IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM

BEFORE: SHRI D MANMOHAN, VICE PRESIDENT
AND
SHRI BR BASKARAN, ACCOUNTANT MEMBER

ITA Nos.204&205/Vizag/2011
Assessment Years: 2006-07 & 2007-08

Hindustan Shipyard Ltd. Visakhapatnam Rep. Assessee of M/s. FSUE Rosoboronexport, Moscow	**Vs.**	**ITO (International Taxation) Visakhapatnam**
(Appellant) PAN No: AADCR 3298P		(Respondent)

Appellant By: **Shri G.V.N. Hari, CA**
Respondent By: **Shri T. Lucas Peter, CIT(DR)**
Date of Hearing: **12.12.2011**
Date of Pronouncement: **17.12.2011**

ORDER

Per Shri B. R. BASKARAN, Accountant Member:

M/s FSUE Rosoboronexport, Mascow is a Russian Company and is the assessee herein (hereinafter "ROE"). The said assessee does not have any office or place of business in India. It is represented by M/s Hindustan Shipyard Ltd., Visakhapatnam (hereinafter "HSL") in the income tax proceedings as "representative assessee". These two appeals have been filed by the assessee against the orders passed by the assessing officer in accordance with the directions issued by the Dispute Resolution Panel, Hyderabad under section 144C(5) r.w.s. 144C(8) of the Income-tax Act and they pertain to the assessment years 2006-07 and 2007-08. Since the issues urged in these two appeals are identical in nature, they were heard together and are being disposed of by this common order, for the sake of convenience.

2. The grounds raised by the assessee in both the years give rise to the following two issues.

(a) Validity of notice issued under section 148 of the Act.

(b) Nature/taxability of the amount received by the assessee for supplying technical materials to M/s HSL.

3.0 The facts relating to the issues are stated in brief. The assessee herein viz., M/s. FSUE Rosoboronexport, Moscow is having required expertise to carry out repair works of submarines. M/s. Hindustan Shipyard Ltd. (hereinafter referred as `HSL') is a Public Sector Undertaking engaged in ship building, ship repairs, etc. The Indian Navy wanted to get its submarine named "Sindhukirti" repaired by M/s HSL. The required approval was given by Govt. of India to undertake repairs by M/s HSL through their proceedings dated 25.06.2002. In the approval letter itself, it was stipulated that technical assistance and collaboration agreements are to be entered with ROE, Russia and the same shall be included in the contract that will be executed between HSL and Indian Army. Accordingly, M/s. HSL entered into a service contract on 03.10.2005 for medium repair and upgradation of naval submarine INS Sindhukriti with Admiral Superintendent of Naval Dockyard, Visakhapatnam. In pursuance thereto M/s. HSL, in turn, entered into a contract with assessee herein on 06.10.2005 (contract no.P/435612223404) for elaboration and transfer of repair technical documentation, which is referred to as "Technical assignment on development of repair technical documentation for medium repair and modernization of Order 877EKM (Yard No.01315) on premises of "Hindustan Shipyard Ltd." in the said agreement.

3.1 It appears that infrastructural facilities that were available with M/s. HSL were not sufficient for carrying out the submarine repair works cited above. Hence M/s HSL entered into another contract with the ROE, the assessee herein, on 24.09.2004 for supplying Detailed Project Report (DPR) for augmentation of infrastructural facilities of HSL in order to enable it to

conduct medium repairs cum modernization of orders of 877 EKM Project, which is referred as "Technical Assignment for elaboration of Detailed Project Report for augmentation of HSL to conduct medium repair cum modernization of orders of 877EKM Project" in the said agreement.

3.2 M/s ROE, the assessee herein received a consideration of Rs.3.03 crores from HSL for supplying technical documents on detailed project report (DPR), referred in para 3.1 (Supra), during the year relevant to the assessment year 2006-07. For supplying the Repair Technical Documents, referred in para 3.0 (Supra), the assessee herein received a sum of Rs.51.58 crores from HSL during the year relevant to the assessment year 2007-08. It is pertinent to note that M/s. HSL deducted tax at source under section 195 of the Act while making these payments to the assessee herein, since the Dy. Commissioner of Income tax (TDS) gave directions to make the TDS at the applicable rates.

3.3 Subsequently, M/s. HSL filed return of income for both the assessment years under consideration in its capacity as the representative assessee of M/s ROE. In the said return, though the amount received from M/s HSL was shown as business income, yet the entire amounts were claimed as exempt on the ground that

(a) the technical documents fall in the category of "goods" and

(b) the transaction of sale was completed outside India and hence there is no income tax liability on such sales effected by M/s ROE.

The return of income filed for the assessment year 2006-07 was processed under section 143(1) of the Act by accepting the return of income. The details of processing of return relating to the assessment year 2007-08 are not clearly emanating from the record. However, the undisputed fact remains that the Assessing Officer initially did not carry out any assessment under section 143(3) of the Act in these two years. Subsequently, the assessment of both the years under consideration was reopened by issuing

notice under section 148 as the assessing officer was of the view that the above said considerations received by the assessee herein from M/s. HSL are in the nature of fee for technical services, which are liable to tax under the Act. For the assessment year 2006-07 the notice was issued on 25.03.2010 and for the assessment year 2007-08, it was issued on 26.04.2010. The assessing officer forwarded a draft of the proposed assessment order to the assessee as per provisions of Section 144C (1) of the Act for both the assessment years, wherein he had treated the entire amounts received by the assessee for supplying the technical documents as "fee for technical services" and accordingly determined the total income. The assessee filed its objections with the Dispute Resolution Panel (herein after "DRP") in terms of section 144C (2) of the Act in both the years. Before DRP, the assessee also challenged re-opening of assessment of both the years.

3.4 The Dispute Resolution Panel upheld the reopening of assessment and also concurred with the view of the assessing officer that the amounts received by the assessee herein are in the nature of fee for technical services liable to tax under the Indian Income-tax Act. Accordingly, DRP gave necessary directions to the assessing officer under section 144C(5) of the Act. Thereafter the assessing officer passed the assessment orders for both the years under consideration as per the said directions. Aggrieved by the said assessment orders, the assessee is in appeal before us in both the years.

4. The first issue relates to validity of reopening of assessment by issuing notice under section 148 of the Act in both the years. The said objection of the assessee was dismissed by the Dispute Resolution Panel with the following observations.

> "*The second objection raised by the assessee was against the reopening of the case under section 147. It is clearly seen from the records that the return was merely*

processed and accepted initially. After recording proper reasons, the Assessing Officer issued notice under section 148. It is not the case of the assessee that reasons were not recorded. The Courts cannot go into the sufficiency of the reasons but can look into the link between the material on record and formation of belief for reopening of the assessment. CIT Vs. Janardan Dwarakadas 290 ITR 1 (Mumbai). Since no original assessment was completed there is ample scope to reopen the case. Adequacy of reasons cannot be questioned.

7.1 After 01.04.1989 it is held by Courts that reopening can be done without much difficulty in cases wherein returns were merely processed. Reliance is placed on the following case-laws:

(a) Rakesh Agarwal Vs. ACIT (87 Taxmann 306) (Delhi)
(b) Ram Prasad Vs. ITO (82 Taxmann 199) (Allahabad)
(c) ACIT Vs. VXL India Ltd. (247 ITR 820) (SC)
(d) Praful Chunnilal Patil Vs. CIT (236 ITR 832) (Gujarat)
(e) Bharat V. Patel Vs. Union of India (268 ITR 116) (Gujarat)

7.2 Moreover, this is not a case wherein a scrutiny assessment was completed and the same was sought to be reopened. Hence, the plea that there is a change of opinion cannot be taken in the impugned case.

7.3 The AR also relied on the case of CIT Vs. Kelvinator of India Ltd., (320 ITR 561) to state that tangible material must be available for reopening an assessment. In this case it is held by the Supreme Court that concept that change of opinion on the part of the Assessing Officer to reopen an assessment does not stand obliterated after the amendment in section 147 w.e.f. 01.04.1989. In the present case, since there was no scrutiny assessment and no opinion expressed earlier, the Assessing Officer has validly reopened the proceedings. In so far as originally the return was merely processed under summary scheme there cannot be any debate whether there was any change of opinion in the case. Hence, the argument of the assessee that reopening is not tenable in law is incorrect."

4.1 We have heard the rival submissions on this issue and carefully perused the observations of Dispute Resolution Panel. Before us, the assessee did not file any material to counter the observations made by Dispute Resolution Panel. Further, the assessee did not make out a case to

show that the Explanation 2 to section 147 is not applicable to the facts and circumstances of the instant case. In view of the foregoing discussions, we do not find any infirmity in the observations of Dispute Resolution Panel and accordingly we reject the ground raised by the assessee on this issue.

5. The remaining issue relates to the nature/taxability of the considerations received by the assessee herein. The contention of the assessee, as stated earlier, is that the technical documents supplied by it to M/s HSL is only a "Sale of Asset", since they were supplied in the form of bound manuals. It was submitted that the "Repair Technical Documents" supplied during the year relevant to the assessment year 2007-08 consisted of 2651 volumes weighing about 2876 Kgs. Similarly, the Detailed Project Report supplied during the year relevant to the assessment year 2006-07 was weighing about 37 Kgs. In support of its plea that the impugned technical documents can only be treated as "goods", our attention was invited to the following documents also.

(a) Copy of photograph of bound volumes of the technical documents.
(b) Invoice copies
(c) Customs clearance documents.

It was further submitted that the delivery of these goods have taken place outside the territories of India and accordingly it was contended that the income tax liability cannot be fastened on a transaction which has taken place outside the Indian territories. In this regard, reliance was placed on the following documents.

(a) Copies of Insurance documents showing that the insurance was taken at Russia, wherein the beneficiary is shown as "M/s HSL".

(b) Clause 2.6 of the agreement which states that the transfer of documents to M/s HSL will be exercised on the terms "CIP-Airport Visakhapatnam" in accordance with "INCOTERMS-2000". As per the INCOTERMS-2000 (International commercial Terms), CIP means "Carriage and Insurance Paid To- Title and risk pass to buyer when delivered to carried by seller who pays

transportation and insurance cost to destination which is used for any mode of transportation.

He further submitted that "Goods" are tangible commodities which is transferable to other, where as "Service" is an intangible one which is not capable of such transfer to others. Ld. A.R further submitted that the "Repair Technical documents" are required to be handed over to Indian Navy as per the agreement entered between M/s HSL and Indian navy, which fact, reinforces the contention of the assessee that these documents can only be categorized as "Goods". However, he fairly conceded that there is no such agreement for transfer of "Detailed Report Project", referred supra.

5.1 In support of various submissions made above, Ld A.R relied upon the following case law:

(a) Nisho Iwai Corporation Re. by RINL Vs. ACIT – Order dated 22.06.2010 passed by ITAT, Visakhapatnam.

(b) Scientific Engineering House (P) Ltd Vs. CIT (157 ITR 86)(SC)
(b) Joint Stock Company Foreign Economic Association "Technopromexport" (2010) (322 ITR 409)

(c) Parsons Brinckerhoff India (P) Ltd Vs. ADIT (2008)(118 TTJ (Del) 0214)

(d) CIT Vs. Maggronic Devices (P) Ltd (2010)(228 CTR (HP) 241)

(f) Tata Consultancy Services Vs. State of AP (2005)(1 SCC 308)

(g) Director of Income tax Vs. LG Cable Ltd (2011)(237 CTR (Del) 438)

(h) Grasim Industries Ltd & Ors Vs. CIT (2011)(58 DTR (Bom) 47).

6. The Ld D.R submitted that the "Repair Technical Documents" and the "Detailed Project Report" shall squarely fall in the category of "Technical services" as they are in substance "Technical advice" reduced in the form of booklets. Hence it can only be construed that the assessee has

rendered technical services to M/s HSL.. viz., (a) explaining the technicalities of carrying out repairs of submarines and (b) advising on augmentation and modernization of infrastructural facilities in order to equip M/s HSL for carrying out the said repair works of submarines. He further submitted that it is a well settled principle that the substance shall prevail over the form and in the instant cases, though the form of documents appear to be mere booklets, but in substance they are related to the technical services rendered by the assessee. He further submitted that the various case law relied upon by the assessee have been rendered in different contexts and they were rightly distinguished by DRP. Hence they have no application on the issue under consideration. The Ld D.R relied upon following case law in support of his contention that the impugned receipts are only "fee for technical services".

(a) D.C.I.T Vs. All Russia Scientific Research Institute of Cable Industry, Moscow (2006)(98 ITD 69)(Mum).

(b) M/s SKODA Export Foreign Trade Corporation Rep by RINL in ITA No. 1263/Hyd/89 and 22/Hyd/92 extracted by the AO in the assessment order.

(c) South West Mining Ltd., In re (2005)(278 ITR 32) (AAR)

(d) Elkem Technology Vs. D.C.I.T (2001)(250 ITR 164)(AP)

7. We have heard the rival contentions and carefully perused the record. Since M/s ROE is the recipient of the impugned amounts, there cannot be any dispute that the taxability of the same should be verified from the angle of M/s ROE. There is no dispute with regard to the fact that the Residential status of M/s ROE is "Non Resident". Under sec. 5(2) of the Income tax Act, the income of a non-resident shall include income from whatever source derived which:-

(a) is received or is deemed to be received in India in such year by or on behalf of Non-resident; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Thus in the case of a non-resident, any income which accrues or arises outside India is not taxable under Indian Income tax Act. However, under sec. 9 of the Act certain types of income, which might have accrued or arose outside India, are deemed to accrue or arise in India. The clause (vii) of sub-section (1) of sec. 9 is relevant to the issue under consideration and for the sake of convenience, we extract the same below:-

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

(a) the Government; or

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

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

*[**Provided** that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government]*

[Explanation 1 – For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.]

Explanation [2] – For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".]

8. The status of M/s HSL, which has paid the impugned amounts to M/s ROE is "resident" under the Income tax Act. Hence as per clause (b) of sec. 9(1)(vii) extracted above, any income by way of fee for technical services payable by M/s HSL shall be deemed to accrue or arise in India if the said fee was paid in respect of services utilized in a business or profession carried on by it in India. In the instant case, M/s HSL has paid considerations to M/s ROE towards supply of "Repair Technical documents" and "Detailed project report", which were utilized for the business carried on by M/s HSL in India.

9. In the back ground of the legal position discussed above, now the question underlying the issue under consideration is whether the amounts received by M/s ROE, being the assessee herein, is in the nature of income that accrues or arises in India or not (for the sake of convenience "Indian Income"). If the technical documents that were supplied by the assessee to M/s HSL are treated as "Goods", then the income from the amounts received from M/s HSL in that regard cannot be treated as Indian income, as the transactions of purchase and sale have taken place outside the Indian territories. The stand of the assessee is that it has only supplied "Goods" and hence no income from the said transactions is taxable under Indian Income tax. In support of this contention only, the Learned A.R has drawn our attention to various documents that are placed in the paper book. On the contrary, if the said receipts are taken as fee received for technical services, then they shall be deemed to accrue or arise in India in view of the deeming provisions prescribed in clause (b) of sec. 9(1)(vii) of the Act. The department's stand is that the impugned amounts are "Fee for technical services" only. It is pertinent to note that the territorial jurisdiction to be seen in respect of "non-resident" shall not be applicable in respect of "fee for technical services" as per the Explanation to sec. 9(2) of the Act, which reads as under. This explanation was substituted by Finance Act 2010 **w.r.e.f 01-06-1976** in the place of old explanation.

[Explanation – For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,--

(i) the non-resident has a residence or place of business or business connection in India; or

(ii) the non-resident has rendered services in India.]

10. The Learned A.R took support of the decision rendered by Hon'ble Supreme Court in the case of Tata Consultancy Services Vs. State of A.P. reported in (2005) 1 SCC 308 in support of his contention that the technical documents supplied by the assessee to M/s HSL in the form bound book manuals fall into the category of "Goods". It is pertinent to note that the said decision was rendered by Hon'ble Apex Court under A.P. General Sales Tax Act. In that case, M/s. Tata Consultancy Services developed custom made software for their customers ("uncanned software") and also sold computer software packages off the shelf ("canned software"). The question raised in that appeal was whether the "canned software" sold by the appellants could be termed as "goods", exigible to tax under Andhra Pradesh General Sales Tax Act. The Hon'ble Supreme Court held that the intellectual property, once it is put on to a medium, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become "goods".

11. Before the DRP also, the assessee drew support of Hon'ble Supreme Court in the case of Tata Consultancy Services referred supra. However, the DRP rejected the same with the following observations:

"5.6 In the case Tata Consultancy Services Vs. State of A.P. (2005) 1 SCC 308, the Supreme Court held that whenever intellectual property is put on a medium such as, in the form of book or canvass, it would become `goods' and accordingly liable to sales tax. Supreme Court held that once technical knowledge is converted into a medium, it assumes the nature of a `good' and

hence, sale of such goods will be liable to sales tax. However, this judgement was with reference to Sales Tax Act. It is nowhere held in this case that the sale of such technical information cannot be regarded as consideration paid as fee for technical services under the Income-tax Act, 1961. A judgement is to be read with reference to the context and the facts obtained in that case. In the case of M/s. Sun Engineering Works Pvt. Ltd., (198 ITR 320) (Supreme Court) held as follows:

> *"It is neither desirable nor permissible to pick out a word or a sentence from the judgement of this court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this court. The judgement must be read as a whole and the observations from the judgement have to be considered in the light of the questions which were before this court. A decision of this court takes its colour form the questions involved in the case in which it is rendered and, while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this court and not to pick out words or sentences from the judgement, divorced from the context of the questions under consideration by this court, to support their reasonings. In Madhav Rao Jivaji Rao Schindia Bahadur Vs. Union of India (1971) 3 SCR 9; AIR 1971 SC 530, this court cautioned (at page 578 of AIR 1971 SC):*
>
> > *"It is not proper to regard a word, a clause or a sentence occurring in a judgement of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgement."*
>
> *5.7 Hence, the reliance placed by the Lr. AR on the judgement of the Supreme Court in the case of M/s. Tata Consultancy Services Ltd., does not preclude the department from bringing to tax the consideration paid simultaneously as a payment towards fee for technical services."*

We have also carefully gone through the above said decision of Hon'ble Supreme Court. We feel that the following observations made by Hon'ble Supreme Court are pertinent here.

"The expression "goods" is not a term of art. ***Its meaning varies from statute to statute.*** *The term "goods" had been defined in the Act as also in Article 366(12) of the Constitution to include all materials, commodities and articles. Commodity is an expression of wide connotation and* ***includes everything of use or value which can be an object of trade and commerce.*** *....*

Indian law does not make any distinction between tangible property and intangible property. "Goods" may be tangible or intangible property. A program would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customised satisfies these attributes, the same would be goods. Unlike the American courts, the Supreme Court of India has also not gone into the question of severability. What is essential for an article to become goods is its marketability."

Thus, it is very much clear that the meaning of "Goods" varies from statute to statute. The above said decision was rendered under A.P. General Sales tax Act for the purpose of determining whether the intellectual property reduced into a medium would fall in the category of "Goods". Hence we are in agreement with the view of DRP that the said decision, which was rendered in a different context, can not be taken support of by the assessee on the issue under consideration.

12. Now let us examine whether a technical service would lose the characteristics of technical service if the same is reduced in writing in the form of bound manuals. Let us consider certain illustrations. If an architect prepares a building plan along with structural designs and other technical details and furnishes the same in the form of bound manual, will his services lose the character of technical services?. If an advocate gives a legal opinion along with the case laws from which he took support in the form of bound manual, will his services lose the character of Professional service?. The answer should obviously be "No" only. In both the above cited illustrations, it is quite possible that the concerned architect/lawyer may not visit the premises of his client

also. Still, in our view, the technical materials supplied by them would not lose the characteristics of "Service", simply because they were supplied in the form of bound manuals, more particularly when it is tailor made for the specific requirements of a person. The Ld A.R drew our attention to the insurance documents, Customs Act documents in support of his contentions that the impugned technical materials are "Goods". However, on these documents, we are inclined to agree with the view of the DRP that they are not decisive factors. Since these technical documents involve payment of huge amount, it is quiet natural for a person (here M/s HSL) to insure the same against any possible damages. Similarly no material could enter the Indian territories without clearance from the customs authorities.

13. Now we shall examine the various case law relied upon by the Ld A.R. In the case of Scientific Engineering house (P) Ltd, supra, the Hon'ble Supreme Court has rendered its decision in the context of allowability of depreciation on technical documents. In the case of Nisho Iwai Corporation Rep. by RINL, supra, the said company had supplied machinery also along with designs and engineering drawings and hence the Tribunal had held that the said Design and Engineering drawings are also in the nature of plant. Similar was the case in the case of Joint Stock Company Foreign Economic Association "Technopromexport", in Re., and L.G Cable Ltd, supra, wherein Plant and equipment were supplied offshore. In the case of Parsons Brinckerhoff India (P) Ltd and also in the case of Maggronic Devices (P) Ltd, supra, the issue was whether the designs and drawings would fall in the definition of "Royalty", which is not relevant to the issue under consideration. The Hon'ble Bombay High Court has rendered the decision in the case of Grasim Industries Ltd., (Supra), before the amendment brought in by Finance Act 2010 in the Explanation to sec.

9(2) of the Act, after which the territorial restrictions shall not apply to "fee for technical services".

14. In the instant cases, there is no dispute that the "Detailed Project Report" and the "Repair Technical Documents" were tailor made documents and specific documents prepared specially for the purposes of M/s HSL.

15. As stated earlier, the Detailed Project Report involved the study of existing infrastructural facilities available with M/s HSL and making of appropriate suggestion for augmentation and improvement of the infrastructural facilities in order to enable M/s HSL to undertake the repair works of a specific type of submarines. For the purpose of preparing the said report, the assessee, M/s ROE, has obtained necessary data from M/s HSL. There cannot be any doubt that the preparation of the Detailed Project Report requires domain expertise. In the instant case, M/s HSL has submitted all the details on available infrastructural facilities to M/s ROE in order to enable it to identify the short fall/inadequacies/gap in the said facilities. Accordingly M/s ROE has prepared the Detailed Project Report elaborating the requirements for augmentation and improvement of facilities in order to enable M/s HSL to conduct medium repair cum modernization of orders of 877 EKM type of submarines. There is no dispute that the said assignment undertaken by M/s ROE from M/s HSL is a technical assignment and hence the amount received in that regard would not, in our view, lose the character of "Fee for technical services" simply because of the fact that the said Detailed Project Report were received in the form bound volumes. We accordingly confirm the order of Assessing officer in respect of "Detailed Project Report" in asst. year 2006-07.

16 In the case of "Repair Technical documents", the agreement entered between the assessee, M/s ROE and M/s HSL describes the assignment as "**Technical assignment** on development of repair technical documentation for medium repair and modernization of Order 877EKM…". The Ld A.R submitted that the impugned technical documents are transferable, which is one of the characteristics attached to "Goods". In this regard, he also invited our attention to clause no.2.3.1 entered between M/s HSL and Indian Navy, according to which the impugned "Repair Technical Documents" are considered to be the property of Indian Navy. However, as observed earlier, we are required to examine about the taxability of the impugned receipts from the point of view of M/s ROE, who has supplied these documents. Accordingly, in our view, the contract entered between M/s HSL and the Indian Navy may not be relevant for determining the issue under consideration. For a moment, if we assume that the impugned "Repair Technical Documents" are procured by Indian Navy directly from M/s ROE, will it change the scenario about the tax implications in the hands of M/s ROE. In our view, the nature and substance of the transaction shall remain the same in the instant case whether the assignment was given either by Indian navy or by M/s HSL. Further on a careful perusal of the agreement entered between M/s ROE and M/s HSL would show that the impugned "Repair Technical Documents" are not freely transferable as represented before us, if one look at the "Protective clauses", which are extracted below:-

"5.1 Neither of the Sides is allowed, without consent of the other side in writing, to transfer its rights and obligations under the present Contract to the third Party.

5.2 The CUSTOMER takes obligation to use the documentation under the present Contract only for declared purposes and not re-export or transfer without the consent of RF formally or in fact the documentation delivered under the present Contract or information concerning documentation to the third countries or allow usage of it to any physical or judicial persons, except

authorised personnel of citizens of the CUSTOMER's country in Government service of the CUSTOMER's country.

The CUSTOMER could re-export or formally or physically transfer the documentation delivered under the present Contract or information on it to the third Party, or any physical or judicial person only after receiving of appropriate official request of the CUSTOMER after receiving of consent of the Russian Federation which is made by the SUPPLIER in compliance with the Law of the Russian Federation.

5.3 The CUSTOMER will not copy or reproduce the documentation delivered under the present Contract as well as utilize Russian inventions, "know-how", and other scientific-technical achievements, used during elaboration of the documentation without previous written consent of the SUPPLIER only upto receipt of appropriate official request from the CUSTOMER."

17 The following findings given by DRP in para 5.2 and 5.3 of its order are also relevant here:

"5.2. As per the terms of this contract, HSL has to complete the project in collaboration with ROE with whom it has to enter into separate contract. Pursuant to this, HSL (now representing ROE Russia) entered into different contracts, such as, General Contract: P/23561222012 dated 27-11-2003; P/435612223404 for the preparation of Repair Technical Documentration (RTD); P/335612313124 for deputation of Russian Specialists to the premises of HSL; etc. From these contracts it can be clearly seen that technical information relating to undertaking of repairs was passed on through books and through another contract engineers/personnel visited Vizag and assisted in carrying out the repair works on the sub-marine. The AR also admitted that approximately $ 52 million was paid for the RTDs and approximately $2 million was paid for the services. With regard to the service contract and the sum paid for the same, it is claimed that income tax is paid treating the same as technical fees.

5.3. However, a perusal of the material submitted shows that drawings and designs were passed on along with other technical information which are essential for carrying out repair works on the submarine. The services were rendered separately by deputing personnel. There is no reason to spilt

the transaction except for the purpose of tax. The personnel could not have carried out the repair works without the RTDs. In so far as the technical information supplied is utilized in the contracting state, there is necessity to tax the same."

The separate contracts referred by DRP for deputation of Russian Specialists also indicate that it is not a case of a simple purchase of "Books" as claimed by the assessee.

18. From the foregoing discussions, we are of the view that the considerations received by M/s ROE from M/s HSL for supplying the Repair Technical documents are also in the nature of "fee for technical services" only. Accordingly we confirm the order of the Assessing Officer in respect of "Repair Technical documents" also in the assessment year 2007-08.

19. In the result, both the appeals of the assessee are **dismissed**.

Pronounced on **17.12.2011.**

Sd/-	Sd/-
(D MANMOHAN)	**(B R BASKARAN)**
Vice President	**Accountant Member**

VG/SPS
Visakhapatnam,
Date: 17th December, 2011
Copy to

1 M/s. FSUE Rosoboronexport, Moscow, Rep. by Hindusthan Shipyard Ltd., Visakhapatnam.
2 The ITO (International Taxation), Visakhapatnam
3 The Addl. CIT (International Taxation), Hyderabad
4. The Dispute Resolution Panel, Hyderabad
5 The DR, ITAT, Visakhapatnam.
6 Guard file.

Fit for publication:

(D MANMOHAN)	**(B R BASKARAN)**
Vice President	**Accountant Member**

By order