IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated this the 15th day of March, 2012

PRESENT

THE HON'BLE MR. JUSTICE N KUMAR

AND

THE HON'BLE MR. JUSTICE RAVI MALIMATH

ITA No. 549 of 2007

C/w

ITA No. 550 of 2007 &

ITA No. 551 of 2007

ITA No.549 OF 2007

BETWEEN:

1. The Commissioner of Income Tax
Central Circle
C.R. Building
Queens Road
Bangalore

2. The Income-Tax Officer
(International Taxation)
Ward 19(1)
C.R. Building

Queens Road
Bangalore

...Appellants

(By Sri Mohan Parasaran,
Additional Solicitor General with
Sri D.L. Chidananda, Sri M.V. Seshachala
And Sri K.V. Arvind, Advocates)

AND:

M/s. De Beers India Minerals Pvt. Ltd.,
No.17/6, Ali Askar Road Cross
Bangalore

...Respondent

(By Sri Girish Dave & K. P. Kumar
Senior Counsel for
M/s. King & Patridge, Advocates)

This ITA filed U/s. 260A of I.T. Act, 1961 arising out of order dated 02-02-2007 passed in ITA No.3402/Bang/2004, for the assessment year 2004-05 praying to: (i) formulate the substantial questions of law stated therein; (ii) allow the appeal and set aside the orders passed by the ITAT, Bangalore in ITA No.3402/Bang/2004 dated 02-02-2007 confirming the order of the Appellate Commissioner and confirm the order passed by the Income Tax Officer (International Taxation), Ward-19(1), Bangalore.

ITA No.550 OF 2007

BETWEEN:

1. The Commissioner of Income Tax
Central Circle
C.R. Building

Queens Road
Bangalore

2. The Income-Tax Officer
(International Taxation)
Ward 19(1)
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Queens Road
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...Appellants

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No.17/6, Ali Askar Road Cross
Bangalore

...Respondent

(By Sri Girish Dave & K. P. Kumar
Senior Counsel for
M/s. King & Patridge, Advocates)

This ITA filed U/s. 260A of I.T. Act, 1961 arising out of order dated 02-02-2007 passed in ITA No.3401/Bang/2004, for the assessment year 2004-05 praying to: (i) formulate the substantial questions of law stated therein; (ii) allow the appeal and set aside the orders passed by the ITAT, Bangalore in ITA No.3401/Bang/2004 dated 02-02-2007 confirming the order of the Appellate Commissioner and confirm the order passed by the Income Tax Officer (International Taxation), Ward-19(1), Bangalore.

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Central Circle
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Senior Counsel for
M/s. King & Patridge, Advocates)

This ITA filed U/s. 260A of I.T. Act, 1961 arising out of order dated 02-02-2007 passed in ITA No.3400/Bang/2004, for the assessment year 2004-05 praying to: (i) formulate the substantial questions of law stated therein; (ii) allow the appeal

and set aside the orders passed by the ITAT, Bangalore in ITA No.3400/Bang/2004 dated 02-02-2007 confirming the order of the Appellate Commissioner and confirm the order passed by the Income Tax Officer (International Taxation), Ward-19(1), Bangalore.

These ITAs coming on for hearing this day, ***N. KUMAR J.,*** delivered the following:

JUDGMENT

As the question involved in these three appeals is identical, they are taken up for consideration together and disposed of by this common order.

2. The assessees in these appeals are private companies engaged in the business of prospecting and mining for diamonds and other minerals. They have been granted licences (Reconnaissance Permits) by the State Government of Karnataka, Andhra Pradesh and Chattisgarh for mineral reconnaissance activities. Reconnaissance is the early stage of exploration. During the early stage, various techniques are employed. For the purpose of carrying out geophysical survey,

the assessees entered into an agreement with M/s Fugro Elbocon B.V. Netherlands (hereinafter referred to as 'Fugro'). Fugro had a team of experts who are specialized in performing air borne geophysical services for clients, process the data acquired during the survey and provide necessary reports. The services are engaged to conduct the air borne survey for providing high quality, high resolution, geophysical data suitable for selecting probable kimberlite targets. For the technical services rendered by them the assessees had paid consideration. The Assessing Officer treated the consideration paid to Fugro under the agreement as falling within the definition of fees for technical services under Article 12 of the Indo-Netherlands Double Tax Avoidance Agreement (DTAA) read with Section 90 of the Income Tax Act 1961, for short, hereinafter referred to as the 'Act'. Alternatively, he has also held that payment in question was for development and transfer of a technical plan or technical design. Thus he held that the assessees had failed to deduct tax on the payments made to Fugro and hence treated the assessees as assessees in

default. He levied tax under Section 201(1) and interest under Section 201(1A) of the Act, for all the three assessment years. Aggrieved by the said order, the assessees preferred appeals to the Commissioner of Income Tax (Appeals).

3. The appellate authority held that services rendered by Fugro to the assessees and the payments made for it are not covered by Article 12(5) of the DTAA between India and Netherlands. He further held that the Fugro has not imparted any technology to the assessees and they have just used the technology and have gone back with the same. He also observed that in future if the assessees require geological survey of a different area, they will have to engage the services of technical experts like Fugro again. He concluded that no technology has been made available to the assessees by Fugro and therefore the consideration paid does not fall within the definition of Article 12(5) of DTAA between India and Netherlands. On the issue whether the payment was for the development and transfer of a technical plan or a technical

design, he held that it cannot be described as plan or design and it was only raw data that was supplied. Therefore he upheld the contention of the assessee that no tax was deductible on the payments made to Fugro. Aggrieved by the said order, the Revenue preferred appeals to the Tribunal.

4. The Tribunal, after referring to various provisions of the agreement, judgments rendered by various Courts and also looking into the provisions of DTAA between India and Netherlands, held that the payment in question for the services rendered would not fall within the definition of fees for technical services under Article 12(5) of the DTAA between India and Netherlands. Fugro has surveyed, collected and processed the data on behalf of the assessees. There is no doubt that Fugro performed the services using technical knowledge and expertise but such technical experience, skill or knowledge has not been made available to the assessees. In so far as the second question, the Tribunal held that Fugro compiles the data and processes them for error correction and

delivers it to the assessees in a computer readable media. Using the raw input data provided by Fugro, the assessees using further process in software technology, which are not owned or provided by Fugro, generates a report to determine probable targets. Thus the payments to Fugro cannot be considered as the payments for technical, plan and design much less, for the development and transfer of them. Fugro is engaged in providing services relating to collection and processing of data which always belong to the assessees. The purpose of agreement is, for provision of services and not for supply or transfer of technical plan or design. The reports and maps are only an additional mode of report of data and cannot be construed as technical plan or technical design. Fugro has not developed or transferred any technical plan or design to the assessees so as to attract Article 12(5)(b) of the India and Netherlands DTAA. Accordingly they dismissed the appeals. Aggrieved by the said order, the Revenue is in appeals.

5. Sri. Mohan Parasaran, the learned Addl. Solicitor General appearing for the Revenue contended that admittedly, the assessees have approached Fugro for technical services, who in turn has rendered technical services to the assessees. After conducting geophysical survey, the service provider has made available their technical knowledge to the assessees. The said knowledge and information which is made available to the assessees was used by the assessees to carry on its work on its own without reference to the service provider. The said technical know-how made available is of an enduring nature. The technical know how, which is made available has a direct nexus with the business which the assessees are carrying on. Therefore, it is not necessary that there should be a transfer of technology to constitute fees for technical services as defined under Article 12 of the agreement. Example 7 of the India-US Agreement clearly applies to the facts of this case. As the information furnished is not of a commercial nature but purely of technical nature, it satisfies the requirement of Article 12(5)(b) and thus it attracts tax under the Act. The reasoning

of the appellate authorities that there is no transfer of technical know-how and therefore the liability to tax is not attracted is on the face of it is erroneous and therefore requires to be set aside.

6. Per contra, the learned Counsel Sri. Girish Dave, appearing for the asseessees contended that no doubt Fugro has utilized their technology to conduct geophysical survey as per the requirement of the assessees. In fact, the assessees have provided even the helicopter and other equipments, but it is the Fugro which has conducted the air borne survey and has taken the photographs of the entire area which depicts the contours of the survey under the earth and has provided that information to the assesseee. No doubt that information made available to the assessees is useful to the assessees in carrying out the further operation which is a part of their business. But Fugro has not made available the technical know-how of conducting the survey. Unless that technical knowledge is made available to the assessee by Fugro, as is clear from

Article 12(5)(b), the liability to pay tax would not arise. In other words, the real test is, after making available the said information, the assessees should be able to do what the service provider did without reference to the service provider in future. Therefore he submits that as rightly held by the appellate authorities the technical knowledge is not made available and therefore, the said order do not call for interference. Similarly, Fugro has not developed and transferred any technical plan or technical design as contemplated under the aforesaid provisions. What they have transferred is the photographs which they have taken which does not involve any development and therefore the said provision has no application to the facts of this case.

7. After hearing the learned counsels it was felt that the substantial questions of law framed could be re-framed and accordingly it is re-framed as under:-

"1) Whether on the facts and circumstances of the case and the law finding of the appellate authorities that the income received by M/s. Fugro Ellbocon B V Netherlands from the assessee for services to supply technical data including drawings, plans, maps etc., (geological survey) to identify the Kimberlite (mineral deposits) targets would not fall within Section 9(1)(vii) of the Income Tax read with Article 12(5) of the DTA agreement between India and Netherlands is perverse and arbitrary ?

2) Whether payment to Fugro was for the development and transfer of technical plan or technical design to the assessee?"

8. The answer to these questions is dependent on the interpretation to be placed on the statutory provisions as well as the terms as contained in the Double Taxation Avoidance Agreement. The relevant statutory provisions are contained in Section 9 of the Act. Section 9 deals with income deemed to accrue or arise in India. Section 9(1) reads as under:-

"9(1) The following incomes shall be deemed to accrue or arise in India:-

(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 utilised 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 utilised 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 the 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

a Judge of the Federal Court or of a High Court within the meaning of the Government of India Act, 1935, continues to serve on or after the commencement of the Constitution as a Judge in India.

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 residence or place of business or business connection in India; or

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

9. Article 12 of the DTAA between India and Netherlands reads as under:

ARTICLE 12- Royalties and Fees for Technical Services-

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 89, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries.".

(2) Notwithstanding anything contained in sub-section(1), any pension payable outside India to a person residing permanently outside India shall not be deemed to accrue or arise in India, if the pension is payable to a person referred to in article 314 of the Constitution or to a person who, having been appointed before the 15th day of August, 1947, to be

1. *Royalties and fees for "technical services" arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*
2. *However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or the fees for technical services.*
3. *The competent authorities of the States shall by mutual agreement settle the mode of application of paragraph 2.*
4. *The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.*

5. *For purposes of this Article, "fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:*

(a) *are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is received; or*

(b) *make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.*

6. *Notwithstanding paragraph 5, "fees for technical services" does not include amounts paid:*

(a) *for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property:*

(b) *for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the*

operation of ships or aircraft in international traffic:

(c) for teaching in or by educational institutions;

(d) for services for the personal use of the individual or individuals, making the payment; or

(e) to an employee of the person making the payments or to any individual or partnership for professional services as defined in Article 14 (Independent Personal Services) of this Convention.]

(7) The income by way of fees for technical services payable.

10. Section 90 deals with the agreement with foreign countries or specified territories where the double tax relief is provided. The said Section reads as under:-

[Agreement with foreign countries or specified territories.

"90.(1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,-

(a) for the granting of relief in respect of-

(i) income on which have been paid both income tax under this Act and income tax in that country or specified territory, as the case may be, or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, or

(c) for exchange of information for the prevention of evasion or avoidance of income tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be,

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

(3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same, meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf.

Explanation 1.- For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company.

Explanation 2.- For the purposes of this section, "specified territory" means any area outside India

which may be notified as such by the Central Government.]

12. From the aforesaid statutory provisions and the relevant Clauses in the DTAA it is clear that there is marked distinction between royalty and fees for technical services. Explanation (2) to Clause(vi) of sub-Section(1) of Section 9 defines royalty for the purpose of the said clause. It amounts to consideration for transfer of or any rights or imparting of information concerning the working of, or the use of a patent, invention, model, design, secret formula or process or trade mark or similar property. It also includes imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill. Further the use or right to use any industrial, commercial or scientific equipment and transfer of all or any other rights and the intellectual Properties mentioned therein or rendering of any services in connection with the activities referred to in sub-Clauses (i) to (iv) (iv)(a) and (v). Therefore fees paid for transfer of rights and

services rendered in that regard constitutes royalty. Explanation 2 to Clause (vii) of sub-Section (1) of Section 9 defines the phrase fees for technical services for the purpose of clause (vii). It is the consideration for the rendering of any managerial, technical or consultancy services. Here there is no question of any right. It is purely for the services rendered. So under the Indian law whether the consideration paid is for the transfer of a right in any Intellectual Property or for rendering of any services which are managerial, technical or consultancy services, the liability to tax is attracted. In the case on hand it is not in dispute that the nature of services rendered is technical in nature. Therefore, it is liable to tax. But this liability arises under the Double Taxation Avoidance Agreement. Section 90 which deals with the Double Taxation relief provides that the provisions of the DTAA overrides the provisions of the Income Tax Act in the matter of ascertainment of chargebility to Income-Tax and ascertainment of total Income-Tax. Infact, the Apex Court in the case ***UNION OF INDIA vs. AZADI BACHAO ANDOLAN AND ANOTHER***

reported in 263 ITR 706(SC) dealing with this provision held as under:-

> *"Taxation of foreign companies and other non-resident taxpayers:*
>
> *43. Tax treaties generally contain a provision to the effect that the laws of the two contracting States will govern the taxation of income in the respective State except when express provision to the contrary is made in the treaty. It may so happen that the tax treaty with a foreign country may contain a provision giving concessional treatment to any income as compared to the position under the Indian law existing at that point of time. However, the Indian law may subsequently be amended, reducing the incidence of tax to a level lower than what has been provided in the tax treaty.*
>
> *43.1 Since the tax treaties are intended to grant tax relief and not put residents of a contracting country at a disadvantage vis-à-vis other taxpayers, section 90 of the Income-tax Act has been amended to clarify that any beneficial provision in the law will not be denied to a resident*

of a contracting country merely because the corresponding provision in the tax treaty is less beneficial."

The provisions of sections 4 and 5 of the Act are expressly made "subject to the provisions of this Act", which would include section 90 of the Act. As to what would happen in the event of a conflict between the provision of the Income tax Act and a notification issued under section 90, is no longer res integra.

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A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the Income-tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the Legislature to make a departure from the general principles of chargeability to tax under section 4 and the general principle of

ascertainment of total income under section 5 of the Act, then there was no purpose in making those sections "subject to the provisions" of the Act. The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under section 90 towards implementation of the terms of the DTAs which would automatically override the provisions of the Income-tax Act in the matter of ascertainment of chargeability to income-tax and ascertainment of total income, to the extent of inconsistency with the terms of the DTAC.

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Section 90, as we have already noticed (including its precursor under the 1922 Act), was brought on the statute book precisely to enable the executive to negotiate a DTAC and quickly implement it. Even accepting the contention of the respondents that the powers exercised by the Central Government under section 90 are delegated powers of legislation, we are unable to see as to why a delegatee of legislative power in all cases has no power to grant exemption. There are provisions galore in statutes made by Parliament and the State Legislatures wherein the power of

conditional or unconditional exemption from the provisions of the statutes are expressly delegated to the executive. For example, even in fiscal legislation like the Central Excise Act and Sales Tax Act, there are provisions for exemption from the levy of tax (see section 5A of the Central Excise Act, 1944, and section 8(5) of the Central Sales Tax Act, 1956). Therefore, we are unable to accept the contention that the delegate of a legislative power cannot exercise the power of exemption in a fiscal statute."

13. Under the Act if the consideration paid for rendering technical services constitutes income by way of fees for technical services, it is taxable. However, Article 12 of the aforesaid India-Netherlands Treaty defines fees for technical services for the purpose of Article 12 which deals with royalties and fees for technical services. The fees for technical services means the payment of any amount to any person in consideration for rendering of any technical services only, if such services make available technical knowledge, expertise, skill, know-how or processes. If the technical knowledge

expertise, skill, know how or process is not made available by the service provider, who has rendered technical service for the purpose of Article 12 of DTAA it would not constitute fees for technical services. To that extent the definition of fee for technical services found in the agreement is inconsistent with the definition of fees for technical services provided in Explanation 2 to Clause(vii) of sub-Section (1) of Section 9. In view of Section 90 the definition of fees for technical services contained in the agreement overrides the statutory provisions contained in the Act. In fact, the latest agreement between India and Singapore further clarifies this position, where they have explained the meaning of the word 'make available'. According to the aforesaid definition fees for technical service means payments of any kind to any person in consideration for services of technical nature if such services make available technical knowledge, experience, skill, know how or processes, which enables the person acquiring the service to apply technology contained therein. Though this provision is not

contained in India Netherlands Treaty, by virtue of Protocol in the agreement, Clause (IV) (2) eads as under:-

> *"If after the signature of this convention under any Convention or Agreement between India and third State which is a member of the OECD India should limit its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention."*

14. Therefore the Clause in Singapore agreement which explicitly makes it clear the meaning of the word 'make available', the said clause has to be applied, and to be read into this agreement also. Therefore, it follows that for attracting the liability to pay tax not only the services should be of technical

in nature, but it should be made available to the person receiving the technical services. The technology will be considered 'made available' when the person who received service is enabled to apply the technology. The service provider in order to render technical services uses technical knowledge, experience, skill, know how or processes. To attract the tax liability, that technical knowledge, experience, skill, know how or process which is used by service provider to render technical service should also be made available to the recipient of the services, so that the recipient also acquires technical knowledge, experience, skill, know how or processes so as to render such technical Services. Once all such technology is made available it is open to the recipient of the service to make use of the said technology. The tax is not dependent on the use of the technology by the recipient. The recipient after receiving of technology may use or may not use the technology. It has no bearing on the taxability aspect is concerned. When the technical service is provided, that technical service is to be made use of by the recipient of the service in further conduct of

his business. Merely because his business is dependent on the technical service which he receives from the service provider, it does not follow that he is making use of the technology which the service provider utilises for rendering technical services. The crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know how or process to the recipient of the technical service, in view of the Clauses in the DTAA, the liability to tax is not attracted.

15. The learned Additional Solicitor General relied on 3 Judgments to point out that was the earlier view. Now there is a departure supporting the department. The first Judgment on which reliance is placed is, the Judgment of the Advance Ruling Authority in the case of ***PERFETTI VAN MELLE HOLDING***, where it was held as under:-

"The expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilise the knowledge or know-how in future on his own. "By making available the technical skills or know-how, the recipient of the same will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider. So when the expertise in running the industry run by the group is provided to the Indian entity in the group to be applied in running the business, the employees of the Indian entity get equipped to carry on that business model or service model on their own without reference to the service provider, when the service agreement comes to an end. It is not as if for making available, the recipient must also be conveyed specifically the right to continue the practice put into effect and adopted under the service agreement on its expiry. "

16. In the aforesaid case, the applicant holding Company was to provide to its subsidiary Company in India the licence to manufacture and sell products, the licence to use

technology, technical marketing and commercial know-how in the manufacture, sales and advertisement and promotion of the products, offer technicians, marketers, salesman, in-house legal counsel and the experienced employees to assist in the activities mentioned above. Under the Service Agreement, specifically the Service recipient require the use of proprietary knowledge and processes belonging to Perfetti Group. Specified services such as Accounting, budgeting, sales, marketing, forex management, loans, HR, legal support etc. and specified services are to be provided on continuous basis. Therefore, it was held in the aforesaid case, that the case falls within the purview of Article 12.5(a) of the DTAC on such service which are ancillary and subsidiary to the applicant or enjoyment of right, property or information for which the payment prescribed in paragrapn 4 of the Article is to be made. Therefore, it is a case of royalty and not fee for technical service. Even otherwise it is clear under the terms of the agreement the technical know-how in the manufacturing, sales, advertisement and promotion of the products is made available. Therefore, the

aforesaid finding recorded is legal and cannot be found fault with.

17. Yet another Judgment relied on is in the case of ***SHELL INDIA MARKETS PRIVATE LTD.,*** where also the Authority For advance Ruling held relying on findings recorded in ***PERFETTI MARKETING*** case where it was held that "the expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilise the knowledge or know-how in future on his own." Here, the industrial specific expertise is provided to the Indian entity which is applied in running its business. The employees of the Indian Company get equipped to carry on their business, market or service market on their own without reference to the service provider when the service Agreement comes to an end. It is a case of making available the technical knowledge. The recipient of the service was conveyed specifically the right to continue the practice put into effect and adopt it under the agreement on its expiry.

18. From the aforesaid statement of law it is clear the test is whether the recipient of the service is equipped to carry on his business without reference to the service provider. If he is able to carry on his business in future without the technical service of the service provider in respect of services rendered then, it would be said that technical knowledge is made available.

19. The 3rd Judgment on which reliance was placed is ***AREVA T & D INDIA LIMITED***. Again the opinion expressed by the Advance Ruling Authority whereunder under the terms of the agreement the French Company has to provide support service to the Central team in the area of Information Technology to the Applicant and to its subsidiaries in the world. The provision of support services by the French Company would itself make available, the technical knowledge/experience to the Applicant. In that context it was held that the service provider under the IT agreement are in the

for its business. The use of equipment is with the usual condition of warranty and the network could be managed by the applicant. The equipment installed is to be integrated into Areva Net Global Network which is managed and controlled by the French Company for equipment installation at gateway sites in Noida and Chennai constitute PE in India as the equipment has been used by the French Company in the course of its business in providing technical data to the group companies.

21. Therefore from the aforesaid Judgments it is not possible to hold that there is a departure by the advance Ruling Authority in respect of its earlier views. It is in this background we have to look at the facts of this case, in order to find out whether the service provider has made available the technical knowledge to the assessee so as to foist the liability of payment of tax.

nature of fees for technical services and taxable under the DTAA as well as under the Act.

20. In the aforesaid case the business of the applicant being that of executing the projects for transmission and distribution of power on turnkey basis, it is the French Company and other Group Companies which continuously upgrade designs, model and other engineering plans and formulae which are used by the applicant for the purpose of its business. The main objective of setting up of an exclusive platform is not for providing information technology but for enabling the applicant to use data in the form of designs, plan, model and engineering formulae etc., in 2D & 3D form. The character of the payment is clearly royalty as defined in Article 13(3) of DTAA as well as to explanation 2 to Section 9(1)(vi) of the Act. The agreement clearly establishes that the applicant has to prepare for the installation at the fixed gateway sites for proper installation of equipment by France telecom. It is to act as bailee of the equipment which is under its control and use

22. What is the meaning of "make available". The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology "making available", the technical knowledge, skills, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered "made available" when the person acquiring the

service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as "fee for technical/included services" only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.

23. The agreement entered into between the assessees and the Fugro makes it clear that the objective of the survey will be to provide high quality, high resolution geophysical data suitable for selecting probable kimberlite targets. The assessees acknowledge the Fugro to be an expert in all aspects of the air borne survey and subsequent data processing. All operations, tests and calibrations have to be carefully undertaken to ensure the highest possible data quality and to

meet or exceed the specifications described in the agreement. It is the responsibility of the Fugro to take the appropriate action to maintain the level of data quality. Survey areas are also mentioned in the agreement. The contract provides that all helicopter charges for the entire survey will be the responsibility and cost of the assessees.

24. The Fugro air borne services provides four varieties of applications of advanced geophysical mapping technologies. They are Electromagnetic, Aeromagnetic, Airborne Gamma-Ray Spectrometry, Airborne Gravity. In the instant case, Fugro air borne surveys helicopter borne time-domain EM system known as DIGHEM was adopted to carry out the survey. A copy of the survey report is also placed on record. The said report discloses that survey was conducted in 8 blocks. The particulars are clearly set out. It also sets out that the air borne data acquisition system utilized on the project consists of the sub-systems which are set out therein. A Bell 206L helicopter registration VT-DAK was used for the survey. The

helicopter pilots and aircraft engineers were contracted from Deccan Aviation Pvt. Ltd., by the assessees. The DIGHEM compact system specifications are also provided. They have also set out the particulars such as EM Receiver and Logging Computer, GPS Receiver, Navigation System, Magnetometer, Altimeter, Radar Alitmeter and Barometric Altimeter. They also provided Ground Data Acquisition Equipment, GPS Base Station System, Magnetic Base Station System and Equipment Calibrations and Monitoring. Data from the air craft and base stations were transferred to the field processing computer by flash disk. Preliminary processing and quality was carried out on a daily basis. Data quality was verified by the assessees representative in the field on a daily basis. Photographs are taken. Tests and Calibrations report are also furnished. Text file indicating survey information co-ordinating system, processing techniques and equipment specifications are also provided.

25. From the aforesaid material it is clear that Fugro conducted air borne survey using its specilized equipments. Helicopter for the survey was hired by the assessees. All the logistics of the survey such as flight schedule, re-flights survey lines, control lines, positioning, etc., were set up by Fugro. Fugro deputed technical personnel for conducting the survey and the data collected from the survey was provided to the assessees in a particular format. The consideration paid under the agreement with Fugro was essentially for providing specific data for which Fugro was required to conduct the airborne survey. Fugro undertook all the operations, test and calibrations in order to provide the assessees with the highest possible data quality. Fugro has performed the surveys using substantial technical skills, knowledge and expertise. After completion of the said survey work, Fugro has delivered the following products:

(1) *Raw XYZ file for each block with header.*

(2) *Final XYZ file for each block with header.*

(3) *Digital plot files for the RTP and 3kHz Resistivity maps for each block.*

(4) *Aircraft data for entire survey. Pseudocolour 3kHz resistivity map for each block, Pseudo-sunshare RTP TMI map for each block, Acquisition and processing report (Tests and Calibrations report), Analog rolls for the entire survey.*

26. Thus, in terms of the contract entered into with Fugro, they have given the data, photographs and maps. But they have not made available technical expertise, skill or knowledge in respect of such collection or processing of data to the assessees, which the assessee can apply independently and without assistance and undertake such survey independently excluding Fugro in future. The Fugro has not made available the aforesaid technology with the aid of which they were able to collect the data, which was passed on to the assessees as a technical service. In other words, Fugro has rendered technical service to the assessees. They have not made available the

supplied by way of technical services and put its experience in identifying the locations where the diamonds are found and carrying on its business. But the technical services which is provided by Fugro will not enable the assessees to independently undertake any survey either in the very same area Fugro conducted the survey or in any other area. They did not get any enduring benefit from the aforesaid survey. In that view of the matter, though Fugro rendered technical services as defined under Section 9(1)(vii) Explanation 2, it does not satisfy the requirement of technical services as contained in DTAA. Therefore the liability to tax is not attracted. Accordingly the first substantial question of law is answered in favour of the assessees and against the Revenue.

28. Fugro is engaged in providing services relating to collection and processing of the data. The contract is for providing of services and not for supply of technical design or plan. Fugro compiles the data and processes them for error correction and delivers it to the assessees in a computer

technical knowledge with which they rendered technical service. There is no transmission of technical knowledge, expertise, skill, etc., from Fugro along with technical services rendered by them. The assessees are completely kept in dark about the process and the technologies which the Fugro adopted in arriving at the information/data which is passed on to the assessees as technical service. The assessee is unable to make use of the said technical knowledge by itself in its business or for its own benefit without recourse to Fugro. In fact, the question whether along with rendering technical services, whether the technical knowledge with which that services was rendered was also made available to the assessees/customers is purely a question of fact which is to be gathered from the terms of the contract, the nature of services undertaken and what is transmitted in the end after rendering technical services. If along with technical services rendered, if the service provider also makes available the technology which they used in rendering services, then it falls with the definition of fee for technical services as contained in DTAA. However, if

the technology is not made available along with the technical services and what is rendered is only technical services and the technical knowledge is with-held, then, such a technical service would not fall within the definition of technical services in DTAA and not liable to tax.

27. In the background of the aforesaid principles and facts of this case, it is clear that assessees acknowledge the services of Fugro for conducting aerial survey, taking photographs and providing data information and maps. That is the technical services which the Fugro has rendered to the assessees. The technology adopted by Fugro in rendering that technical services is not made available to the assessees. The survey report is very clear. Unless that technology is also made available, the assessees are unable to undertake the very same survey independently excluding Fugro in future. Therefore that technical services which is rendered by Fugro is not of enduring in nature. It is a case specific. That information pertains to 8 blocks. The assessees can make use of the data

readable media. Using this raw input data provided by Fugro, the assessees using further process in software technology, which are not owned or provided by Fugro, generates a report to determine probable targets. The reports and maps are only additional mode of representation of data and it is not a technical plan or design as understood in law. Para 1.15 of the agreement entered into between the assessees and the Fugro, makes it clear that the information and data to any site on which any work services are performed under the agreement shall belong exclusively to the assessees and its assigns and the Fugro shall keep such information strictly confidential. Therefore, the technical plan or design always belong to the ownership of the assessees. It never vested with Fugro. Under the terms of the agreement, the data collected is kept confidential under the supervision of the Government of India. Under the terms of the agreement, the ownership of the data collected or other documents vest with the assessees only and not with Fugro. Therefore the Fugro was never the owner of the said data and hence the question of transfer of such data

does not arise. It is because the assessees were given the licence for prospecting under the provisions of Mines & Minerals (Development and Regulation) Act, 1957. By virtue of the aforesaid licence, the assessees were given the right to undertake reconnaissance, prospecting or mining operations in any area except under and in accordance with the terms and conditions of reconnaissance permit or of a prospecting licence as the case may be of a mining lease granted under the Act and the Rules made thereunder. Reconnaissance permit means permit granted for the purpose of undertaking the reconnaissance operations. Reconnaissance operations means any operations undertaken for preliminary prospecting of a mineral through regional, aerial, geophysical or geochemical surveys and geological mapping on a grid specified from time to time by the Central Government or sub-surface excavation. Prospecting operations means any operations undertaken for the purpose of exploring, locating or proving mineral deposits.

29. Rule 16 of Mineral Concession Rules, 1960 provides that lincensee shall submit to the State Government a six monthly report of the work done by him stating that number of persons engaged and disclosing in full the geological, geophysical or other valuable data collected by him during the period. Further sub-rule (3) makes it clearly obligatory that while submitting the report under sub-rule (1) or (2), the licensee may specify that the whole or any part of the report or data submitted by him shali be kept confidential and the State Government shall thereupon, keep the specified portions as confidential for a period of two years from the expiry of the licence or abandonment of operations or termination of the licencee, whichever is earlier.

30. It is because of the statutory obligation imposed on the licencee in the contract entered into between the assessees and Fugro, it is specifically provided in clause (15) that all information and data relating to any site on which any work or services are performed under the agreement shall belong

exclusively to the assessees and its assigns and the contractor shall keep such information strictly confidential. All information recorded in digital and analog form and all products derived from information are the property of the assessees. The contractor agrees not to divulge any information to any person or organisation without the written permission of the assessees and only to be divulged to the assessee personnel who are specified by the assessees as appropriate persons to whom the contractor may provide information. Further clause (16) provides that the contractor shall not grant entry to any data site or aircraft to any person other than those authorised by the assessees and the contractor shall exercise all due care to preserve the integrity of all information.

31. Therefore the assessees not being possessed with the technical know how to conduct this prospecting operations and reconnaissance operations, engaged the services of Fugro which is expert in the field. By way of technical services Fugro

delivered to the assessees the data and information after such operations. The said data is certainly made use of by the assessees. Not only the said data and information was furnished in the digital form, it is also provided to the assessees in the form of maps and photographs. These maps and photographs which were made available to the assessees cannot be construed as Technology made available. Fugro has not devised any technical plan or technical design. Therefore the question of Fugro transferring any technical plan or technical design did not arise in the facts of these cases. The maps which are delivered are not of kind of any developmental activity. As such, earlier the information which is furnished to the assessees by way of technical services in the digital form is also given in the form of maps. Therefore the case on hand do not fall in the second part of the aforesaid clause dealing with development and transfer of plans and designs. Therefore the second substantial question of law is also answered in favour of the assessees and against the Revenue.

32. In that view of the matter, we do not find any merit in these appeals. ***Accordingly the appeals are dismissed.***

Sd/-
JUDGE

Sd/-
JUDGE

ksp/Rsk/dh/-