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IN THE INCOME TAX APPELLATE TRIBUNAL
"L" Bench, Mumbai

Before Shri B. Ramakotaiah, Accountant Member
& Shri Amit Shukla, Judicial Member

ITA No.4356/Mum/2010
(Assessment year:)

Siemens Limited, 130 Pandurang Budhkar Marg, Worli, Mumbai 400018 PAN: AAACS 0764 L	Vs.	Commissioner of Income Tax (Appeals) – 11 Mumbai
(Appellant)		**(Respondent)**

Assessee by: Shri Sunil Lala, and Ms.Sheetal Jain
Department by: Shri Narendra Kumar, DR

Date of Hearing: 19/12/2012
Date of Pronouncement: 12/02/2013

O R D E R

Per Amit Shukla, J.M.

This appeal has been preferred by the assessee against order dated 29.03.2010 passed by the CIT (A)-11, Mumbai in relation to the order passed under section 195(2*), inter alia* on the following grounds of appeal:

> *"1. Based on the facts and circumstance of the case, the Commissioner of Income-tax (Appeals)-ll [hereinafter referred to as the CIT(A)] ought to have held that no tax is required to be deducted @ 10% from the payment to be made to Pehla Testing Laboratory (Pehla) towards type tests.*
> *2. The CIT (A) erred in not considering the fact that the payment to be made mainly for standard facility provided by laboratory using highly sophisticated equipment and is essential and core ingredient for carrying out the test. CIT (A) wrongly ignored this aspect which is going to the root of the case. Even while noting that Pehla carried out type test using sophisticated equipment without any human intervention CIT (A) failed to address the topic and wrongly held that consideration paid to Pehla is taxable in India, although Pehla does not*

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have a Permanent Establishment in India.

3. The CIT(A) erred in upholding the stand of the AO that the payment to be made to Pehla is in the nature of fees for technical services covered by section 9(1)(vii) read with Explanation to section 9 of the Income-tax Act, 1961 and as per DT AA between India and Germany.

Without prejudice to the above, the CIT(A) ought to have held that the payment to be made to Pehla was in the nature of business profits and as per Article 7 of the DT AA between India and Germany, the payment was not liable to tax in India in the absence of a Permanent Establishment (PE) in India to which such payment could be attributed".

2. Brief facts of the case are that the assessee was required to make payment to "Pehla Testing Laboratory" (hereinafter referred to as PTL) located at Berlin Siemensstadt 13623 Berlin, Germany for carrying out type tests of the circuit breakers manufactured by assessee in order to establish that the design and the product meets the requirement of the International Standards – IEC 62271-100. Pehala Lab is accredited by National Accreditation Board for Testing & Calibration Laboratories (NABL) Germany, which carries out various kinds of tests for circuit breakers and other electronic devices to prove that the designs of the equipment meets the requirements of the international standards. This is a standard service provided by the Laboratory, which is done automatically by machines. For the purpose of the payment for making remittance to PTL, assessee moved an application under section 195 (2) before the Asstt. Director (I.T.). Along with the said application assessee has given a detailed submission and reasons justifying as to why the remittance made to the PTL is not liable to tax in India under the provisions of the Income Tax Act. The main contention of assessee has been summarized by AO in the following manner:

"*i) No income accrues or arises in India as all services are rendered outside India and the payment is made outside India.*

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ii) The payment is in the nature of business income of Pehla Laboratory and since it does not have any Permanent Establishment in India, the same is not taxable in India as per the DTAA.

iii) Since the service is rendered outside India, it is not taxable in India also as per Indian Income Tax Act. The Supreme Court decision in Ishikawajima-Harima Heavy Industries Ltd (288 ITR 408) stated that in order to tax the income it is necessary that the services have to be rendered and utilized in India.

iv) The Laboratory will use their test equipment to impose both high voltage and high currents on our circuit breakers, in line with the ratings of the breakers and check the performance of the circuit breakers and give us a report of test conducted indicating all the test results. It is a standard facility provided by the laboratory".

3. It was further submitted that even as per the provisions of Explanation 2 to section 9(1)(vii), the payment do not fall in the nature and category of fees for technical services (FTS). The main contention in this regard was that it is not a FTS but the payment was purely for standard facility provided by the Laboratory which is done automatically by the machines without any human intervention. In support of this contention, flyer received from PTL, describing the nature and procedure of the testing was filed before the AO. Reliance was also placed on the judgment of the Hon'ble Delhi High Court in the case of **CIT vs. Bharati Cellular Ltd reported in 2009, 319 ITR 258** and Madras High Court judgment in the case of **Skycell Communications Ltd vs. DCIT reported in 2001, 251 ITR 53 (Mad.)** to support that the expression "Technical Services" involves a human element, whereas in the case of assessee there is no involvement of human interface.

4. AO, however, rejected the assessee's contentions on the ground that firstly, type of the services provided by the Pehla Lab is of highly technical in nature and the payment is definitely covered by section 9(1)(vii) and secondly, the Explanation 2 to section 9

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which was inserted by the Finance Act, 2007 with retrospective effect 1.6.1976 provides that, where the income is deemed or accrued or arise in India, such income shall be included 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. Reference was also made to CBDT Circular No.03 of 2008 dated 12.03.2008. AO further held that the decision of the Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd Vs DIT [2007] 288 ITR 408 relied upon by assessee will not be applicable as the same was rendered upon the provision, prior to the amendment. Accordingly he held that payment made by assessee would qualify as fees for technical services as per the DTAA between India and Germany, as well as per section 9(1)(vii) of the Income Tax Act. Thus, he directed assessee to deduct the tax @ 10% on the gross amount of payment to be made to PTL.

5. Aggrieved by this, assessee preferred an appeal before the CIT (A), wherein it was submitted that this kind of testing certificate is required by assessee for completing the tender formalities in India and for this purpose it had to send circuit breakers, one of the product manufactured by assessee to Pehla in Germany for quality tests. The circuit breakers undergo a destructive test in the Labs and the same are not received back in India. They are sent on sample basis for the purpose of testing only and once it has cleared the test in the Lab, a certificate is issued by the PTL. This test is carried out through the use of sophisticated machines and equipment which impose both high voltage and high current on the circuit breakers to test the resistance. All this is done without human intervention and report is prepared for the test conducted. In this manner, the Pehla Lab does not offer any kind of consultancy services or technical services. This certificate is one of the formalities for completing the tender project in India by the assessee, as the ultimate sale of the product, depend on fulfillment

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of other tender requirements. It was further submitted that the word "technical services" as appearing in Explanation 2 to section 9(1)(vii) has to be read with the word "managerial and consultancy" which requires and involvement of human element. In support of this contention, decision of the Delhi High Court in the case of CIT vs. Bharati Cellular Ltd reported in (2009), 319 ITR 258 and Madras High Court judgment in the case of Skycell Communications Ltd vs. DCIT reported in (2001), 251 ITR 53 (Mad.) was relied upon. Further reliance was also placed on the decision of the ITAT Jaipur Bench in the case of Jaipur Vidyut Vitaran Nigam Ltd vs. DCIT 123 TTJ 888.

6. The learned CIT (A) first of all noted the nature of the services for which the payment was made to PTL in the following manner:

> "*3.7 The nature of services has been described in detail in the preceding Paras. However, to reiterate, the payments are to Pehla Testing Laboratory, located at Berlin, Germany for carrying out type tests. The type tests were required to be carried out on the circuit breakers manufactured by the appellants to prove that the design of the equipment meets the requirements stipulated by International Standards and were for the purpose of fulfillment of one of the Tender formalities laid down by the purchasers. For this purpose, the appellants had to send the circuit breakers (the product manufactured by the appellants) to Pehla Germany to obtain the type testing certificate. The circuit breakers undergo a destructive test in the laboratories. The breakers are not received back in India and are destroyed. Pehla carried out only type testing by using their sophisticated test equipments to impose both high voltage and high currents on the circuit breakers without human intervention and issued reports of the tests conducted".*

Thereafter he come to the conclusion that PTL is carrying out technical kind of services after observing as under:

> *"3.10. Keeping this background in mind, it is now to be seen whether the services being provided by Pehla to the appellant fall in this spectrum. As per the flyer provided by the appellant, it is seen that by its own definition "Pehla is the competent authority for testing of all components*

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relating to the transmission and distribution of high voltage power". It is a highly specialized 'technical laboratory' fitted with the state of art equipment to conduct 'type tests' on the circuit breakers manufactured by the appellants to prove that the design of the equipment meets the requirements stipulated by International Standards. Thus, the 'type testing' services provided by Pehla can by no stretch of imagination be considered as non technical. Moreover, Pehla carried out the said type testing by using their sophisticated test equipments to impose both high voltage and high currents on the circuit breakers and issues reports of the tests conducted which are sent to the appellant in India".

7. He further also referred to following decisions:

i) South West Mining Ltd. In re (2005) 148 Taxman 366 (AAR)

ii) Cochin Refineries 222 ITR 354 (Ker.)

iii) Searle (India) Ltd v. CBDT (1983) 2 Taxman 300 (Bom.)

And held that the service rendered by Pehla is 'technical services'. Thereafter he analyzed the provisions of section 9(1)(vii) r.w. Explanation 2 and held that firstly, fee payable to Pehla is within the meaning of FTS and secondly, the services received by assessee was utilized in India in the business of assessee and also for earning income from source within India, therefore, it has to be considered that services are rendered in India, hence taxable in India. He further made reference to the Article-12(4) of the Indo German DTAA and held that the definition of FTS given therein is similar to Explanation 2 to section 9(1)(vii) of the Income Tax Act. Regarding other contentions of assessee that testing was carried out, outside India and the payment made to Pehla cannot be charged to tax in India in view of the principles laid down by the Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd Vs DIT [2007] 288 ITR 408 (SC), he held that the said decision is not applicable after the insertion of Explanation 2 to section 9(1)(vii) with retrospective effect w.e.f. 1.6.1976. He thus upheld the reliance placed by the AO on the CBDT circular No.03 of

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2008. Assessee's plea that the payment made to Pehla cannot be taxed in view of Article 7 of the DTAA as Pehla does not have a PE in India was also rejected by the CIT (A) as per the discussion given from Para 5.1 to 5.6. Accordingly assessee's entire contentions were rejected.

8. The learned Counsel appearing on behalf of the assessee after reiterating the facts as incorporated above, submitted that, it has been undisputed by the AO that the type testing carried out by Pehla by use of highly sophisticated test equipment is without any human intervention and this fact has also been admitted by the CIT (A) in Para 3.7 of his order, wherein his decision has been recorded. Once it is an admitted fact that no human intervention is involved in such kind of testing, it does not amount to rendering of any "technical services". He submitted that the word "technical service" as appearing in Explanation 2 to section 9(1) (vii) is sandwiched between the word "managerial" and "consultancy" and therefore the word "technical service" has to be read along with these two words. These words signify the involvement of human intervention as without human involvement managerial and consultancy services cannot be provided. A testing carried out purely by the machines cannot be held to be providing "technical services" within the meaning of section 9(1)(vii). In support of his contention, he has relied upon catena decisions, some of which are cited herein below:

a) CIT vs. Bharati Cellular Ltd (2009) 319 ITR 258 (Del.)
b) CIT vs. Bharat Cellular Ltd (2011) 330 ITR 239 (SC)
c) UPS SCS (Asia) Ltd v.ADIT (2012) 18 taxman.com 302 (Mum.)
d) Jaipur Vidyut Vitran Nigam Ltd v. DCIT (2009) 123 TTJ 888 (Jp.)
e) Skycell Communications Ltd & ANR v. DCIT & Qrs. (2001) 251 ITR 53 (Mad).
f) Idea Cellular Ltd v. DCIT (2010) 123 ITD 620 (Del.)
g) Dampskibsselskabet AF 1912 A/S Akitieselskabet v. ADIT (I.T) (2011) 130 ITD 59 (Mum.)

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9. The learned Counsel also filed a copy of flyer giving the description of the type of testing done by the Pehla, which was filed before the AO as well as before the CIT (A). Thus he concluded that once payment is made for carrying out test in a Lab which is done through sophisticated machines without any human intervention, the same cannot be held to be "fees for technical services" as held by various Courts in the aforesaid decisions.

10. Per contra learned CIT (DR) submitted that the AO has not examined whether there was any involvement of any human element or human intervention in carrying out the test by the Pehla or not. The learned CIT (A) has merely reproduced the contention of assessee and has not given any categorical finding on that aspect. Further he submitted that even carrying out the test of circuit breakers in the machines, some technical experts are required to observe and analyze the process and then only they certify the tests. The laymen cannot do such kind of an exercise. He referred to Page 4 of the flyer filed by assessee, wherein he pointed out various kinds of activities like providing test certificate and test report can only be done through a technical expert person. Therefore, human brain is involved in such kind of service. Apart from this, there were certain human observers to confirm the result. This inter alia means that human intervention is definitely there. Distinguishing the case of the Hon'ble Delhi High Court judgment in the case of Bharati Cellular (Supra), he submitted that in that case the issue was diversion of calls from cell to cell through towers. This definitely was a case of usage of machines and no human intervention is required in such kind of transmission. Further the judgment of the Hon'ble Delhi High Court has been set aside by the Hon'ble Supreme Court in the case now reported as CIT vs. Bharati Cellular Ltd. (2011) 330 ITR 239 (SC). Thus the said decision cannot be relied upon. In the

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case of Jaipur Vidyut Vitran Nigam Ltd (supra) passed by the ITAT Jaipur Bench, the matter related to transmission of electricity which is distinguishable from assessee's case. In support of his contention, he gave an example of conducting of blood test, which nowadays are done through sophisticated machines, but it is certified by the Pathologist who analyses the report. This kind of conducting blood test is definitely said to be done by the Pathologist only who is human and not a service through machine. He also relied upon the decision of the Cochin Refineries reported in (1996), 222 ITR 354 (Ker.), wherein the matter related to carrying out certain tests conducted by a foreign company at the instance of the Indian company and the payments made to the person of the foreign company was treated as FTS within the meaning of section 9(1)(vii). Thus in the case of assessee also same has to be treated as FTS. He further relied upon the decision of the ITAT in the case of Ashapura Minichem Ltd. Vs. Assistant Director of Income-tax, International Taxation 1(1), Mumbai, reported in (2010), 40 SOT 220. In this case bauxite testing services conducted by Chinese company in its Laboratories and preparing of test report was held to be taxable under section 9(1)(vii). Strong reliance was also placed on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Havells India Ltd in ITA Nos. 55 & 57 of 2012 dated 21.05.2012 wherein one of the issues related to deduction of tax at source of testing fee which was held to be FTS. Thus, he submitted that the learned CIT (A) has rightly concluded that the payment made by assessee is in the nature of FTS and also the same is taxable in India and TDS has to be deducted on such payment.

11. In the rejoinder the learned Counsel stated that none of the judgment relied upon by the learned DR has dealt with the issue of human intervention as has been discussed and the case law relied upon by him are entirely different from the issue involved in the assessee's case. He submitted that the learned DR at this stage

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cannot controvert this fact that issue of human intervention has not been examined by the AO and the CIT (A). He drew our specific attention to the relevant paragraphs of the assessment order and the order of the learned CIT (A). So far as the reliance of the Delhi High Court judgment in the case of Havells India Ltd (supra), he submitted that in that case assessee's Counsel has himself conceded that this was the case of FTS and the issue was with regard to the Explanation to section 9(1)(vii) and applicability of section 40(a)(ia). Regarding other decisions relied upon by the AO he submitted that the issues were more of accrual of income in India. Lastly, he concluded that AO and the CIT (A) have referred to the flyer submitted by assessee and they have not given any interpretation that there was any kind of human intervention in the process. The learned Counsel further clarified that he is not placing reliance on the provisions of the treaty, but submitting his arguments solely on the basis of section 9(1)(vii) and the meaning of FTS given in Explanation 2 thereto.

12. We have given our anxious consideration to the rival contention, orders passed by the CIT (A) as well as AO and the decisions relied upon by the parties. One of the main issue for our adjudication which also goes to the core of the issue is, whether the payment made to Pehla Testing Laboratories in Germany, for carrying out certain tests on circuit breakers manufactured by assessee for the purpose of certification, so as to meet the international standard, falls within the meaning of fees for technical services and is taxable within the meaning of section 9(1)(vii). Assessee in pursuance of its tender formalities with the Gujarat Energy Transmission Corporation Ltd and Maharashtra State Electricity Transmission Company Ltd. was required to obtain type testing certificate of the circuit breakers manufactured by it. For this purpose it has sent the circuit breakers to be tested in the Laboratory of PTL, wherein the circuit breakers undergo destructive

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tests in the Laboratories. Once it passes through the test in the Laboratories, certificate is given by the PTL for the quality of the product manufactured by assessee. Whether such a payment for this kind of testing falls within the realm of fees for "technical services". Section 9(1)(vii) provides that income by way of Fee for Technical Services shall deemed to accrue or arise in India. Explanation 2 defines the "fees for technical services" as under:

Section 9(1)(vii)

"(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*

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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".]

[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".]

13. From the above, it is seen that the expression "fees for technical services" has been given as consideration for rendering **managerial, technical or consultancy services**. No other definition as such of the term technical services in the Act has been given. The word "technical" as appearing in Explanation 2 is preceded by the word "managerial" and succeeded by the word "consultancy". It cannot be read in isolation as it takes colour from the word "managerial and consultancy" between which it is sandwiched. The Courts have held that in such a case principle of *noscitur a sociis* gets attracted, which means that the meaning of the word or expression is to be gathered from the surrounding word i.e. from the context. Coupling of the words together shows that they are to be understood in the same sense. The word "managerial and consultancy" is a definite indicative of the involvement of a human element. Managerial services and consultancy services has to be given by human only and not by any means or equipment. Therefore, the word "technical" has to be construed in the same sense involving direct human involvement without that, technical services cannot be held to be made available. Where simply an equipment or sophisticated machine or standard facility is provided

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albeit developed or manufactured with the usage of technology, such a user cannot be characterized as providing technical services. The Hon'ble Delhi High Court in the case of **CIT vs. Bharati Cellular Ltd (supra)** in this regard has observed and held as under:

"13.....

"In the said Explanation the expression " fees for technical services" means any consideration for rendering of any " managerial, technical or consultancy services" . The word " technical" is preceded by the word " managerial" and succeeded by the word " consultancy" . Since the expression " technical services" is in doubt and is unclear, the rule of noscitur a sociis is clearly applicable.

The said rule is explained in Maxwell on the Interpretation of Statutes (Twelfth Edition) in the following words (page 289) :

" Where two or more words which are susceptible of analogous meaning are coupled together, nosicutur a sociis, they are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general."

This would mean that the word " technical" would take colour from the words " managerial" and " consultancy" , between which it is sandwiched. The word " managerial" has been defined in the Shorter Oxford English Dictionary, Fifth Edition as :

" of pertaining to, or characteristic of a manager, esp. a professional manager of or within an organization, business, establishment, etc."

The word "manager" has been defined, inter alia, as :

" a person whose office it is to manage an organization, business establishment, or public institution, or part of one ;a person with the primarily executive or supervisory function within an organization, etc., a person controlling the activities of a person or team in sports, entertainment, etc."

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It is, therefore, clear that a managerial service would be one which pertains to or has the characteristic of a manager. It is obvious that the expression "manager" and consequently "managerial service" has a definite human element attached to it. To put it bluntly, a machine cannot be a manager.

14. Similarly, the word "consultancy" has been defined in the said Dictionary as the work or position of a consultant; a department of consultants. "Consultant" itself has been defined, inter alia, "as a person who gives professional advice or services in a specialized field". It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the said Dictionary as " ask advice for, seek counsel or a professional opinion from; refer to (a source of information) ; seek permission or approval from for a proposed action" . It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant.

15. From the above discussion, it is apparent that both the words "managerial" and "consultancy" involve a human element. And, both, managerial service and consultancy service, are provided by humans. Consequently, applying the rule of noscitur a sociis, the word "technical" as appearing in Explanation 2 to section 9(1)(vii) would also have to be construed as involving a human element. But, the facility provided by MTNL/other companies for interconnection/port access is one which is provided automatically by machines. It is independently provided by the use of technology and that too, sophisticated technology, but that does not mean that MTNL/other companies which provide such facilities are rendering any technical services as contemplated in Explanation 2 to section 9(1)(vii) of the said Act. This is so because the expression " technical services" takes colour from the expressions " managerial services" and " consultancy services" which necessarily involve a human element or, what is now a days fashionably called, human interface"

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This principle has been reiterated several times by various Courts and the Tribunals as have been highlighted by the learned Counsel during the course of hearing. Thus, one has to see whether any kind of human interface or human involvement is there for providing technical services by the PTL in this case.

14. Now coming to the facts of the present case, whether standard service provided at the Laboratory of PTL for the purpose of testing the equipments is done automatically by the machines or purely by human intervention. Assessee before the AO after drawing his attention to the flyer received from the PTL had categorically pointed out that the standard service provided by the PTL is without any human intervention. This factor has not been disputed by him. Even before the CIT (A), this contention has been deposed again by the assessee which has been noted by him in Para 3.4 and again in his findings in Para 3.7. None of the authorities have either rebutted this contention of assessee, or has given any adverse remark or findings that there was any human intervention in the process. The learned CIT (A) as well as AO have gone merely by the fact that such a type testing services provided by the PTL is highly sophisticated and technical, and it cannot be considered as non technical. Therefore, being highly technical in nature, it amounts to rendering of technical services. From the perusal of the flyer as submitted by the learned Counsel, it is seen that it describes various stages of tests which have to be carried out for testing the circuit breakers in various sophisticated machines. Such tests include switching capacity and short circuit current carrying capacity, dielectric test, temperature rise tests, magnetic tests, climatic tests and other kind of tests. These tests are carried out in a Lab by the automatic machines though under observations of technical experts. Once these tests are done successfully by the machines, a certificate is issued by the authorities of the PTL. The learned CIT (DR) had argued that for observing the process, preparing the report,

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issuance of certificate and for monitoring of machines, human involvement is definitely there, therefore, it cannot be held that there is no human intervention. In our opinion, this cannot be the criteria for understanding the term "technical services" as contemplated in Explanation 2 to section 9(1)(vii). If any person delivers any technical skills or services or make available any such services through aid of any machine, equipment or any kind of technology, then such a rendering of services can be inferred as "technical services". In such a situation there is a constant human endeavour and the involvement of the human interface. On the contrary, if any technology or machine developed by human and put to operation automatically, wherein it operates without any much of human interface or intervention, then usage of such technology cannot per se be held as rendering of "technical services" by human skills. It is obvious that in such a situation some human involvement could be there but it is not a constant endeavour of the human in the process. Merely because certificates have been provided by the humans after a test is carried out in a Laboratory automatically by the machines, it cannot be held that services have been provided through the human skills. Therefore, the contention raised by the learned CIT (DR) does not appeal much to us.

15. The Hon'ble Judge in the case of Skycells Communications Ltd (Supra) while interpreting the word "fees for technical services" as defined in Explanation 2 to section 9(1)(vii) has made a very important observation:

> *"5. In the modern day world, almost every facet of one's life is linked to science and technology in as much as numerous things used or relied upon in every day life is the result of scientific and technological development. Every instrument or gadget that is used to make life easier is the result of scientific invention or development and involves the use of technology. On that score, every provider of every instrument or facility used by a person cannot be regarded as providing technical service.*

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When a person hires a taxi to move from one place to another, he uses a product of science and technology, viz., an automobile. It cannot on that ground be said that the taxi driver who controls the vehicle, and monitors its movement is rendering a technical service to the person who uses the automobile. Similarly, when a person travels by train or in an aeroplane, it cannot be said that the railways or airlines is rendering a technical service to the passenger and, therefore, the passenger is under an obligation to deduct tax at source on the payments made to the railway or the airline for having used it for travelling from one destination to another. When a person travels by bus, it cannot be said that the undertaking which owns the bus service is rendering technical service to the passenger and, therefore, the passenger must deduct tax at source on the payment made to the bus service provider, for having used the bus. The electricity supplied to a consumer cannot, on the ground that generators are used to generate electricity, transmission lines to carry the power, transformers to regulate the flow of current, meters to measure the consumption, be regarded as amounting to provision of technical services to the consumer resulting in the consumer having to deduct tax at source on the payment made for the power consumed and remit the same to the Revenue.

Satellite television has become ubiquitous, and is spreading its area and coverage, and covers millions of homes. When a person receives such transmission of television signals through the cable provided by the cable operator, it cannot be said that the home owner who has such a cable connection is receiving a technical service for which he is required to deduct tax at source on the payments made to the cable operator.

Installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision of technical service to the customer for a fee.

6. When a person decides to subscribe to a cellular telephone service in order to have the facility of being able to communicate with others, he does not contract to receive a technical service. What he does agree to is to pay for the use of the airtime for which he pays a charge. The fact that the telephone service provider has installed

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sophisticated technical equipment in the exchange to ensure connectivity to its subscriber, does not on that score, make it provision of a technical service to the subscriber. The subscriber is not concerned with the complexity of the equipment installed in the exchange, or the location of the base station. All that he wants is the facility of using the telephone when he wishes to, and being able to get connected to the person at the number to which he desires to be connected. What applies to cellular mobile telephone is also applicable in fixed telephone service. Neither service can be regarded as "technical service" for the purpose of section 194J of the Act.

7. The use of the internet and the world wide web is increasing by leaps and bounds, and there are hundreds of thousands, if not millions, of subscribers to that facility. The internet is very much a product of technology, and without the sophisticated equipment installed by the internet service providers and the use of the telephone fixed or mobile through which the connection is established, the service cannot be provided. However, on that score, every subscriber of the internet service provider cannot be regarded as having entered into a contract for availing of technical ser- vices from the provider of the internet service, and such subscriber regarded as being obliged to deduct tax at source on the payment made to the internet service provider.

Thus if a standard facility is provided through a usage of machine or technology, it cannot be termed as rendering of technical services. Once in this case it has not been disputed that there is not much of the human involvement for carrying out the tests of circuit breakers in the Laboratory and it is mostly done by machines and is a standard facility, it cannot be held that Pehla Testing Laboratory is rendering any kind of technical services to assessee. In our conclusion, we thus hold that payment made by assessee to the PTL in Germany is not in consideration for rendering of any kind of "technical services" either in the nature of managerial or technical or consultancy services. Therefore, it does not fall within the ambit of section 9(1)(vii).

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16. The learned CIT (DR) has relied upon the decision of the Delhi High Court in the case of Havells India Ltd (Supra) wherein the issue was with regard to the disallowances under section 40(a)(ia). In this case it was categorically admitted by the learned Counsel on behalf of assessee that he has not disputed that the payment made was within the purview of fees for technical services. This aspect of the matter was thus not disputed. Therefore, the Hon'ble High Court has not dealt with this issue at all. Even in the other cases as relied upon by the learned CIT (DR) the issue mostly revolved around whether the income were accruing in India or not. None of the judgments relied upon are directly on the point whether the technical services has been provided through human intervention or not.

17. Lastly coming to the learned DR's contentions that the judgment of the Hon'ble Delhi High Court in the case of Bharati Cellular Ltd (Supra) has been set aside by the Hon'ble Supreme Court, it is however, seen that the Hon'ble Supreme Court has set aside the matter to the Assessing Officer with regard to examination and to establish whether technical services provided, involved any kind of human intervention or not during the process of call communication. The Hon'ble Supreme Court has not reversed or adversely commented on the provisions or principles of law discussed by the Hon'ble Delhi High Court. It was on the fact of the case that the matter was set aside to examine the nature of the technical services and to examine the involvement of the human in the process.

18. In our final conclusion we hold that the learned CIT (A) was not correct in holding that the payment made by assessee to Pehla Testing Lab was in any manner in the nature of "fees for technical services" within the ambit of section 9(1)(vii) read with Explanation 2 and accordingly there was no requirement in law to deduct tax at

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service on such payment. In the result this issue is decided in the favour of the assessee.

19. Now coming to the other issues in the grounds raised by assessee, we find that same have become purely academic in view of our findings given above. Therefore, the same are treated as infructuous. Technically speaking the appeal of assessee is treated as allowed.

20. In the result appeal filed by assessee is as allowed.

Order pronounced in the open court on 12th February, 2013

Sd/-	Sd/-
(B. Ramakotaiah)	**(Amit Shukla)**
Accountant Member	**Judicial Member**

Mumbai, dated 12th February, 2013.

Vnodan/sps

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The concerned CIT(A)*
4. *The concerned CIT*
5. *The DR, " L" Bench, ITAT, Mumbai*

By Order

Assistant Registrar
Income Tax Appellate Tribunal,
Mumbai Benches, MUMBAI