IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "L", MUMBAI

Before Shri R.S.Syal, AM and Shri N.V.Vasudevan, JM

ITA No.2426/Mum/2010 : Asst. Year 2006-2007

M/s.UPS SCS (Asia) Limited C/o.BSR & Co., 2nd Floor, Lodha Excellus Apollo Mills Compound, N.M.Joshi Marg Mahalaxmi, Mumbai – 400 011. **PAN : AAACU8509M.**	Vs.	The Asstt.Director of Income-tax (International Taxation) 2 (2) Mumbai.
(Appellant)		(Respondent)

Appellant by : Shri Sunil Lala
Respondent by : Shri Mahesh Kumar

Date of Hearing : 14.02.2012		**Date of Pronouncement : 22.02.2012**

O R D E R

Per R.S.Syal, AM :

This appeal by the assessee arises out of the order passed by the Commissioner of Income-tax (Appeals) on 04th January, 2010, in relation to the assessment year 2006-2007.

2. The only grievance of the assessee projected through ground no.1 as under:-

> *"1. Transportation fee being erroneously treated as fees for technical services under Section 9(1)(vii) of the Income-tax Act, 1961.*
>
> *1.1 On the facts and circumstances of the case and in law, the Commissioner of Income-tax (Appeals)-11 has erred in upholding the action of the Assessing Officer in treating the transportation fee receivable by the Appellant from Menlo Worldwide Forwarding India Private Limited is taxable in India as fees for technical services under Section 9(1)(vii) of the Income-tax Act, 1961 on the contention that the services provided by the Appellant are in the nature of managerial, technical or consultancy services.*

1.2 The Appellant prays that the transportation fee receivable by it is not in the nature of fees for technical, managerial or consultancy services under Section 9(1)(vii) of the Act and therefore such fees are not liable to tax in India and the entire addition of ₹2,32,89,208 should be deleted."

3. Briefly stated the facts of the case are that the assessee, a foreign company incorporated under the laws of Hong Kong, is engaged in the business of provision of supply chain management, including the provision of freight and forwarding and logistics services. The assessee entered into a "Regional Transportation Services Agreement" (hereinafter called the `Agreement') on 01.06.2005 with Menlo Worldwide Forwarding (India) Private Limited (hereinafter called `Menlo India') for providing freight and logistics services to each other. As per this Agreement, each party agreed to render services to the other in respect of import and export of consignments. The Assessing Officer vide para 5 has noted two types of consignments, viz, Import consignments and Export consignments. He has observed that Import consignments are those which originate outside India and are to be delivered in India. The services in origin of foreign country broadly comprise of overseas local pick, overseas ground transportation, overseas customer clearance, overseas documentation, loading and unloading and stuffing consignment in cargo, agreed to be performed outside India. Menlo India, undertook to perform destination services on the arrival of consignment in India. Destination services to be carried out in India by Menlo India comprises of local unloading and loading of consignment, local custom clearance, local ground transportation, local documentation etc. On the other hand, Export consignments originate from India for the delivery of consignments outside India. The assessee, as per the Agreement, undertook to perform the destination services outside India, similar to those performed by Menlo India in India as discussed above in the context of Import consignments. During the year in question the assessee earned

₹2,32,89,208 as international transportation fee under the Agreement from Menlo India towards services rendered by it abroad on the above described Export consignments. Such amount was claimed by the assessee to be not chargeable to tax in India as per the provisions of section 5 read with section 9 of the Income-tax Act, 1961. It was so claimed on the premise that the income arose from services rendered by it outside India and no operations in this regard were carried out in India. The assessee also claimed that its relationship with Menlo India was that of independent contractor and the business between them was done on principal to principal basis and at arm's length. The Assessing Officer observed that the services rendered by the assessee under the Agreement were in the nature of freight and logistics services such as transport, procurement, custom clearance, sorting, delivery, warehousing and picking up services. In his opinion such services were covered under the provisions of section 9(1)(vii), being "fees for technical services". In order to buttress his view point, the A.O. also observed that Menlo India had deducted tax at source from the transportation fees paid to the assessee and in that view of the matter the assessee's contention that the amount was not chargeable to tax in India, was bereft of any force. The learned CIT(A) echoed the assessment order on this point by holding that the transportation fees received by the assessee from Menlo India was taxable in India as "fees for technical services" u/s 9(1)(vii) as it was for the services in the nature of "managerial, technical or consultancy services". The assessee is in appeal before us.

4. We have heard the rival submissions and perused the relevant material on record in the light of precedents cited. The entire dispute centers around the taxability of the amount received by the assessee from Menlo India in respect of services performed outside India on the export consignments of Menlo India originating from India. There is no quarrel over the nature of services for which the above referred amount has been paid to the assessee being, freight and

logistics services such as transport, procurement, customs clearance, sorting, delivery, warehousing and pick up services. Now the primary question which arises for our consideration is as to whether the payment in respect of these services can be held as `fees for technical services' within the meaning of section 9(1)(vii). The expression "fees for technical services" has been defined in *Explanation 2* to section 9(1)(vii) as under:-

> *"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"."*
>
> (Emphasis supplied by us)

5. A bare perusal of the above quoted provision indicates that the "fees for technical services" means any consideration for rendering of any "managerial, technical or consultancy services" but does not include the consideration for any construction, assembly etc. The learned CIT(A) has held the services rendered by the assessee as `fees for technical services' coming with in the sweep of "managerial, technical or consultancy services". On the contrary, the contention of the assessee has remained before the authorities below as well as us that the such services do not fall within the ambit of any of the categories taken note of by the authorities below. We will examine as to whether the services so provided by the assessee fall within the scope of `managerial, technical or consultancy services' as per *Explanation 2* to section 9(1)(vii).

6. In order to appreciate the nature of services more elaborately, it is relevant to consider the terms of the Agreement entered into between the

assessee and Menlo India executed on November 7, 2006 with effect from 1st June, 2005, a copy of which is available on page 1 onwards of the paper book. The scope of services has been given in clause 1.1. In the recital clause it has been provided that the assessee-company may require Menlo India to perform logistics services such as transport, procurement, custom clearance, sorting, delivery, warehousing and picking up services (Local services) within India (Local operating area). It has further been provided that Menlo India may also seek similar services from the assessee-company such as transport, procurement, customs clearance, sorting, delivery, warehousing and pick up services (International services) outside India. In the present appeal we are concerned with the "International services" provided by the assessee to Menlo outside India. These services comprise of transport, procurement, customs clearance, sorting, warehousing and pick up services on the cargo exported by Menlo on behalf of its customers. Having noted the nature of services provided by the assessee outside India, for which Menlo India made the payment, let us consider if these can be described as managerial or technical or consultancy services.

7. First we will consider the ambit of `managerial services' to test whether the instant services can qualify to be so called. Ordinarily the managerial services mean managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down. The managerial services contemplate not only execution but also the planning part of the activity to be done. If the overall planning aspect is missing and one has to follow a direction from the other for executing particular job in a particular manner, it cannot be said that the former is managing that affair. It would mean that the directions of the latter are executed simplicity without there being any planning part involved in the execution and also the evaluation of the performance. In the absence of any

specific definition of the phrase "managerial services" as used in section 9(1)(vii) defining the "fees for technical services", it needs to be considered in a commercial sense. It cannot be interpreted in a narrow sense to mean simply executing the directions of the other for doing a specific task. For instance, if goods are to be loaded and some worker is instructed to place the goods on a carrier in a particular manner, the act of the worker in placing the goods in the prescribed manner, cannot be described as managing the goods. It is a simple direction given to the worker who has to execute it in the way prescribed. It is quite natural that some sort of application of mind is required in each and every aspect of the work done. As in the above example when the worker will lift the goods, he is expected to be vigilant in picking up the goods moving towards the carrier and then placing them. This act of the worker cannot be described as managing the goods because he simply followed the direction given to him. On the other hand, `managing' encompasses not only the simple execution of a work, but also certain other aspects, such as planning for the way in which the execution is to be done coupled with the overall responsibility in a larger sense. Thus it is manifest that the word `managing' is wider in scope than the word `executing'. Rather the later is embedded in the former and not *vice versa*.

8. Adverting to the facts of the instant case it is observed that the assessee performed freight and logistics services outside India in respect of consignments originating from India undertaken to be delivered by Menlo India. The role of the assessee in the entire transaction was to perform only the destination services outside India by unloading and loading of consignment, custom clearance and transportation to the ultimate customer. In our considered opinion, it is too much to categorize such restricted services as managerial services. We, therefore, jettison this contention raised on behalf of the Revenue.

9. Now we take up the next component of the definition of "fees for technical services", being `consultancy services', which has been pressed into service by the learned CIT(A) to fortify his view that the amount received by the assessee is covered within section 9(1)(vii). The word "consultancy" means giving some sort of consultation *de hors* the performance or the execution of any work. It is only when some consideration is given for rendering some advice or opinion etc., that the same falls within the scope of "consultancy services". The word `consultancy' excludes actual `execution'. The nature of services, being freight and logistics services provided by the assessee to Menlo India has not been disputed by the authorities below. There is nothing like giving any consultation worth the name. Rather such payment is wholly and exclusively for the execution in the shape of transport, procurement, customs clearance, delivery, warehousing and picking up services. That being the position, we opine that the payment in lieu of freight and logistics services cannot be ranked as consultancy services.

10. The only left over component of the definition of "fees for technical services" taken note of by the ld. CIT(A) is "technical services". He observed that the assessee's business structure is time bound service coupled with continuous real time transmission of information by using and also making available its technology in the form of sophisticated equipments and software etc. The learned CIT(A) has held that : "in order to ensure efficient and timely delivery and to provide continuous real time information, the Appellant is required to use sophisticated technology for which the Indian entity is also equally involved and to whom the appellant is committed to providing the requisite software and equipment". The learned CIT(A) has also accentuated on the clause 2 of the Agreement which reads as under:-

> *"2. Contractor shall separately execute a Technology and Software license agreement for the provision of computer equipment and software supplied by SCS. Contractor shall separately execute a Trademark license agreement for the use of any marks or brands owned by United Parcel Service of America, Inc. The fee payable by Contractor under paragraph 3.1 will not include any royalty amount relating to the use of intangible property or information."*

11. On going through clause 2 of the Agreement, it is obvious that Menlo India shall `separately execute a technology and software license agreement' for the provision of computer equipment and software supplied by the assessee. It is nobody's case that the consideration in question relates to the supply of any computer equipment and software by the assessee to Menlo India. We fail to appreciate as to how this clause 2 makes the services provided by the assessee as "technical". Rather clause 2 mandates to execute a separate Technology and Software license agreement for the provision of computer equipment and software. How is it that the consideration for the services can be attributed to a proposed agreement, which has yet to see the light of the day.

12. The learned CIT(A) has also harped on "transportation of time sensitive packages" with a view to bring the services provided by the assessee within the fold of "technical services". In reaching this conclusion the learned CIT(A) also relied on the order passed by the Mumbai bench of the Tribunal in *Blue Dart Express Limited Vs. JCIT [(2000) 75 ITD 414 (Mum.)]*. Let us examine the facts of that case. The assessee there claimed deduction u/s 80-O in respect of its foreign exchange earnings for rendering technical / professional services to a US Multi International company. During the course of assessment proceedings, the A.O. required the assessee to furnish the nature of services rendered and also the calculation of deduction. The assessee did it. On being satisfied the A.O. granted deduction u/s 80-O. By exercising the power u/s 263, the learned

CIT held the assessment order to be erroneous and prejudicial to the interest of the Revenue to the extent of granting deduction u/s 80-O. When the matter came up before the Tribunal, it was observed that the issue is debatable and hence outside the ambit of section 263. Apart from that, it was also observed that the assessee was engaged in integrated air and ground transportation of time sensitive packages to various destinations rendering commercial services. It was in this context that the assessee was held to be eligible for deduction u/s 80-O. At this juncture it will be useful to note that at the material time section 80-O provided for deduction on any `*income by way of royalty, commission, fees or any similar payment received by the assessee from the Government of a foreign State or a foreign enterprise in consideration* ***for the use*** *outside India* ***of*** *any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial,* ***commercial*** *or scientific* ***knowledge, experience or skill*** *made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee,* ***or in consideration of technical or professional services*** *rendered or agreed to be rendered outside India to such Government or enterprise by the assessee'.* From the above quoted part of sec. 80-O, it can be seen that the deduction at that time was available not only in respect of income as a consideration for the use of `technical or professional services' but also any `commercial….knowledge experience or skill'. Theses two sources are distinct from each other as can be seen from the employment of word `or' between them. In order to qualify for deduction under this section, the income could have resulted from the rendering of `technical or professional services' or commercial knowledge, experience or skill etc. When the tribunal in *Blue Dart Express Limited (supra)* held the assessee to be entitled to deduction, it was considering all the species of the services set out in section 80-O and not only `technical or professional services'. It was in the light of such language of the provision that the Tribunal held the assessee to be eligible for relief u/s 80-O.

We are currently dealing with section 9(1)(vii), being the `fees for technical services' and the definition of such expression is restricted only to `managerial, technical or consultancy services' and does not have any such elements as are there in section 80-O. The decision in the case of *Blue Dart Express Limited (supra)* came up for consideration before the Mumbai bench of the tribunal in *Dampskibsselskabet AF 1912 Vs. Addl.DIT (International Taxation) [(2011) 51 DTR 148]* (to which one of us, namely, the ld. JM is party) in which it has been held that the *ratio* laid down in that case cannot be universally applied. Due to material difference in the language of sections 9(1)(vii) and 80-O as discussed above, we hold that the decision in *Blue Dart Express Limited (supra)*, can not be held to be supporting the case of the Revenue.

13. The ld. CIT(A) in reaching the conclusion that the assessee rendered `technical services' also observed that its `business structure is time bound service coupled with continuous real time transmission of information by using and also making available advanced technology in the form of sophisticated equipment and software.' He was swayed by the contention of the assessee that the Manlo India or the ultimate customer could track the movement of cargo with the help of computers. We have noted supra that the consideration received by the assessee did not include any consideration for the supply of any equipment to Manlo India. Now we will examine as to whether the use of computer in any manner for knowing the location of the cargo at a particular time, can be held as technical service.

14. *Explanation* to section 9(1)(vii) defines the expression "fees for technical services" as consideration for rendering `managerial, technical or consultancy services'. It is seen that there is no definition of the term "technical services" in the Act.

15. The principle of *noscitur a sociis* mandates that the meaning of a word is to be judged by the company of other words which it keeps. This rule is wider in scope than the rule of *ejusdem generis.* In order to discover the meaning of a word which has not been defined in the Act, the Hon'ble Supreme Court has applied the principle of *noscitur a sociis* in several cases including *Aravinda Paramila Works Vs. CIT [(1999) 237 ITR 284 (SC)].* As noted above the word `technical' has been sandwiched between the words `managerial' and `consultancy' in Explanation 2 to sec. 9(1)(vii) and no definition has been assigned to the `technical' services in the relevant provision, we need to ascertain the meaning of the `technical services' from the overall meaning of the words `managerial' and `consultancy' services by applying the principle of *nosticur a sociis*. It has been held above that the `managerial services' and `consultancy services' pre-suppose some sort of direct human involvement. These services cannot be conceived without the direct involvement of man. These services can be rendered with or without any equipment, but the human involvement is inevitable. Moving in the light of this rule, there remains no doubt whatsoever that the technical services cannot be contemplated without the direct involvement of human endeavor. Where simply an equipment or a standard facility *albeit* developed or manufactured with the use of technology is used, such a user cannot be characterized as using `technical services'.

16. Coming back to the facts of the present case, even if we accept the learned first appellate authority's point of view that the computer could be used in tracing the movement of the goods, such use of computer, though indirect, remote and not necessary, can not bring the payment for freight and logistics services within the purview of "technical services". The essence of the consideration for the payment is rendering of services and not the use of computer. If incidentally computer is used at any stage, which is otherwise not necessary for rendering such services, the payment for freight and logistics will

not partake of the character of fees of `technical services'. We, therefore, repel this contention raised on behalf of the Revenue.

17. Thus it can be noticed that the payment made to the assessee in question is not a consideration for managerial or technical or consultancy services. That being the position, it cannot fall within the ambit of section 9(1)(vii).

18. Section 4 provides that the income tax shall be charged on the total income of any assesse of the previous year for any assessment year at the rates in accordance with and subject to the provisions of this Act. Scope of total income of any person has been enshrined in section 5. The assessee in question is a non-resident company. Section 5(2) mandates that the total income of a non-resident includes the income from whatever source derived which is received or is deemed to be received in India; or accrues or arises or is deemed to accrue or arise in India. The only possibility of the receipt by the assessee in the present facts and circumstances qualifying for inclusion in the total income, can be under section 9. We have observed that section 9(1)(vii) is not applicable. Now let us examine the prescription of section 9(1)(i) which deals with the income accruing or arising from any business connection in India. It provides that where an income accrues or arises whether directly or indirectly through or from any business connection in India etc., it shall be deemed to accrue or arise in India. *Explanation 1(a)* states that in the case of a business of which all operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. This *Explanation* makes it prominent that only that part of the income from business operations can be said to be accruing or arising in India, as is relatable to the carrying on of operations in India. In other words, if a non-resident earns any income from India by means of operations carried on outside India, that

will not fall within the scope of section 9(1)(i). Even *Explanation* below section 9(2), as relied on by the ld DR, requiring inclusion of income in the total income of the non-resident whether or not the non-resident has a residence or place of business or business-connection in India or the non-resident has rendered services in India, is applicable only in respect of clauses (v) to (vii). Clause (i) of section 9 has not been included by the legislature within the ambit of this *Explanation*. It shows that unless a non-resident earns income from business operations carried out in India, such income cannot be deemed as accruing or arising in India. Reverting to the facts of the instant case, it is crystal clear that the assessee rendered "International services" outside India which required the payment in question. If this is the position, which has not even been disputed by the learned Departmental Representative, then there can be no question of roping such income within the ken of section 9(1)(i).

19. It is, therefore, patent that the payment received by the assessee neither falls u/s 9(1)(i) nor u/s 9(1)(vii). Since the income cannot be described as deemed to accrue or arise in India and there is no doubt about such income having not been received or deemed to be received or accruing or arising in India, the taxability of such income fails. We, therefore, overturn the impugned order and hold that the amount in question cannot be charged to tax.

20. In the result, the appeal is allowed.

Order pronounced on this **22nd day of February, 2012.**

Sd/-	**Sd/-**
(N.V.Vasudevan)	**(R.S.Syal)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai : **22nd February, 2012.**
Devdas*

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1. The Appellant.
2. The Respondent.
3. The CIT concerned
4. The CIT(A) - II, Mumbai
5. The DR/ITAT, Mumbai.
6. Guard File.

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By Order

Assistant Registrar, ITAT, Mumbai.