmental Representative submitted that tax was deducted to the extent of Rs.2,11,63,425/- including the reimbursable expenditure. Though originally, the assessee claimed all the TDS Certificates in the assessment year 2000-01. Subsequently, it was found that the assessee was following the

Mercantile System of Accounting and the TDS has to be given credit for the assessment year 2000-01 only to the extent of Rs.211,63,426/- instead of Rs.279,80,493/-. Referring to Page 15 of the CIT(A) order, more particularly Para 19.2, the learned departmental representative pointed out that the CIT(A) followed the judgement of the Calcutta High Court in the case of CIT Vs. Sanderson & Morgan's 75 ITR 433, Bombay High Court in the case of CIT Vs. Tanubai D. Desai 84 ITR 713. According to the learned departmental representative, the case before the Calcutta High Court and Bombay High Court are entirely different, therefore these Calcutta High Court and Bombay High Court judgement may not be applicable to the facts of the case. According to the learned representative, no case was made out before the Lower Authorities that the expenditure was incurred on behalf of National Highway Authority of India. According to learned representative, Article 12 of Double Taxation Avoidance Agreement, between USA and India clearly says that any payment for rendering the services would amounts to payment for technical services. Therefore, the CIT(A) is not correct in saying that Sec.44D and Sec.115A(3) are applicable only to the income and not to reimbursable expenditure. According to learned representative, even the reimbursable expenditure form part of the fee for technical services, therefore, there is no question of any exclusion of the same while computing the total income.

3. The learned departmental representative further pointed out that the Assessing Officer also disallowed a sum of Rs.62,27,887/- towards service tax reimbursed. According to learned departmental representative, service tax is liability of the service provider. Service provider may eventually pass over the same to the other person. However, the liability remains that of the service provider for payment of service tax. The learned departmental representative placed reliance on the judgement of the Calcutta High Court in the case of Chowringhee Sales Bureau (P) Ltd. Vs. CIT, 110 ITR 385, Apex Court in the case of Sinclair

Murray & Co. P. Ltd. Vs. CIT, 97 ITR 615. Referring to the disallowance of tax deducted at source, the learned departmental representative submitted that the reimbursable expenditures are to be taxed. Therefore, the tax deducted at source are borne by the clients of the assessee are part of the technical services. The learned representative further submitted that since the tax payable by the assessee has to be borne by the respective clients, it has to be treated as part of the fee payable for technical services. The learned representative placed reliance on the judgement of the Andhra Pradesh High Court in the case of CIT Vs**.** Superintendent Engineer, Upper Sileru, 152 ITR 753. Further, submitted that the judgement of the Andhra Pradesh High Court was approved by the Apex Court in the case of Transmission Corporation of AP Ltd. & Others Vs. CIT, 239 ITR 587. The judgement of the Supreme Court further followed by the Kerala High Court in the case of Asian Development Service Vs. CIT, 239 ITR 713. Referring to the CIT(A) order, more particularly, Para 24, the learned representative pointed out that the Industrial Policy notified by the Govt. of India dated 24.7.1991 was produced first time before the CIT(A). According to the learned Departmental Representative, the Industrial Policy was notified on 24.7.1991 therefore it was out dated and it is not relevant for the assessment year under consideration. The portion of the Industrial Policy reproduced by the CIT(A) cannot be a basis for holding that the government approval was obtained as required u/s 10(6A) of the Income Tax Act, 1961. Further, the learned representative pointed out that reference to Sec.80IA (4) by CIT(A) is not relevant in the facts of the case. Therefore, according to learned representative, the assessee is not eligible for deduction u/s 10(6A) of the Act. Referring features for technical services, the learned representative pointed out that payment of any kind has to be considered as fee for technical services, therefore there is not need for examining the nature of the payment. Referring to payment made to sub contractor, the learned representative pointed out that the liability of the assessee

to execute the work cannot be diluted by raising bill through sub contractors. The learned representative placed reliance on the decision of this Tribunal in the case of Progressive Constructions Vs. JCIT in ITA.No.482/Hyd/2001 dated 23.11.2006 and submitted that by assigning the work to the sub contractor, there is no diversion of income by overriding title. According to learned representative, at the best the payment made to the sub contractor may constitute an expenditure in the hands of the assessee as found by this Tribunal in the case of Progressive Construction (supra).

4. On the contrary, Shri Rama Rao, learned counsel for the assessee submitted that the assessee company is a Non Resident Company incorporated in the USA. The assessee company engaged in providing technical services to Govt. of India and the other govt. organizations for developing infrastructure facilities. Most of the agreements entered into by the assessee were with National Highway Authority of India, State Govt. departments. The assessee has to provide technical services to the govt. agencies. According to the learned counsel for the assessee, in the course of its business activity in India, the assessee has to incur expenditure on behalf of the National Highway Authority of India and other govt. departments which engage the services of the assessee. The expenditure incurred by the assessee would be reimbursed in terms of the agreement. The learned counsel for the assessee pointed out that there is a maximum limit for such expenditure to be reimbursed by the National Highway Authority of India and other departments of Govt.

5. According to learned counsel for the assessee, the assessee being a non resident foreign company, assessable either under the provisions of the Income Tax Act, 1961 or in accordance with Double Taxation Avoidance Agreement between the govt. of India and the USA. During the assessment proceedings, the assessee claimed reimbursable expenditure as not taxable, since the same

does not represent the income of the assessee. According to the learned counsel for the assessee, the reimbursable expenditure is only to reimburse the expenditure incurred on behalf of the clients, therefore, it is a capital receipt. However, the assessing officer referring to Article 12 of Double Taxation Avoidance Agreement found that any some received by the assessee would constitute payment for technical services. Accordingly, the assessing officer assessed the entire gross amount including the reimbursable expenditure as the income of the assessee and estimated the profit at 15% on such receipt. However, for the purpose of rate of tax, the assessing officer applied Article 7 of the Double Taxation Avoidance Agreement and levied tax at 20%. Referring to reimbursable expenditure, the learned counsel submitted that the reimbursement of expenditure by the National Highway Authority of India and other departments cannot partake the character of income. Therefore, such reimbursement of expenditure has to be excluded from the fee payable for technical services. According to learned counsel, reimbursement of expenditure is entirely different from the fee payable for technical services. The amount will be reimbursed by the Government or Government department when the expenditure was actually incurred on their behalf. In such an event, the assessee spends the amount on behalf of the govt. or its department. Therefore, the said expenditure is only paid by the govt. by way of reimbursement. The learned counsel further submitted that the assessee has also incurred expenditure on its own in the course of its business activity and as such expenditure was not claimed as reimbursable expenditure. The assessee claiming the expenditure incurred on behalf of its clients alone as reimbursable expenditure. According to the learned counsel, the expenditure incurred by the assessee on behalf of Govt. is a debt due from the Government. Therefore, it would amount to capital receipt in the hands of the assessee. Accordingly, the same is not taxable.

6. Referring to Sec.9(1)(vii) of the Income Tax Act, 1961 and Sec.115A, the learned counsel submitted that the amount received towards fee for rendering technical services are governed by Sec.9(1)(vii) and Sec.115A. Referring to Explanation to Sec.9(1)(vii), the learned counsel pointed out that the Legislature employed the word `for rendering any managerial, technical or consultancy services' for relevant consideration. Explanation to sec. 9(1)(vii) does not say that any amount received which is not for rendering any service also would form part of fee for services. In view of explanation Sec.9(1)(vii), according to the learned counsel, the reimbursable expenditure are not included in the definition fee for technical services in Sec.9(1)(vii) of the Act. Referring to Article 12(4) of the Double Taxation Avoidance Agreement between Govt. of India and USA, the learned counsel submitted that any amount other than the amount received as consideration for services rendered cannot form part of fee technical service. Therefore, the reimbursable expenditure cannot constitute fee paid/payable for the services rendered by the assessee. The learned counsel submitted that the reimbursable expenditure by the government or its department cannot be treated as income of the assessee. Referring to Sec.44D of the Act, the learned counsel submitted that this section is applicable in respect of any sum received towards technical services and it is not applicable for reimbursable expenditure. According to the learned counsel, reimbursable expenditure would not be part of fee for technical services. Referring to Article 12 of the Double Taxation Avoidance Agreement between the Govt. of India and USA, learned counsel submitted that what is stated in the Article 12 of the agreement between Govt. of India and USA is only gross amount of fees. It does not refer to any reimbursable expenditure to be incurred by the clients. Therefore, the learned counsel submitted that the reimbursable expenditure cannot be considered to be an expenditure incurred by the assessee for its business. The learned counsel placed reliance on the judgement of the Bombay High Court in the case of CIT Vs. Siemens

Aktiongeselleschaft 310 ITR 320 and submitted that the claim of reimbursement of expenditure was not taxable in India. The learned counsel also placed reliance on the decision of the Special Bench of this Tribunal in ITO Vs. Prasad Productions in I.T.A. No.663/Mad/2003 dated 9.4.2010 and submitted that reimbursement expenditure need not be subjected to deduction of tax at source within the meaning of Sec.195(1) of the Act. The learned counsel also placed reliance on the decision of this Tribunal in the case of Carvi Energy (India) Pvt. Ltd. Vs. ACIT 126 TTJ 226. The learned counsel again placed reliance on the decision of Delhi Bench of this Tribunal in the case of ACIT Vs. Modicon Network (P) Ltd. 2007 14 SOT 204 and submitted that reimbursement of expenditure does not amount to payment for technical services. The learned counsel also placed reliance on the judgement of the Apex Court in the case of CIT Vs. Tejaji Farasram Kharawalla Ltd. 67 ITR 95 and submitted that any amount received in respect of expenses incurred, would be exempt from taxation. Referring to the Calcutta High Court judgement in the case of CIT Vs Sandersons & Morgan's 75 ITR 433 and submitted that when the solicitors received money on behalf of his client the same cannot be considered to be a Revenue receipt. He also placed reliance on the judgement in the case of Bombay High Court in CIT Vs. Tanubhai D. Desai 84 ITR 713. The learned counsel also placed reliance on the decision of the Authority for Advance Ruling Danfoss Industries (P) Ltd. 268 ITR 1 and submitted that there is no direct nexus between the actual cost incurred by the foreign company in providing services and fee payable to each individual company availing services. Therefore the authority of advance ruling held that the amount does not represent reimbursement of expenditure. Therefore, according to the learned counsel, this decision is not applicable to the facts of the case. Referring to the decision in the case of Progressive construction Ltd. (supra) the learned counsel submitted that this decision has no application to the facts of this case. In the case of progressive Construction Ltd. (supra) the entire payment was

made otherwise than by way of crossed cheque/demand draft and the question was whether Sec.40A(3) are applicable or not. Referring to the exemption claimed by the assessee u/s 10(6A) of the Act, the learned counsel submitted that for the purpose of exemption any one of the conditions shall be fulfilled. According to the learned counsel, when the agreement is with regard to a matter which was included in the Industrial Policy, approval of the Central Government was not required. Referring to Industrial Policy of Govt. of India 1991, the learned counsel submitted that item No.11 of the Industrial Policy speaks of providing infrastructure facilities. Therefore, providing infrastructure facility is one of the policy of Govt. of India declared in the Industrial Policy. Referring to Sec.80IA of the Act, the learned counsel submitted that the infrastructure facility includes development of roads. The agreement with Govt. of India and other govt. department are only for the purpose of providing infrastructure facility such as development of roads. Therefore, according to the learned counsel, the agreement with National Highway Authority of India and other govt. department is in line with industrial policy declared by Govt. of India. Moreover, according to the learned counsel, the agreement itself was entered into with govt. departments and National Highway Authority of India which is a limb of the Govt. of India. Therefore, further approval of the agreement by the Central Government does not require. According to the learned counsel, specific approval of Govt. of India may be required, in case the assessee entered into agreement for providing technical service with any company which is not connected or associated with Govt. of India. Since the agreement itself with the Govt. and Govt. departments, no specific approval is required. Therefore, according to the representative, both the conditions laid down to Sec.10(6A) are fulfilled. Referring to the argument of the learned departmental representative with regard to the industrial policy declared in 1991, the learned counsel submitted that the assessing officer himself referred to the very same industrial policy for the assessment year 2003-04. The

assessing officer for the assessment year 2003-04 has not referred any other industrial policy. Therefore, according to the learned representative, the Revenue may not be correct in saying that the industrial policy declared in 1991 is out dated. According to the learned counsel, in the absence of any other industrial policy, the policy declared in 1991 has to be taken as such. Therefore, according to the counsel, the assessee is entitled for exemption u/s 10(6A) of the Act.

7. Referring to rate of tax on the fee for technical services, the learned counsel submitted that Article 12 of the Double Taxation Avoidance Agreement between Govt. of India and USA clearly says that tax be levied at 15% and not 20%. According to learned counsel, in 1998-99, 1999-2000, the assessee company itself claimed that Article 7 would apply. However, the assessing officer did not accept the claim of the assessee and levied tax under article 12 of the Double Taxation Avoidance Agreement. Referring to Article 7 of the Double Taxation Avoidance Agreement, the learned counsel submitted that taxable income would be the amount received by the assessee as reduced by the expenses incurred. In other words, net income alone is assessable. Referring to Article 12 of the Double Taxation Avoidance Agreement, the learned counsel submitted that it speaks of taxability of gross income at the rate of 15%. Referring to Article 7 of the Double Taxation Avoidance Agreement, the learned counsel submitted that this Article would be applicable only to business activity and not to the service provider. According to the learned counsel, the assessee has no other activity except providing technical services for establishing infrastructure facilities. According to the learned counsel, the assessing officer cannot take one stand by computing the gross receipt as required under Article 12 and take another stand for the purpose of taxing the income at 20% under Article 7 of the Double Taxation Avoidance Agreement read with section 115A of the Act. The learned counsel submitted that the CIT(A) has rightly found that

the tax has to be levied at 15% and not 20%. The learned counsel placed reliance on the decision of the Delhi Bench of this Tribunal in the case of SNC Lavalin International Inc. Vs. DCIT, 118 TTJ 802. The counsel also placed reliance on the decision of the Calcutta Bench in the case of Gentex Merchants (P) Ltd. Vs. DY.DIT, 94 ITD 211.

8. Referring to levy of interest u/s 234B of the Act, the learned counsel submitted that the assessee has to estimate the income as provided in Chapter XVIIC of the Act for the purpose of paying the advance tax. Further, the learned counsel submitted that the assessee has to estimate the income relevant to previous year and compute the tax payable thereon at the rate prescribed by the Finance Act for the relevant assessment year. According to the learned counsel for the assessee the entire amount was received by the assessee from the government and its agencies for the service rendered by it and tax was deducted at source. Therefore, according to the learned counsel, the assessee is not liable to pay any advance tax and there is no question of levy of interest u/s 234B (1) of the Act. The learned counsel also placed reliance on the decision of Delhi Bench in SNC Lavalin International Inc. Vs. DY. DDIT 118 TTJ 802 and the decision in the case of ADIT(International Taxation)1(2)/JCIT Vs. Kaiser Aluminium Technical Services Inc. 20 SOT 226.

9. We have considered the rival submissions on either side and also perused the material on record. Let us first take up the issue of reimbursable expenditure. The Assessing Officer found that the reimbursable expenditure forms part of the fees for technical services. The Assessing Officer mainly placed reliance in Article 12 of Double Taxation Avoidance Agreement (DTAA) between Government of India and USA and also the provisions of section 9(1)(vii) of the Income-tax Act, 1961. The learned Departmental Representative also placing reliance on the DTAA, more particularly on Article 12, submitted that the reimbursable expenditure would form part of the fee payable for technical

services. The question arises for consideration is whether the reimbursable expenditure received by the assessee in the course of its business activities would form part of the fees payable towards technical services.

10. We have carefully gone through the provisions of the agreement entered into between the assessee and the National Highways Authority of India (NHAI), the DTAA between the Government of India and the USA and the provisions of section 9(1)(vii) of the Act. As rightly pointed out by the learned Departmental Representative, the agreement executed by the assessee and the NHAI contains both general and special clauses. The copy of the agreement executed on 20th April, 2001 is available at page 7 of the Paper Book. Admittedly, the other agreement contains similar and identical clauses. As per this agreement the assessee has to supervise the construction of roads, consultancy services in the formation of Golden Quadrilateral for four laning and strengthening of the existing two lanes structure in the states of Orissa and West Bengal. Remuneration and reimbursable expenditure payable to the assessee has been stated in clause 6.2 of the agreement besides payment for providing of consultancy services which reads as follows:

> 6.1 Cost Estimates : Ceiling amount:
>
> (a) An estimate of the cost of the Services payable in foreign currency is set forth in Appendix G. An estimate of the cost of the Services payable in local currency is set forth in Appendix H.
>
> (b) Except as may be otherwise agreed under Clause GC 2.6 and subject to Clause GC 6.1(c), payments under this Contract shall not exceed the ceilings in foreign currency and in local currency specified in the SC. The Consultants shall notify the Client as soon as cumulative charges incurred for the

Services have reached 80% of either of these ceilings.

(c) Notwithstanding Clause GC 6.1(b) hereof, if pursuant to clauses GC 5.3, 5.4 and 5.6 hereof, the Parties shall agree that additional payments in local and/or foreign currency, as the case may be, shall be made to the Consultants in order to cover any necessary additional expenditures and envisages in the cost estimates referred to in Clause GC 6.1(a) above, the ceiling or ceilings, as the case may be, set forth in Clause GC 6.1(b) above shall be increased by the amount or amounts, as the case may be, of any such additional payments.

"6.2 Remuneration and Reimbursable Expenditures:

(a) Subject to ceilings specified in clause GC 6.1(b) hereof, the client shall pay the consultants (i) remuneration as set forth in Clause GC 6.2(b) and (ii) reimbursable expenditure as set forth in Clause GC 6.2(c). If specified in the SC, said remuneration shall be subject to price adjustment as specified in SC.

(b) Remuneration for the personnel shall be determined on the basis of time actually spent by such personnel in the performance of the services after the date determined in accordance with clause GC 2.3 and clause SC 2.3, (or such other date as the Parties shall agree in writing) (including time for necessary travel via the most direct route) at the rates referred to and subject to such additional provisions as are set forth, in the SC.

(c) Reimbursable expenditure actually and reasonably incurred by the consultants in the performance of the services as specified in clause SC 6.3(b).

Clause 6.3(b) reads as follows:

(a) The SC shall specify which items of the remuneration and reimbursable

expenditure shall be paid, respectively, in foreign and local currency.

11. In view of the above, we have to see the special clause for reimbursement of the expenditure in foreign currency and in local currency. As far as tax for technical services, which falls in clause 6.1 of the agreement, there is no dispute. The dispute is only in respect of reimbursable expenditure, which falls in clause 6.2 of the agreement. Special clause 6.3(b)(ii) provides for reimbursement of expenditure in foreign currency. For the purpose of convenience we reproduce the special clause containing the agreement at clause 6.3(b)(ii) and 6.3.(b)(iii) which read as follows:

"6.3.(b)(ii): The reimbursable expenditures in foreign currency shall be the following:

(1) a per diem allowance for each of the Expat Personnel for every day in which such personnel shall be absent from his home office and shall be outside India for the purpose of the services at the daily rate specified in Appendix G.

(2) The following transportation costs:

(i) the cost of international transportation of the foreign personnel and, as specified below, eligible dependents of the foreign personnel, by the most appropriate means of transport and the most direct practicable route to and from the Consultants' home office, in the case of air travel, this shall be less than first class i.e., economy class.

(ii) For any foreign key personnel, only one round trip shall be admissible for 'economy class' regardless of any length of continuous stay on the project. In case the foreign key personnel as per agreed Manning Schedule is NOT required continuously for entire duration of his input period at a stretch but has to discontinue and resume later after some time gap, only in such cases the employer shall reimburse the consultant as per the requirements established by

the Manning Schedule for that foreign key personnel only.

(iii) The cost of transportation to and from India of eligible dependants who shall be the spouse and not more than two (2) unmarried dependant children under eighteen (18) years of age of those of the foreign personnel assigned to resident duty in India for the purpose of the services for periods of six (6) consecutive months or longer. Only one round trip shall be admissible during the entire duration of the contract to any eligible dependant of the foreign key personnel whose input is continuously foreseen on the project. For other foreign personnel whose input is not continuous (as in the case of Pavement cum Material Engineer), the number of round trips of the dependants shall also be same as for the key personnel provided that the dependants shall stay after arrival in India for a minimum period of 3 (three) consecutive months and the remaining input is not less than 6 (six) months for such key personnel.

(iv) For the air travel of each of the foreign personnel, and each eligible dependent, the cost of excess baggage up to twenty (20) kilograms per person, or the equivalent in cost of unaccompanied baggage or air freight, and

(v) Miscellaneous travel expenses such as the cost of transportation to and from airports, airport taxes, passport, visas, travel permits, vaccinations, etc., at a fixed unit price per round trip as specified in Appendix G.

(3) the cost of shipment of personnel effects up to fifty kilograms weight.

(4) The cost of laboratory tests on materials, model tests and other technical services authorized or requested by the Client, as specified in Appendix G.

(5) The cost of training of the client's personnel outside India, as specified in Appendix G.

(6) The cost of items not covered in the foregoing but which may be required by the consultants

for completion of the services, subject to the prior authorization in writing by the client, and

(7) Any such additional payments in foreign currency for properly procured items as the parties may have agreed upon pursuant to the provisions of clause GC 6.1(c).

(8) As required within India in accordance with the applicable Laws.

6.3(b)(iii) The reimbursable expenditures in local currency shall be the following:

(1) a per diem allowance at a rate in local currency as per approved proposal of the consultants engaged for this contract (Appendix-'G' and 'H').

(2) a living allowance for each of the long-term foreign personnel (twelve) (12) months or longer consecutive stay in India) at the rates specified in Appendix H.

(3) the cost of the following locally procured items: local transportation, office accommodations, camp facilities, camp services, subcontracted services, soil testing, equipment rentals, supplies, utilities and communication charges arising in India, all if and to the extent required for the purpose of the services, at rates specified in Appendix- H.

(4) the cost of equipment, materials and suppliers to be procured locally in India as specified in Appendix H.

(5) the local currency cost of any subcontract required for the services and approved in writing by the client;

(6) any such additional payments in local currency for properly procured items as the parties may have agreed upon pursuant to the provisions of Clause GC 6.1(c); and

(7) the cost of such further items as may be required by the consultants for the purpose of the services, as agreed in writing by the client.

12. From the above clauses of the agreement it is obvious that the expenditures narrated above are to be reimbursed to the assessee by NHAI in foreign currency and in local currency. The NHAI in addition to reimbursable expenditure, has to pay for the services rendered by the assessee. The contention of the Learned

Departmental Representative is that these expenditures are primary liability of the assessee and not the NHAI. We are unable to accept the contention of the Learned Departmental Representative. The agreement entered into between the parties clearly shows that certain expenses are reimbursable in foreign currency and certain expenses are reimbursable in Indian currency besides payment of fee for technical services. Therefore, the expenditure reimbursable by the NHAI is the liability of the NHAI and not that of the assessee. At the initial stage in order to carry out the contract between the parties, the assessee has to incur the expenditure. However, the liability as agreed in the agreement rests with NHAI and they undertook to reimburse the expenditure that may be incurred by the assessee. In addition to reimbursable expenditure the NHAI has also agreed to pay fee for services which include the expenditure which has to be incurred by the assessee. Therefore, the reimbursable expenditures are in the nature of expenditure to be incurred by the NHAI in the course of its expansion programme of infrastructure. The assessee being a consultant has agreed to incur at the first instance on behalf of NHAI on condition that the same shall be reimbursed by the NHAI. Therefore, in our opinion this reimbursable expenditure cannot form part of the fee payable for technical services.

13. We have carefully gone through the DTAA between the Government of India and USA. Article 12 of the DTAA defines royalty and fees for the services. we have carefully gone through clause 4 to Article 12 of the DTAA. The contention of the learned Departmental Representative is that clause 4 of Article 12 refers to payment of 'any kind to any person' in consideration for rendering of technical or consultancy services. Therefore, the words 'any kind to any person' include the reimbursable expenditure also. This clause 4 provides for payment of fees in respect of services included in the consultancy services. In the case before this Tribunal the agreement clearly provides for consultancy services in the form of supervision. This is obvious from the preamble portion

of the agreement. Therefore, all payments in connection with supervision of the forming of 4 lane road would form part of fee for consultancy services. Clause 6.1 of the agreement between the assessee and NHAI provides payment of fee for consultancy service. In addition to that NHAI has to incur certain expenditure as provided in clause 6.2 of the agreement. These additional expenditures are in respect of personnel/dependents who are away from India, allowances as approved and the materials procured locally. Therefore, in our opinion, the payment received by the assessee as reimbursable expenditure does not fall within the four corners of clause 4 to Article 12 to the DTAA. The reimbursable expenditure are the expenditures of NHAI and the same were incurred by the assessee because of the agreement. But for the agreement, the assessee would not have incurred this expenditure. therefore, the same do not in any way be included in the services to be provided by the assessee. Therefore, in our opinion, clause 4 to the DTAA may not be applicable to the facts of this case.

14. We have also carefully gone through the provisions of section 9(1)(vii) of the Act. The Revenue placing reliance in Explanation 2 to section 9(1)(vii) contended that fee for technical services means any consideration for rendering of any managerial, technical or consultancy services. As observed earlier in the case before us, the assessee has received a separate fee for consultancy services provided in pursuance to the agreement. Apart from the consultancy services, the NHAI has agreed to reimburse certain expenditures which are to be incurred by the NHAI. In the ordinary circumstances such expenditures are to be incurred only by the NHAI and not by the assessee.

15. Let us now examine item-wise expenditure said to be reimbursed by the NHAI. A per diem allowance for each of the export personnel for every day in which such personnel shall be absent from his home office and shall be outside India for the

purpose of service at the daily rates. This expenditure shall be reimbursable by the NHAI. The question arises for consideration is whether this expenditure incurred by the assessee on behalf of the NHAI would form part of services as provided in clause 4(a) of Article 12. In the DTAA itself example 2 in the Memorandum of Undertaking clarified that this kind of expenditure would not form part of the services. In fact, as per example 2, it has to be clarified as follows:

> Example 2:
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> Facts: "An Indian manufacturing company produces a product that must be manufactured under sterile conditions using machinery that must be kept completely free of bacterial or other harmful deposits. An US company has developed special cleaning process for removing such deposits from that type of machinery. The US company entered into a contract with the Indian company under which the former will clean the latest machinery on a regular basis. As a part of the arrangement the US company leases to the Indian company a piece of equipment which allows the Indian company to ensure the level of bacterial deposit on its machinery in order for it to which when cleaning is required. All the payments for the services, fees for included services?
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> Analysis: In this example, the provision of cleaning services by the U.S. company and the rental of the monitoring equipment are related to each other. However, the clearly predominant purpose of the arrangement is the provision of cleaning services. Thus, although the cleaning services might be considered technical services, they are not ancillary and subsidiary to the rental of the monitoring equipment. Accordingly, the cleaning services are not included services within the meaning of paragraph 4*(a)*.

16. In this example the provision of cleaning services by the US company and the rental of the monitoring equipment are related to each other. However, clearly predominant purpose of the

arrangement is the provision for cleaning services. Thus although the cleaning services might be considered as technical services, they are not ancillary and subsidiary to the rental of monitoring equipment. Accordingly, cleaning services are not included services within the meaning of paragraph 4(a). In the case before us also the predominant purpose of the agreement between the parties is to provide consultancy services in the formation of four lane road in the states of Orissa and West Bengal. In the course of formation of four lane road, the NHAI has to incur certain expenditure. The reimbursable expenditures are the expenditure incurred by the assessee which are otherwise the liability of the NHAI in the course of its formation of 4 lane road. The services of the assessee is to provide only consultancy services to the assessee in the formation of 4 lane road. Therefore, the payment relatable to the technical advice provided by the assessee in the formation of the road alone to be treated as fee for technical services. The payment for the personnel who are absent from India are not for the consultancy services. Merely because such personnel happen to be the employees of the assessee it does not mean that the expenditure has some connection with the services to be provided by the assessee in India. In our opinion, the reimbursable expenditure received by the assessee other than the consideration received for the services rendered cannot form part of the fee for technical services. In view of example 2 given in the Memorandum of Understanding the payment reimbursed by the NHAI is not for the included services also. Therefore, in our opinion, it cannot be treated as fee for technical services.

17. Similarly Explanation 2 to section 9(1)(vii) speaks of the consideration for rendering managerial, technical or consultancy services. Therefore, any amount received by the assessee for rendering consultancy services in the formation of four lane road alone can be considered as fee for technical services. This Explanation 2 does not applicable for the amounts received by the assessee as reimbursable expenditure from the NHAI. As already

observed reimbursable expenditures are the expenditures in the ordinary course to be incurred by the NHAI and not by the assessee. Merely because certain expenditures are relatable to the employees of the assessee it does not mean that the payment was in connection with providing of consultancy services. At best it may be said that the payment received in pursuance to the agreement between the parties and not in connection with providing consultancy services. Therefore, even under Explanation 2 to section 9(1)(vii) it cannot be treated as fee for technical services.

18. We have carefully gone through the decision of the Authority for Advance Ruling (AAR) in Timken India Ltd., In re (2005) 273 ITR 67. In the case before the AAR, the Indian company was engaged in the business of manufacture and sale of bearings and other ancillary products. The Indian company was a subsidiary of USA non resident company. By an agreement dated 2.8.2000 Timken USA was to render in the USA services including management services, system development and computer usage, communication services, engineering services, etc. As per the agreement the Indian company has to pay only the actual cost incurred by the non resident company in providing services and there is no profit element would be added to the cost. The Indian company before making payment to non-resident company approached the Assessing Officer u/s. 195(2) of the Act to remit the amount without deducting tax at source contending that the amount was only reimbursement of expenditure and the cost was incurred by non resident company. The Assessing Officer rejected the claim of the assessee. The assessee approached the AAR. The AAR held that the assessee company has to deduct tax while making payment u/s. 195(2) of the Act. The AAR further observed that the question of computing net income for the purpose of withholding the tax u/s. 195(2) did not arise. In the case before us it is not the case of deduction of tax while making the payment. The question is whether the reimbursable expenditure would form

part of the fee for technical services. As already observed, NHAI agreed to incur the expenditure. Therefore, the liability is that of NHAI and not that of the assessee. The assessee has to separately incur expenditure, for which separate payment was made towards fees for services. Therefore, there is a clear distinction between the payment made for service and reimbursable expenditure. Therefore, the decision of the AAR may not be applicable to the facts of the case. The provisions of section 44D(b) would be applicable only in respect of deduction at source. In the case before us, we have to compute the net taxable income for the purpose of taxation. Therefore, the expenditure incurred by the assessee which are to be reimbursed by the NHAI are to be excluded from the net taxable income. In view of this factual situation, in our opinion, this decision of the AAR in the case of Timken (I) Ltd. (Supra) may not be of any assistance to the Revenue.

19. We have also carefully gone through the decision of the AAR in the case of AT & S India P. Ltd., *In re* (2006) 187 ITR 421. In the case before the AAR, the Indian company was a subsidiary of AT & S, Australia, a non resident company. The Indian company entered into an agreement with the Australian company under which the non resident company undertook to assign or cause its subsidiary to assign its qualified employees to the Indian company. The non resident company retained the right over the employees and had the power to remove from the Indian company. The only condition is that the Indian company has to replace such employees with the similarly qualified individual. The assessee has to compensate the non resident company towards all costs that were arising directly or indirectly in connection with such employees. On this factual situation, the AAR ruled that the non resident company offered the services of technical experts to the assessee and the AAR ruled that payments made by the assessee company were for rendering services of technical or other personnel. Therefore, the assessee has to deduct tax u/s.

195(2) of the Act. In the case before the AAR the very agreement is to depute the qualified employees to serve the Indian company. Therefore, the assessee reimbursed the salary and other expenditure payable to the employees by the non resident company. Apart from the salary for the personnel employed in the Indian company no other payment is required to be made by the Indian company. In other words, no other expenses are required to be met by the Indian company. In the case before us, apart from fees for technical services, NHAI has to incur certain expenditure in connection with the execution of the four lane road as per the agreement. Merely because such expenditures are relatable to the employees of the assessee it does not mean that will form part of the fee for technical services. Apart from the reimbursable expenditure, the NHAI is also liable to pay fee for technical services as provided in clause 6.1 of the agreement. But for the agreement, the assessee need not incur the expenditure. As already observed, in the ordinary course, the expenditure has to be incurred by the NHAI. the assessee was separately paid in respect of fee for technical services. Therefore, this decision of the AAR also may not of any assistance to the Revenue.

20. We have also carefully gone through the decision of the AAR in DVH Consultants BV, *In re* (2005) 277 ITR 97. In the case before the AAR the applicant company was a foreign company incorporated in the Netherlands engaged in the business of providing consultancy services. The foreign company sent its employees from the Netherlands to work on various projects in India. The employees during their stay in India continued to receive salary from the non resident company. On this factual situation, the AAR ruled that the remuneration of the employees was borne by a permanent establishment. Therefore, the same is deductible while computing the permanent establishment's taxable profits in the source country. In the case before us it is not in dispute with regard to payment of salary to the employees of the non resident company. The assessee is not claiming any

deduction in respect of salary paid to its employees. As per the agreement, certain expenditure has to be incurred initially by the non resident company which otherwise has to be incurred by the NHAI. However, it would be reimbursed by the NHAI. Therefore, such a reimbursed expenditure would not form part of the fee for technical services. The AAR in the case of DHV Consultants BV (supra) had no occasion to consider the reimbursable expenditure received by the assessee besides fee for technical services. In the case before us it is not in dispute that the assessee itself offered for taxation in respect of fee for technical services in connection with the execution of the services. Therefore, this decision of the AAR also may not be of any assistance to the Revenue. We have also carefully gone through the judgement of the Andhra Pradesh High Court in Superintending Engineer, Upper Siler (supra) and that of the Apex Court in Transmission Corporation of A.P. Ltd. (supra). In both the judgements, the Court has considered the deduction of tax at source u/s. 195 of the Act. In both the cases, the Court has no occasion to consider the reimbursable expenditure. Therefore, in our opinion, the same may not be applicable to the facts of the case.

21. We have also carefully gone through the judgement of the Delhi High Court in CIT vs. Industrial Engineering Projects Pvt. Ltd. (1993) 202 ITR 1014. In the case before the Delhi High Court the assessee had agreement with M/s. ETAG, a Swiss company, for rendering services. The assessee would receive a minimum sum of Rs.1,20,000 per month for the services rendered besides reimbursement of certain costs and expenditure incurred by the assessee while rendering the services as per the agreement. The Income-tax Officer disallowed the expenses incurred. On appeal by the assessee before the Delhi Bench of this Tribunal, it was held that the reimbursement of the expenditure did not constitute income as the expenses were incurred on behalf of the Swiss company. On a reference to the Delhi High Court at the instance of the Revenue, the Delhi High Court after considering the

judgement of the Apex Court in the case of CIT vs. Tejaji Farasram Kharawalla Ltd. (1968) 67 ITR 95 held that the reimbursable expenditure cannot form part of the taxable income. Accordingly it was held that the reimbursable expenditures are to be excluded from the total income. In view of this judgement of the Delhi High Court, in our opinion, the reimbursable expenditure received by the assessee for the purpose of rendering services cannot form part of the total income. Therefore, it has to be excluded.

22. We have also carefully gone through the judgement of the Calcutta High Court in CIT vs. Sanderson & Morgan (1970) 75 ITR 433. In the case before the Calcutta High Court a firm of solicitors received money from their clients. The question arose before the Calcutta High Court was whether the money received by the solicitors in the course of their professional activities would form part of the total income or not. The Calcutta High Court held that the money received by the solicitors was not revenue receipt. It was further held that when a solicitor received money from his clients he does not do so as a trading receipt but he receives the money from the principal in capacity as an agent. Therefore, the money received does not have any profit making quality. In this case also the money was received by the assessee on behalf of their clients for incurring the expenditure. Therefore, the money received did not have the profit making quality as held by the Calcutta High Court. In our opinion, this judgement of the Calcutta High Court also supports the case of the assessee.

23. We have also carefully gone through the judgement of the Apex Court in the case of CIT vs. Tejaji Farasram Kharawalla Ltd. (1968) 67 ITR 95. The assessee before the Apex Court acted as a selling agent of Ciba (India) Ltd. The assessee was entitled to commission of 12.5% on sales. Out of the 12.5%, 7.5% was treated as selling commission and 5% as compensation in lieu of contingency expenses which it had to meet. The question arose before the Apex Court was whether the 5% selling commission in

lieu of the contingency expenditure would form part of the total income or not. The Apex Court held that 5% of the expenses in lieu of the contingency expenses was for the expenditure incurred in the performance of the duties of the respondent as selling agent. Therefore, it will not form part of the taxable income. Accordingly, the same was exempt. In view of this judgement of the Apex Court, the reimbursable expenditure received by the assessee in pursuance to the agreement cannot form part of the taxable income. Accordingly, the same has to be excluded.

24. We have also carefully gone through the judgement of the Bombay High Court in CIT vs. Tanubai D. Desai (1972) 84 ITR 713. In the case before the Bombay High Court, the assessee was a practising solicitor. In the course of carrying on his profession the assessee used to receive money from or on behalf of his clients. The money received was deposited by him in separate current account with Imperial Bank of India. Subsequently the assessee withdrew a sum of Rs.3.25 lakhs and placed the same in fixed deposit with Chartered Bank. The assessee renewed the account from time to time together with interest earned thereon. The assessee earned interest on the fixed deposit. The interest earned on the fixed deposit was not adjusted by apportioning it to different clients whose moneys were deposited in the bank account. The assessee did not show the interest in the return of income. The question arose before the Bombay High Court was whether the interest accrued in the fixed deposit with Chartered Bank was the income of the assessee or not. The Bombay High Court after elaborately examining the issue found that the moneys received by the solicitor from his clients are held by him in fiduciary capacity. Even the income received from such money must equally be held by the solicitor in a fiduciary capacity. What the solicitor actually does with the income, i.e., whether he appropriates it to himself or not is a matter of no consequence. If the solicitor appropriates the interest accrued on such deposit to himself that would amount to a breach of his fiduciary relationship

and whatever may be the consequences in law would follow. But his unauthorised act of converting any part of the corpus or even the income derived therefrom would not convert those moneys held by him for his benefit. Accordingly, it was held that the interest income which was neither disclosed in the return of income nor adjusted to the clients was held to be not taxable. In the case before us the facts are almost similar. The assessee received the money as a reimbursement after incurring the expenditure. In the case before the Bombay High Court, the money was received by the solicitor in advance. In the case before us the money was received after incurring the expenditure by way of reimbursement. Therefore, the reimbursable expenditure received by the assessee cannot form part of the total income. In view of the above discussion, in our opinion, the reimbursable expenditure received by the assessee cannot form part of the total income. Therefore, we do not find any infirmity in the order of the lower authority. Accordingly the same is confirmed.

25. The next contention of the learned Departmental Representative is that the Government of has not approved the agreement as required u/s. 10(6A) of the Income-tax Act, 1961. Admittedly, the assessee entered into agreement with State Governments or the agency of Central Government for the purpose of providing consultancy in formation of infrastructure facilities. The contention of the learned counsel for the assessee is that the industrial policy of Government of India is to develop infrastructure. Therefore, specific approval of the Central Government is not required for claiming exemption u/s. 10(6A) of the Act. We have carefully gone through the provisions of section 10(6A) of the Act which reads as follows:

> *"(6A) where in the case of a foreign company deriving income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or the Indian*

concern after the 31st day of March, 1976 but before the 1st day of June, 2002 and,-

(a) where the agreement relates to a matter included in the industrial policy, for the time being in force, of the Government of India, such agreement is in accordance with that policy; and

(b) in any other case, the agreement is approved by the Central Government,

the tax on such income is payable, under the terms of the agreement, by Government or the Indian concern to the Central Government, the tax so paid."

26. For the purpose of claiming exemption u/s. 10(6A) an agreement needs to be entered into after 31st day of March, 1976 but before the 1st day of June, 2002 in relation to matters included in the industrial policy of the Government of India. In any other case the approval of the Government is required. The industrial policy of Government of India as disclosed in the year 1991 clearly shows that development of infrastructure is one of the policy included as item No. 11. The contention of the learned Departmental Representative is that the policy was declared in the year 1991. Therefore, it is outdated. The learned Departmental Representative, however, could not bring to the notice of the Bench any latest policy which was declared in the year relevant for the assessment year under consideration. Moreover, as rightly pointed out by the learned counsel for the assessee, the Assessing Officer himself refers to the very same industrial policy in some of the assessment years under consideration. Therefore, we have no hesitation in taking note of the industrial policy as declared by the Government of India in the year 1991 is applicable for the year under consideration also. It is not in dispute that development of infrastructure is one of the industrial policy of the Government of India as disclosed in item No. 11 of the policy. Once development of infrastructure falls in the industrial policy of the Government of India then, as rightly submitted by the learned counsel for the assessee, approval of the Central Government is not a pre-

requirement for claiming exemption u/s. 10(6A) of the Act. Therefore, in our opinion, since the development of infrastructure falls within the industrial policy of Government of India specific approval may not be required for claiming exemption u/s. 10(6A) of the Act.

27. The next contention of the learned Departmental Representative is that in view of section 44D(b) and section 150A(3) the payment received by the assessee has to be construed as fee for technical services. We have carefully gone through the provisions of section 44D and section 150A of the Act. Section 44D provides special provisions for computation of income by way of royalty in the case of foreign company. Sub clause (b) says that no deduction in respect of any expenditure or allowance shall be allowed in computing the income by way of royalty or fees for technical services received from the Government or an Indian concern. This section clearly says that while computing the income by way of royalty and technical services no deduction in respect of expenditure would be allowed u/s. 28 to 44C of the Act. Therefore, any expenditure incurred by the assessee in relation to fees for technical services cannot be deducted. As rightly observed by the CIT(A) the assessee received fee for technical services and has not claimed any expenditure from the fee for technical services. As we have already discussed, the reimbursable expenditure may not form part of the free for technical services. Therefore, Assessing Officer may not be correct in placing reliance u/s. 44D(b) of the Act. The reimbursable expenditures are to be incurred by the NHAI and other clients. therefore, it was the expenditure of NHAI and other clients and definitely it is not the expenditure of the assessee.

28. We have also carefully gone through the decision of the Tribunal in Progressive Construction (supra). The facts in Progressive Construction (supra) are definitely non different set of facts. The Tribunal in that case has no occasion to consider

whether the reimbursable expenditure would form part of fee for technical services. Therefore, this decision may not be any assistance to the Revenue.

29. Now coming to section 115A of the Act, this provision is for the purpose of computing expenses from the fee for technical services. As observed by the CIT(A) it cannot be meant to say that reimbursable expenditure will be taxed as income. In fact, the expenditure incurred by the assessee in the course of carrying on its activities in India cannot be deducted in view of section 115A(3). However, the expenditure now reimbursed was the expenditure to be incurred by the NHAI. Therefore, it is the expenditure of the assessee's client and not that of the assessee. Therefore, section 115A(3) also has no application at all. In view of the above discussion, we do not find any infirmity in the order of the lower authority. Accordingly the same is confirmed.

30. The next issue arises for consideration is reimbursement of service tax. Service tax has to be collected by the respective service providers from the clients and it has to be paid to the Government account. The liability of the assessee is only to collect and pay the same to the Government. The assessee need not pay from his pocket. There is a lot of difference between payment service tax is and income-tax. Service tax is just like sales tax. In the case of sales tax also the respective trader has to collect the tax and remit the same to Government account. Therefore, the liability to pay either sales tax or service tax is not on the trader or service provider. The liability of the trader/ service provider is only to collect from the respective persons. In case of default, service provider/trader may be held responsible to pay the same. In the case before us the agreement entered into between the parties clearly says that service tax payable shall be reimbursed separately on production of original receipt by the assessee. For the purpose of convenience, we are reproducing

clause 1.10.3 in the agreement which is available at page 36 of the Paper Book.

> *"However, the consultancy service tax payable in India for providing this consultancy service shall be paid/reimbursed by the client separately. The consultant shall produce the original receipt to the client in this regard as evidence for claim."*

31. In view of this clause what was received by the assessee is after paying the service tax and on production of the original receipt the respective client reimburses the same. In the normal circumstances, the assessee would have collected the service tax from the respective clients and would have paid the same. Therefore, in our opinion, reimbursement of the service tax cannot form part of the taxable income of the assessee. Fee for technical service is for the service rendered by the assessee. Service tax would not form part of fee for technical services. In other words, service tax is not an expenditure incurred by the assessee. It is a statutory levy on the person who availed the service from the assessee. The matter would stand entirely on a different footing in case the assessee collected the service tax and it was not paid to the Government account. That is not the case before us.

32. We have also carefully gone through the judgement of the Calcutta High Court in the case of Chowranghie Sales Bureau Pvt. Ltd. (supra). In the case before the Calcutta High Court, the assessee collected the sales tax along with the price of the goods and credited the same in separate sales tax account. Since the amount was not paid into the Government account and it was credited in a separate account, it was held that the sales tax formed part of the trading receipt. In the case before us it is not the case of the Revenue that the assessee collected the service tax and kept the same separately. It is an admitted fact by both the parties that service tax was reimbursed on production of original receipt of payment to Government. Therefore, this judgement of the Calcutta High Court has no application to the facts of the present case.

33. We have also gone through the judgement of the Apex Court in the case of Sinclair Murray & Co. Pvt. Ltd. (supra). In the case before the Apex Court the assessee sold jute and charged sales tax under a separate head in the bill as sales tax. The sales tax was not paid to Government. On those facts, it was held that the sales tax collected by the assessee would form part of the trading receipt and it has to be included in the taxable income in case it is not paid. In the case before us, what was reimbursed is the service tax paid by the assessee to the Government account. therefore, such an amount cannot form part of technical fee. In other words, it cannot be treated as trading receipt. In view of the above, in our opinion, the reimbursement of service tax cannot form part of the total income of the assessee.

34. The next ground of appeal is the rate of tax. We have considered the rival submissions on either side and perused the material on record. We have also carefully gone through the provisions of DTAA and the provisions of section 115A of the Act. The contention of the DR is that tax has to be levied at 20% u/s. 115A r/w Article 7 of DTAA. As observed by the CIT(A), fee received by the assessee towards technical services/ consultancy would fall under Article 12 and not under Article 7. Therefore, in our opinion, tax has to be levied only at 15% and not at 20%. Therefore, we do not find any infirmity in the order of the lower authority. Accordingly the same is upheld.

35. The next ground arises for consideration in assessment years 1998-99, 1999-2000 and 2000-01 is levy of tax u/s. 234B of the Act. We have considered the rival submissions on either side and perused the material on record. As rightly submitted by the learned counsel for the assessee all payments were received from the Government or its agencies. All payments were subjected to deduction of tax at source as required u/s. 195 of the Act. The Mumbai Bench of this Tribunal in the case of Lavelin International Inc. (supra) and Kaiser Aluminium Technical Services Inc. (supra)

examined this issue and held that there is no liability to pay the advance tax wherever the tax was deducted at source. A similar view was taken by Special Bench of this Tribunal in Sumit Bhattacharya (2008) 112 ITD 1. Therefore, interest was not chargeable u/s. 234B of the Act. In view of the above, we do not find any infirmity in the order of the lower authority. Therefore, the contention of the DR that interest has to be levied u/s. 234B has no merit. Accordingly the same is cancelled.

36. In the result, all the appeals of the Revenue stand dismissed.

Order pronounced in the open Court on 30th June, 2010.

Sd/-	**Sd/-**
(AKBER BASHA)	**(N.R.S. GANESAN)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated 30th June, 2010

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4. CIT(A)-III, Hyderabad.
5. CIT-II, Hyderabad
6. The D.R. – B Bench, ITAT, Hyderabad.

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