आयकर अपीलीय अधिकरण "एल" न्यायपीठ मुंबई में।

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

श्री आर.सी. शर्मा, लेखा सदस्य एवं

श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।

BEFORE SHRI R C SHARMA, ACCOUNTANT MEMBER AND SHRI AMIT SHUKLA, JUDICIAL MEMBERITA

M/s Flag Telecom Group Limited (Erstwhile FLAG Limited)(FLAG), C/o. Chaturvedi & Shah., 814-815, Tulsiani Chambers, 212, Nariman Point, Mumbai -400 021 स्थयी लेखा सं.:PAN: **AAACF 4015 D**	**Vs**	Dy. Director of Income Tax (International Taxation), Range -1(1), Scindia House, Ballard Estate, Mumbai -400 001
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Jehangir Mistri
Respondent by	:	Shri Girish Dave, Spl. Counsel

ITA No. : 2255/Mum/2006
(Assessment year: 2001-02)
ITA No. : 2256/Mum/2006
(Assessment year: 2002-03)
ITA No. : 5043/Mum/2006
(Assessment year: 2003-04)
ITA No. : 537/Mum/2009
(Assessment year: 2004-05)
ITA No. : 538/Mum/2009
(Assessment year: 2005-06)
ITA No. : 2511/Mum/2009
(Assessment year: 2006-07)
ITA No. : 4685/Mum/2011
(Assessment year: 2007-08)
ITA No. : 7138/Mum/2011
(Assessment year: 2008-09)

Jt. Director (OSD) (IT) – Rg.1, R. No. 117, 1st Floor, Scindia House, Ballard Estate, Mumbai -400 038	**Vs**	M/s Flag Telecom Group Limited (Erstwhile FLAG Limited)(FLAG), C/o. Chaturvedi & Shah., Mumbai -400 021 स्थयी लेखा सं.:PAN: **AAACF 4015 D**
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	Shri Girish Dave, Spl. Counsel
Respondent by	:	Shri Jehangir Mistri

ITA No. : 2525/Mum/2006
(Assessment year: 2001-02)
ITA No. : 2526/Mum/2006
(Assessment year: 2002-03)
ITA No. : 5014/Mum/2006
(Assessment year: 2003-04)

ITA No. : 1169/Mum/2009
(Assessment year: 2004-05)
ITA No. : 1170/Mum/2009
(Assessment year: 2005-06)
ITA No. : 3286/Mum/2009
(Assessment year: 2006-07)
ITA No. : 8365/Mum/2011
(Assessment year: 2008-09)

सुनवाई की तारीख /Date of Hearing : 09-04-2015
घोषणा की तारीख /Date of Pronouncement : 15-06-2015

आदेश
ORDER

PER BENCH:

Aforesaid Cross appeals have been filed by the assessee as well as by the revenue against separate impugned orders passed by CIT(A), Mumbai for the quantum of assessment passed u/s 143(3) for the assessment years 2001-02 to 2008-09, as per details mentioned above in the title of the case. Since common issues are involved in all the appeals arising out of identical set of the facts therefore, all these appeals were heard together and are being disposed off by way of this consolidated order for the sake of convenience & brevity.

2. To understand the implication of the issues involved, the facts of the cross appeals for the assessment year 2001-02 are taken-up first. In the assessee's appeal, being ITA No. 2255/Mum/2006, following grounds have been raised:

Ground No.1:

"On the facts and circumstances of the case, the learned Commissioner of Income-Tax (Appeals) –XXXI [CIT(A)] erred in holding that income from standby maintenance revenues earned by the Appellant under the Construction and Maintenance Agreement (C&MA) from VSNL are taxable in India".

Ground No. 2:

"On the facts and circumstances of the case, the learned CIT(A) further erred in treating that the standby maintenance revenues earned by the Appellant are in

the nature of fees for technical services under section 9(1)(vii) of the Act".

Ground No.3:

"On the facts and circumstances of the case, without prejudice to Ground no.1, the learned CIT(A) erred in not accepting the Appellant's contention that the revenues chargeable to tax in India, be computed as per Explanation to Section 9(1)(i) of the Act, by applying the proportion of the cable length situated in India vis-à-vis the total cable length world-wide".

Ground No.4:

"On the facts and circumstances of the case, the learned CIT(A) erred in holding the restoration revenues earned by the appellant under Restoration Agreement are taxable in India".

Ground No.5:

"On the facts and circumstances of the case, without prejudice to Ground no.4, the learned CIT(A) erred in holding that 10% of receipts (i.e. 10% of USD 441,854) from Restoration revenues earned by the Appellant under the Restoration Agreement are taxable in India as business Income".

Ground No.6:

"On the facts and circumstances of the case, without prejudice to Ground no.4 & Ground no. 5, the learned CIT(A) erred in accepting the Appellant's contention that the revenues earned by the appellant, in the form of restoration services during the assessment year under consideration, by applying the proportion of the cable length situated in India vis-à-vis the total cable length world-wide".

Ground No.7:

"On the facts and circumstances of the case, the learned CIT(A) erred in not deleting the levy of interest u/s 234D of the Act by the learned A.O. on the Appellant".

Whereas, in the Department's appeal, being ITA No. 2525/Mum/2006, following grounds have been raised:

"1. On the facts and circumstances of the case and in law, the ld. CIT(A) erred in holding that the payment received by the assessee from provision of restoration

activity is not taxable as 'fees for technical services' but is taxable as business income".

"2. On the facts and circumstances of the case and in law, the ld. CIT(A) erred in holding that the payment received by the assessee from provision of restoration activity is taxable as business income is estimated at 10% of the restoration activity receipts without grossing up".

"3. On the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the interest charged u/s 234B of the I.T. Act, 1961".

3. From the above grounds, the following issues can be culled out, which requires our adjudication in the impugned appeals:

(i) Whether the income earned from standby Maintenance activity is liable for tax in India as 'Fees for Technical Services' ('FTS') under section 9(1)(vii) of the Income Tax Act, 1961 ('the Act')?

(ii) Whether the income earned from Restoration activity is liable for tax in India either as 'Fees for Technical Services' ('FTS') under section 9(1)(vii) of the Act or as business income under section 9(1)(i) of the Act?

(iii) Whether the assessee is liable to pay interest under section 234B of the Act?

(iv) Whether the assessee is liable to pay interest under section 234D of the Act?

4. The brief facts of the case are that the assessee, 'FLAG Limited' is a company incorporated in Bermuda, which was set-up to build high capacity submarine Fiber Optic Telecommunication Link Cable System. It has build under-sea cable for providing telecommunication link between United Kingdom & Japan. In India, Videsh Sanchar Nigam Limited (VSNL) was one of the original landing party in the FLAG cable system. For the purpose of selling the capacity in the cable system to various landing parties, including VSNL, Capacity Sales Agreement (CSA) was entered into amongst Landing Parties and FLAG on 31.03.1995, which was

further amended on 29th April, 1998, by which, VSNL has bought the capacity in the said cable system. The entire procedure for the ownership of capacity in the cable system and also for providing standby maintenance activities contains in the Construction and Maintenance Agreement (C&MA) separately entered between the parties. The CSA & C&MA was for the period of 25 years, which coincides with the life of the cable. Under the terms of C&MA, the FLAG cable system is to be jointly operated and maintained in efficient working condition along with FLAG and landing parties signatories.

5. In the year under consideration, the assessee has received a sum of Rs. US $ 2,694,317 from VSNL on account of provision of standby maintenance activities, as in the earlier years. In the notes to the computation filed with the return of income, the assessee had filed a detailed note in this regard, which have been incorporated by the AO in Para 2.1 of the assessment order. The AO, however held that, there is no material change in the facts of the case, as compared to the facts for AY 1998-99, wherein, it was held that receipts from standby maintenance services/charges are in the nature of 'fees for technical services' within the meaning of section 9(1)(vii) and hence it is to be taxed accordingly in India. The relevant observation of the AO is as under:

> *"It is seen, that in the year under consideration, there is no material change in the facts of the case, as compared to the facts obtaining in AY 1998-99. The only change is in the quantum of receipts. Accordingly, following the reasoning given by the assessing officer in AY 1998-99, it is held that the receipts of the assessee on account of standby maintenance services of US $ 2,694,317 are held to be in the nature of 'fees for technical services' as per the assessment order for AY 1998-99, and are taxed @20%".*

6. The Ld. CIT(A) too held that this issue is similar to the earlier years and upheld the order of the AO after observing and holding as under:

> *"The issue is whether the standby maintenance charges paid for the maintenance of the fiber optic cable is a business receipt or it is "Fees for Technical Services". The issue has been examined by the AO in AY 1998-99, 99-00 & 00-01. The AO has consistently held in all these years that standby maintenance charges are "fees for technical services" within the meaning of Sec. 9(1)(vii) of the I.T. Act and therefore taxable in India. My predecessor had decided appeal for A.Y. 1998-99 and 99-00 & 00-01. In AY 1998-99, he has discussed the issue in para 6.3 of his order dated 23.5.2003 in appeal No. CIT(A)XXXI/DCCIT Cir. 23(1)/IT-17/01-02/03-04 and has held that the payment for standby maintenance charges is "fees for technical services" within the meaning of Explanation 2 to Sec. 9(1)(vii) of the I.T. Act. He has followed his finding in AY 1999-00 and 2000-01 and has held similarly.*
>
> *I have examined the facts. There is no difference in the facts during the AY 2001-02 compared to previous assessment years. The appellant company is maintaining fiber optic cable in good condition for use by viz. VSNL & other parties. VSNL having purchased capacity has further agreed to pay minimum amount of charges to be paid to the appellant so that the appellant maintains cable system for error free use by VSNL. The fiber optic cable as 'modern technological' system cable is submerged in the seas. The maintenance of the same is highly technical expertise work. The cable having been sold to the VSNL & Other parties for the period of 25 years. The appellant is charging standby maintenance charges from VSNL for technical services rendered by it towards maintenance of such cable maintenance. Accordingly, I find no force in the arguments of the appellant and hold that the standby maintenance as "fees for Technical Services" within the meaning of Explanation (2) to Sec. 9(1)(vii) and agree with my predecessor in this regard. Accordingly, the*

appeal on this point is dismissed and finding of the AO is upheld".

7. Before us, Ld. Sr. Counsel, Shri J D Mistri submitted that exactly similar issue was involved in the assessment years 1998-99 to 2000-01 wherein, the matter has reached upto the stage of the Tribunal and Tribunal vide its order dated 06.02.2015 had decided this issue in favour of the assessee by holding that *the provision of standby maintenance charges cannot be taxed as 'fee for Technical Services' within the definition and meaning of section 9(1)(vii).* Hence, the issue is squarely covered by the decision of the Tribunal in the earlier years and even AO as well as CIT(A) has admitted the fact that the facts and issue are similar to the earlier years.

8. On the other hand, Ld. Spl. Counsel, on behalf of the revenue, Shri Girish Dave submitted that this matter needs to be set aside and restored back to the file of the AO, firstly, to examine, whether there is any actual maintenance services rendered by the assessee, as the Tribunal, in its finding have observed that *'if the payment is received on account of actual repairs and maintenance, then same would fall within the ambit of FTS chargeable to tax u/s 9(1)(vii*). Secondly, it needs to be examined, whether the assessee has charged any mark-up, over and above the cost for providing standby maintenance activities. He further submitted that the revenue from these activities cannot be said to be annual charges since the amount of income from these activities are varying across various assessment years and there being no modification or amendment in the agreement, there could not be such a variation. Thus, to examine these matters, the issue of standby maintenance charges needs to be be set aside to the file of the AO.

9. In rejoinder, Mr. Mistri submitted that the matter need not be set aside, firstly because, the AO as well as CIT(A) have categorically held that the facts and issues involved are similar to that in the earlier years and secondly, the maintenance charges

vary from time to time depending upon the infrastructure at a given time. All these issues have been discussed in detail in the earlier years; therefore, the Tribunal order should be followed.

10. We have heard rival contentions and also the finding given in the impugned orders. Both the AO as well as CIT(A) have held that this issue had been examined in the earlier years and Department's consistent plea had been that, such a standby maintenance charges are for rendering of 'technical services'. It has also been admitted that there is no difference in the facts of the earlier years, present year as well as of the subsequent years and accordingly, this has to be decided in light of the findings given in the earlier years. This issue had come up for consideration before the Tribunal, wherein, it was held that standby maintenance charges do not fall within the realm of "Technical Services". After considering the entire facts of the cases, the relevant finding of the Tribunal on this issue are as under:

> *"68. The second issue relates to taxability of 'standby maintenance charges' as fees for technical services u/s 9(1)(vii), as raised by the assessee in ground no. 4. As stated earlier, the assessee along with consortium of other parties has built the submarine fiber optic cable providing telecommunication link between UK and Japan. Under the terms of C&MA the FLAG cable system is to be jointly operated and maintained in efficient working condition or along with the founding signatory i.e. Flag and the landing party signatories. The operation and maintenance duties and rights has been elaborated in para 10 along with various sub clauses. The entire cable system is to be operated and maintained by founding signatory in co-ordination with relevant landing party signatory. Flag Network Operation Centre (FNOC) has to provide overall network service surveillance and over all co-ordination of maintenance and repair operations of Flag cable system. The Flag has to co-ordinate the deployment of the vessels for repairs and maintenance operation in accordance with the procedure defined. Para 11 along with various sub clauses provides the responsibility for operation and maintenance cost. Clause 11.11 gives the details of activities, expenses and cost incurred. The relevant clause reads as under:- 11.1 The cost of standby*

maintenance of Segments S. X-1 and X-2, including, but not limited to, the maintenance of Segments S X-1 and X-2, the FNOC, the procurement of cable ship services covering, inter alia, ship depreciation, ship retrofit, crew, insurance (except insurance at sea), in-port expenses, the storage of submersible plant, remotely operated vehicles and other devices when included in the wet maintenance zone agreement standby charges, shall be recovered by the Founding Signatory through fixed charges payable by the Signatories and other holders of Assignable Capacity, in accordance with Schedules H-1 through H-55 and J. adjusted to reflect inflation.

11.2 The cost of running charges, which shall be limited to recovery the direct incremental costs incurred in connection with a repair operation involving Segment S or Segment X-1 or Segment X-2, including, but not limited to, the cost of fuel, at sea insurance, additional crew at sea, crew overtime, victual ling, telecommunications, mobilization and de-mobilization expenses, consumables, replenished equipment, and remotely operated vehicles, the extent not included in the wet maintenance agreement standby charges, shall be apportioned among Signatories (excluding the Founding Signatory) and other holders of Assignable Capacity on the affected Segment S or Segment X- 1 or Segment X-2 in accordance with Schedule F.

69. Thus, under the C&MA the responsibility of maintenance and repairs belongs to both, assessee and the landing parties. The maintenance activities under taken by the assessee for the purpose of standby maintenance which is the impugned issue, was for the arrangement for standby cover and maintenance and operation of FNOC. So far as standby maintenance charges is concerned, it is not in respect of any actual rendering of services but to maintain infrastructures for co-ordination and setting up conditions for efficient rendering of services in relation to maintenance and repairs of cable system. There is a separate charge for repair and maintenance under the C&MA whereby, the assessee is actually required to undertake repair and maintenance and for which the assessee separately charges. Such a repair and maintenance is separate from standby maintenance cost, which is in the nature of reimbursement of fixed cost. The standby maintenance is a fixed annual charge which is payable not for providing or rendering services but for arranging standby maintenance arrangement which is required for a situation whenever some repair work in the undersea cable or terrestrial cable is actually to be performed or rendered. It is a facility or infrastructure maintained for ready to use or render the technical

services or repair services, if required. On these facts we have to examine whether assessee is providing any service to VSNL in respect of standby maintenance. 70. Explanation 2 to section 9(1)(vii) defines "fees for technical services" in the following manner:- "Explanation (2)- For the purpose 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 service of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries". From the above definition it is evident that if the income is to be characterized as FTS, then it has to be necessarily from the services provided for the following types, viz; "managerial", "technical" or "consultancy". Another very important phrase preceding the word managerial, technical and consultancy services is, "rendering". The word 'rendering' qualifies the other terms used for the FTS. The word "rendering" connotes to "provide" or "deliver" or "to do something". Thus, rendering services mean some kind of actual services is being provided or delivered which are in the nature of managerial technical or consultancy. The word 'managerial' has to be understood in the context of running and managing the business of the client or one who is in charge for management and control of its business. Here the payment made by VSNL is not in the nature of managerial. Again the term 'consultancy' has to be understood as advisory services wherein necessary advice and consultation is given to the client for the purpose of client's business. It is act of consulting or giving advice or guidance. Again here-in-this case there is no consultancy services. The word "technical" services connote services which are provided in technical field or by the person who has skill, knowledge expertise in the area of technical or science. Here-in-this case if the assessee is providing some kind of repair services in the cable system, then it can be termed as technical services, however, if there is no actual rendering of services, but mere collection of annual charge to recover the cost of standby facility, agreed by all the members of the consortium on proportionate cost basis, then it cannot be held that it is providing any kind of technical services. Here the most crucial point which has to be seen is firstly, whether there is any actual rendering of services; secondly, is there any mark up or element of profit in the charge received for standby maintenance; and lastly whether it is in the nature of fixed annual charge which is to be recovered

as proportionate cost of maintaining the standby facility ready for carrying out any maintenance or repair services. This charge is different from an annual maintenance contract, whereby repairs and maintenance is covered for a certain period or services. In the present case as evident from the clause 11.1, that so far as standby maintenance charges is concerned, it is in the form of fixed annual charge which is in the nature of reimbursement. It has been also brought on record that only actual cost incurred has been recovered from VSNL in providing the standby maintenance services. There is no profit element or mark up involved. The assessee has also provided the details of receipt and cost involved in providing standby maintenance services to VSNL for A.Ys. 1998-99, 1999-2000 and 2000-01 which are as under:-

Particulars Amount in US $ A.Y. 1998-99 A.Y. 1999-00 A.Y. 2000-01 Revenues from standby maintenance activities 512,955 1,226,860 2,072,453 Total costs incurred (as per auditor's certificate) (857,093) (2,0,77,219) (2,800,495) Profit/(Loss) from standby maintenance activities (344,138) (850,359) (728,042) It has been contended that there is a loss in this account.

71. Thus, on the facts and circumstances of the case as well as looking to the nature of standby maintenance cost, we hold that the receipts from standby maintenance charges from VSNL cannot be taxed as FTS, within the definition and meaning of section 9(1)(vii) as there is no rendering of services. However, whenever payment is received on account of actual repair or maintenance carried out, then same would definitely fall within the ambit of FTS chargeable to tax u/s 9(1)(vii). Accordingly the order of the CIT(A) is set aside and assessee's ground on this score is allowed".

11. It is not in dispute that the standby charges is a fixed annual charge, which is payable not for providing or rendering services *albeit* for arranging standby maintenance arrangement, which is required for a situation whenever some repair work in under-sea cable or terrestrial cable is actually required to be performed or rendered. It is a facility or infrastructure maintained for ready to use for rendering the technical services or for repairing services, if required. There is no actual rendering of the services *qua* the standby maintenance charges.

Here, it is not the case of AO or CIT(A) that standby maintenance charges is on account of actual repair or maintenance carried out by the assessee. Hence, following the earlier years' precedence, we hold that the receipt on account of standby maintenance charges is not chargeable as 'fees for technical services' within the scope of section 9(1)(vii). Accordingly, the Ground no. 1 & 2 are treated as allowed and Ground no. 3 will become purely academic in view of the findings given above.

12. The next main issue involved is with regard to taxability of "restoration activity" whether it is taxable in India either as fee for technical services u/s 9(1)(vii) or else as business income under section 9(1)(i). Further, if it is taxable as business income, then how much is attributable to operations in India.

13. Briefly stated the relevant facts *qua* the issue involved are that, the assessee has built a submarine Fiber Optic Telecommunication Cable to Link Telecom traffic between and amongst Western Europe, Middle East, South Asia, South East Asia and Far East. The capacity in the said cable system has been sold to various landing parties, which are mostly National Telecommunication Companies belonging to different nations. The unsold capacity rests with the assessee as its stock. This entire issue of sales of capacity and its taxability in India has been dealt in detail by the Tribunal in the appeal of the earlier years. The assessee in this year had entered into an arrangement with certain telecom cable operators to provide restoration of traffic to their customers in the event of disruption in the traffic on their cable system. Under these arrangements, if there is disruption in the traffic on a particular segment of the other cable operator, the assessee provides the alternative telecommunication link route through its own capacity in the cable. In India, VSNL had an arrangement with SEA-ME-WE3, herein referred to as (SMW3), for carrying its telecommunications traffic on segments to and from

India and between the segments not connected to India. In case of a disruption in the traffic on a particular segment on SMW-3 Cable, the operator SMW3 approaches the assessee for restoration of the traffic on a particular segment through its cable. For this purpose, the assessee, had entered into a "Restoration Agreement" with SMW3 Cable Network vide agreement dated 23rd March, 2000. The assessee agreed to provide for restoration of traffic to VSNL through its cable in case of disruption in the SMW3 cable on various segments. In such a case of restoration activity, the assessee invoices the restoration calling party i.e. VSNL, directly for the 'Restoration Activity'. Thus, the assessee provides alternative route of telecommunication which is end to end connectivity to VSNL, in case there is a disruption in the SMW3 cable system. In other words, if SMW3 is providing telecommunication link through its cable between X place to Y place to VSNL and if there is any disruption on this segment, then SMW3 approaches the assessee, who is also having spare capacity in the cable between place X and place Y, to allow VSNL to link its telecommunication traffic with the cable of assessee for the temporary period of restoration. During the year, the assessee has received a sum of US $ 4,41,854 from the provision of Restoration Services to VSNL under the said Agreement. In response to the show cause notice as to why it should not be taxed as FTS, the assessee before the AO, submitted that the payment made by VSNL for restoration activity is neither towards "royalty" nor towards "fee for technical services". Assessee's detailed submissions in this regard have been incorporated by the AO from pages 3 to 7 of the assessment order. The AO held that such a rendering of service is basically rendering of technical service by allowing the utilization of spare capacity of its submarine cable Optic fiber system by the assessee. The relevant facts, noted by the AO and his conclusion for taxing the said receipt u/s 9(1)(vii) is as under:

"Thus, the following facts can be ascertained in this regard:

(i) FLAG has entered into a Capacity Sales Agreement with VSNL, the nodal telecommunications service provider in India. The capacity is borne by its sophisticated optical fiber cable system.

(ii) Similarly, SEA-ME-WE3, another optical fiber cable system, is having an arrangement with VSNL for providing end-to-end connectivity.

(iii) As per the agreement between FLAG and SEA-ME-WE3 dated 23.03.2000, it is agreed that if and when, there is a disruption in the SEA-ME-WE3 cable system, FLAG will provide the connectivity to VSNL, on its own cable system, utilizing its available spare/free capacity.

(iv) This is possible as VSNL is already linked with FLAG system, and FLAG is having utilized excess capacity.

(v) It is VSNL, who is making the payment to FLAG, and not SEA-ME-WE3, as it is VSNL, which is benefiting from the end-to-end connectivity on spare capacity of FLAG, which it is using to impart facilities to its users.

4.2.5 In effect, what has been termed as 'restoration activity' is basically rendering of technical service by allowing the utilization of spare capacity on its submarine fiber-optic cable system by FLAG. The assessee has claimed that if at all it has to be taxed, then the revenue attributable to India should be derived by using the ratio

$$\frac{\textbf{Length of cable in India}}{\textbf{Total Length of cable Worldwide}}$$

, and applying this Method, it has submitted that the revenues attributable to India would be USD 943.7 out of USD 441854, as paid by VSNL.

The above method begs for the question as to why, at all, VSNL has to FLAG the amount of USD 441854, if only USD 943.7 could be attributed to it. The fact remains that, as per the terms of the agreement, this arrangement is temporary. Ownership is not transferred FLAG is simply allowing VSNL to utilize the technical facility as available with it, in the form of the sophisticated cable system. The same is taxable u/s 9(1)(vii) of the I.T. Act, 1961.

4.2.6 Accordingly, it is held that the receipts of the assessee on account of restoration services of US $ 441,854 are held to be in the nature of 'fees for technical, and are taxed @ 20%. It is seen from clause D.6 of the agreement, that FLAG is receiving the payments free of all taxes. Thus, the amount of revenue has to be grossed for computation of income".

14. In the first appeal, the Ld. CIT(A) on the other hand held that the receipts from 'Restoration Activity' is income derived from the business, because the assessee is making available only its system for transmission of digital data on emergency basis to the customers of SMW3 Cable network for a temporary period. Such a restoration activity cannot be termed as managerial or consultancy services, carrying of digital data of its customer on its cable does also does not mean rendering of any technical services to the customer. Accordingly, he held that such payment is to be assessed as business income and is taxable in India u/s 9(1)(i).

15. Thereafter, the Ld. CIT(A) held that the computation of income in respect of receipts from restoration facility should be computed on the basis of global profit & loss account of the assessee would wide. After detail discussion, he estimated the Indian income from restoration activity at 10% of the global receipts.

16. Before us, Ld Senior Counsel for the assessee, Shri J D Mistri, after explaining the nature of restoration activity, submitted that the very nature of the restoration activity has to be seen, whether it fits into the definition of technical services as defined in Explanation 2 to section 9(1)(vii) or not. The relevant provisions enshrined in the Explanation envisages that the payment should be in consideration *for rendering of any managerial, technical or consultancy services*. Here, in this case, the provision for restoration activity is certainly not in the nature of managerial or consultancy services. Because the managerial services are services in the nature of managing by direction, regulation, administration or supervision of activities verified by another. In the present case, the assessee is not providing any services to manage the affairs of VSNL. The consultancy services imply providing of advisory services, which here in this case no such service is being provided to VSNL, while arranging for restoration activities. Regarding

technical services, he submitted that the assessee is merely providing a standard facility of carrying telecommunications traffic to other capacity provider, such as SMW3 on temporary basis in the event of disruption in its traffic. When a restoration calling party i.e. VSNL decides to avail of the connectivity from the assessee, there is neither transfer of technology nor rendering of any technical services. Customers like VSNL only receive end-to-end connectivity to enable it to carry on its normal transmission business activity. Simply using highly sophisticated technical equipment or cable for providing capacity to the customer does not make it a provision for a technical service to the customer. In support of his contention, he strongly relied upon a decision of Madras High Court in the case of Sky-Cell Communications Ltd vs DCIT, reported in 254 ITR 53 and ITAT Bangalore Bench decision in the case of Vipro Ltd. 80 TTJ 191. Thus, there is no technical service provided by the assessee while providing a standard facility of carrying telecommunication traffic through its capacity in the cable.

17. He further submitted that the activity of providing a restoration services is, in fact, in the nature of business income of the assessee as held by the CIT(A). Thus, to this extent, he strongly relied upon the finding of the CIT(A) that it is a business income. However, he submitted that in order to charge business income to tax in India, it should be squarely covered under the relevant provisions of section 9(1)(i). He submitted that under this clause, the income is deemed to accrue or arise in India, if it is accrues or arise, directly or indirectly through or from any business connection from India; or through or from any property in India; or through or from any asset as source of income in India; or through the transfer of a capital asset situated in India. Here, in this case, since no business operations have been carried out in India in respect of restoration activity as the assessee's distribution and restoration services have been received outside India, therefore, the

revenue from these activities are not taxable in India. He clarified that, only a small portion/part of the entire cable runs through the territorial waters of India. The assessee does not have any business connections or operation or any property in India with respect to the provision of restoration activities. The majority of the segments of the bulk cable system on which restoration have been provided, is located outside India and there is only small part of the entire cable that passes through territorial waters of India, which can be 12 nautical miles from Indian shore. In such a situation it cannot be held that the entire cable is one asset and is deemed to be situated in India. Thus, assessee does not have any asset or source in India through which the revenues from restoration activities have been received. Since the services rendered are in respect of assets outside India and there being no source in India, therefore, the question of taxing revenue in India itself does not arise.

18. Without prejudice to the aforesaid arguments and by way of an alternative argument, the Shri J D Mistri submitted that, in case the income from restoration activities is held to be taxable as business income in India u/s 9(1)(i), then attribution of income has to be made in terms of Explanation 1(a) to section 9(1)(i), which provides that in case of the operation of entity are not carried out in India, then only such part of income as is reasonably attributable to the operations carried out in India shall be taxable in India. Here, in this case the only activity carried out by the assessee in India if at all can be attributed, is that, it has small portion of cable system laid in the territorial waters of India. In such a situation, the most appropriate basis for identifying the income, which can be reasonably attributed to India, would be on the basis of a fraction of a length of the entire cable system, which falls within territorial waters of India, which is only 12 nautical miles. Hence, only 12 nautical miles cable system ought to be considered in India. He submitted that, during the relevant years under consideration, there were three segments in which

restoration activities were undertaken, that were connected to the cable landing station in the territorial water in India i.e. Fujairah to Mumbai, Miura to Mumbai and Mumbai to Singapore. He also filed a chart showing a details of restoration charges received over the years (which are subject matter of appeals before us) and the segments on which restoration services were provided; length of the cable segment; length of the cable in the territorial waters in India and the apportionment of the revenue to India. He submitted that at the most, business income can be taxed on such a apportionment of revenue in India. The basis on which the Ld. CIT(A) has worked out, is absolutely incorrect as he has estimated 10% of the entire global receipt, when only a very small portion of cable is connected to India. Such as estimation of Ld. CIT(A) cannot be upheld, firstly, it was categorically submitted before him that overall revenue from the restoration activities at the global level was at loss and secondly, the entire cable network has nothing to do with the restoration activity, except for a small portion of cable and accordingly, such an allocation on estimate basis is very unreasonable.

19. On the other hand, before us, the Ld. Special Counsel, Shri Girish Dave submitted that VSNL is a landing party of the FLAG Cable system, which has used the capacity of the cable owned by the FLAG for the purpose of restoration services. The restoration has been provided to the VSNL for which FLAG has raised bill directly to VSNL for availing the cable services to the VSNL in India. The asset and equipments of the FLAG are lying in India in the landing stations. He further submitted that functions of a submarine cable system is not a simple process but highly technical in nature. In support of his contentions, he provided a chart and the details from public domain, which contains information about the submarine cable system and the various equipments used. From such information, he pointed out that providing restoration services in submarine cables, is a highly

technical job which require high technical skills and equipments. He also referred to the equipments required in the entire cable system, through which such cable system is operated. He also handed over a handbook on Laws and Policy of submarine cable system and referred to Chapter –VI of the said Hand-book and explained the provisions with respect to repair and maintenance of submarine cable system. After explaining the entire process, he referred to the 'Restoration Agreement' and relevant clauses for restoration of SMW3 cable network and cable system of the FLAG. He submitted that VSNL who is already a customer of the assessee is using cable system of the FLAG as well as also the cable of SMW3 for transmission & telecommunication data. The agreement has been entered into between FLAG and SMW3 to allow the VSNL to use the system of FLAG in the case of disruption in SMW3 cable, so as to ensure un-interrupted transmission of telecommunication data. He submitted that, if VSNL bought the capacity in the submarine cable system of the FLAG and is also a co-owner, how can then VSNL make payment to the assessee towards use of the capacity on the cable system owned by it. After referring to the various clauses of the restoration agreement, he submitted that services provided by the assessee to the VSNL are purely technical services. He further reiterated that the assessee retains the co-ownership of the system till Mumbai and is also the owner of the equipment in the cable landing station for monitoring the submarine cable system. This cable landing station provides point of power to the submarine cable system and receiving and processing of signals for communication to the domestic network system of VSNL. Thereafter, VSNL connects the cable through an interface point at a landing station into its backhaul system. Thus, entire equipment is owned by the assessee in India and hence it cannot be held that there is no asset or source of income in India. He referred to the statement of facts submitted by the assessee before the CIT(A), from there he pointed out that it has been stated

that the assessee retains the co-ownership of submarine cable system in India. The finding of the CIT(A) is not correct that the receipts from the restoration activity are in the nature of business income. There is an utilization of services of the cable network system by the VSNL by the assessee and hence the assessee's case clearly falls within the ambit of fee for technical services, as defined in Explanation to section 9(1)(vii). He further pointed out that the Ld. CIT(A) has not appreciated the fact that there are two types of activities carried on by the assessee, one activity of capacity sales and another providing of services. In the second activity, the assessee is providing service to SMW3, which in turn is being provided to VSNL for which the assessee directly bills to VSNL and gets the payments for such services. Thus the payment from VSNL is to be taxed as FTS. Lastly, he submitted that the restoration activity is not an ordinary activity, but requires highly technical expertise for restoring the cable transmission through its own cables and hence it clearly falls in the nature of FTS.

20. We have heard the rival submissions and perused the relevant findings given in the impugned order. The assessee has built a high capacity submarine optic fiber telecommunications link cable system and has sold the capacity in the said cable system to various landing parties including VSNL. The VSNL has bought the capacity for its telecommunication transmission in various segments of the Flag cable system. The unsold capacity in the cable lies back with the assessee. The VSNL apart from operating its telecommunication in the FLAG cable system also has an arrangement for telecommunication services/transmission in the cable of another operator/party, SMW3. The SMW3 had entered into an agreement with the FLAG that it will provide restoration of traffic to SMW3 customers, including VSNL in the event of disruption in the traffic on SMW3 cable. For this purpose the FLAG provides alternative route for transmission of data using its spare capacity available with it in its cable system.

21. Now, whether such an activity of providing restoration services is in the nature of technical services within the ambit of section 9(1)(vii) or not. Section 9(1)(vii) r.w. Explanation (2) provides that the payment made in consideration for the rendering of managerial, technical or consultancy services falls within the category of 'fees for technical services' which is taxable in India u/s 9(1)(vii). In this case, such a restoration activity does not fall within the nature of 'managerial' or 'consultancy services', because there was no rendering or managing by direction, regulation, administration or supervision of activities by the FLAG to the VSNL. Neither it is providing any advisory services for arranging of restoration activities to the VSNL. The assessee already has a cable system network in which it has spare capacity, which is being provided to the VSNL on behalf of SMW3 in case of disruption in SMW3 cable network. It is a kind of providing a standard facility for carrying telecommunication traffic to other telecommunication/capacity provider. When a restoration calling party like VSNL avails the network link in the cable of the assessee, no transfer of technology is involved nor have any technical services been rendered. The VSNL only receives end to end connectivity for a temporary period till the cable of SMW3 is restored for the traffic. Here the existing cable with its spare capacity with the Flag is being allowed to be used for transmitting the data. Simple use of sophisticated technical equipment for providing the capacity in the cable to the VSNL *ipso facto* does not lead to any inference that any technical services is being provided/rendered by the FLAG to the VSNL. Already a cable system of the assessee is working and is in operation and what is being provided is the link for transmission in the cable. As per the requirement it is providing its network to the VSNL as an alternate route to the SMW3 cable for the temporary period. We are unable to appreciate the argument of Shri Girish Dave that, since the submarine cable system is highly technical in nature and involves

sophisticated process and technical equipments, therefore, the transmission of data through such a cable amounts to rendering of technical services. The cable system though may be highly sophisticated process and for transmission of data technical equipments are required, but this itself does not qualify that assessee through such a cable is rendering technical services to the VSNL. Under the restoration activity the cable of the assessee is merely providing an alternative route to the VSNL for a certain period of time. Hence, it cannot be held that for providing such a standard facility through its cable system, the assessee is rendering any kind of technical services to the VSNL, so as to fall within the ambit of FTS u/s 9(1)(vii). For rendering of technical services there has to be delivery of technical skills through human element or there is a constant human endeavor in providing technical service or advice or make available such a technical skills or services. But if any technical equipment developed by human has been put to operation automatically, then usage of such a technology *per se* cannot be held as rendering of technical services. Transmission of a data or telecommunication through a cable is not a rendering of a technical service but a use of technical device/equipment. This proposition has been well explained by the Hon'ble Madras High Court in the case of Sky Sales Communications Ltd (*supra*). Thus, in our opinion such a standard facility for transmission of data and telecommunication traffic by cable operators cannot be termed as rendering of technical services. Accordingly, finding of the ld.CIT(A) that it is not fee for technical services is upheld. The other arguments of Shri Dave that landing station belongs to the assessee is not acceptable as this aspect of the matter has already been dealt in detail in our earlier years order.

22. Further, from the perusal of the restoration agreement and various clauses, it cannot be inferred that there is any actual rendering of technical services by the assessee. Nothing is

suggestive of the fact that under the restoration agreement some kind of technical skill, technical services are being provided, except for the kinds of restorations which can be undertaken and terms thereof for the connectivity and payment.

Thus on these facts, we hold that revenue received from restoration activities is not taxable as FTS u/s 9(1)(vii).

23. Now coming to the issue, whether providing of such restoration services is in the nature of 'business income' or not. The assessee's case had been that no business operations were carried out in India in respect of the restoration activities as the revenue from such services have been received outside India and there is no business connection or any asset or source of income in India, because majority of the FLAG cable system on which restoration has been provided is located outside India. Section 9(1)(i) is a deeming provision which provides that income is deemed to accrue as arise in India, if it accrues, directly or indirectly through or from any business correction in India; or through or from any property in India; or through or from any asset or source of income in India; or through the transfer of a capital asset situated in India. The FLAG has an under-sea network cable telecommunication system from UK to Japan for providing telecommunication link to various countries. The layout of undersea cable route is as such that, it has various terrestrial link in various countries, wherefrom the cable network comes to ashore to a landing station, which are mostly owned by the landing parties. The FLAG sales the capacity in the cable system to the various landing parties, which fact too has been noted by the AO as well by the CIT(A) in the impugned order and also held by us, in the earlier years. After selling the capacities, the FLAG is left with spare capacity, which here in this case has been used for providing restoration activity services to SMW3 which in turn has been provided to VSNL. A portion of the cable length falls within the

territorial waters of India from where it connects to Mumbai and from there it again goes to other countries. In case of sale of the capacity, the landing parties become the complete owner of the capacity to the exclusion of assessee as held in earlier years. However, the spare capacity which lies in the cable belongs to the assessee, through which it has provided the restoration network to the VSNL. The portion of the asset i.e. "cable" through which restoration activity has been provided also has connection in India in as much as it lies within the territorial waters of India. Accordingly, it can be very well held that income has accrued to the assessee from an asset in India and hence it is deemed to be business income arising in India. However, here all the business operations of the assessee are not carried out in India, therefore reasonable attribution of income from such operations has to be done. In such a situation, Explanation 1A to section 9(1)(i) provides that, in case of a business of which all operations are not carried out in India, then the income of the business shall be deemed to accrue or arise in India only such part of the income, which can be reasonably attributable to the operations carried out in India. In other words, attribution of such income has to be made in accordance with Explanation 1A. The Ld. CIT(A) though held that it is a business income of the assessee to which we fully endorse, however has allocated the income in India by estimating 10% of the global income from restoration activities. Such an apportionment by the CIT(A) cannot be held to be tenable at all, firstly, the Ld. CIT(A) himself has stated that the working of the loss given by the assessee to show that it has incurred huge loss at global level, cannot be corroborated because there is no availability of certified global statement; and secondly, the global income cannot be the basis for attributing the income in India, when only small portion of cable passes through territorial waters of India and the majority length of the cable is situated outside India. Under the present fact, the most appropriate basis for identifying

the income, which can be reasonably attributable to India would be on the basis of the fraction of the length of the entire cable system in the cases where restoration services have been provided in respect of the cable segments connected to India in its territorial waters. The territorial waters extend upto 12 nautical miles in India and hence only 12 nautical miles of the cable system ought to be considered for attributing the income to India. The assessee has provided the chart of the segments on which the restoration activities have been undertaken by way connection to the cable landing station in the territorial waters in India, which was from Fujirah to Mumbai, Miura to Mumbai and Mumbai to Singapore. The assessee has also filed a statement showing the details of restoration charges over the years giving the details of segments on which the restoration has been provided; length of the segment, length of the cable in territorial waters of India and apportionment of revenue to India. In principle, we uphold the method of attribution of revenue as given in the said statement, however the AO is directed to determine the income of the assessee which is to be taxed in India after apportioning the revenue on the basis of length of the cable in the territorial waters in India on the segments on which restoration have been provided. The working given in chart submitted by the assessee shall be verified by the AO, so as to determine the correct business income which is to be taxed in India. With these observations, the ground raised by the assessee is treated as partly allowed, whereas revenue's Ground no. 1 & 2 are treated as dismissed.

24. The next issue relates to levy of interest u/s 234B.

25. As admitted by both the parties, this issue is similar to the issue involved in the appeal for assessment year 1998-99, 1999-2000 & 2000-01, wherein, the Tribunal after following the decision of jurisdictional High Court in the case of DIT vs NGC Network

Asia LLc reported in 313 ITR 187, held that there was no liability to pay interest u/s 234B.

26. Lastly, coming to the issue of interest under section 234D, it has been admitted by the ld. Counsel that the levy of interest u/s 234D would be applicable in these years also in view of the decision of Hon'ble Bombay High Court in CIT vs. Indian Oil Corporation Ltd.(2012) 25 Taxmann.com 284. Accordingly, the this issue is decided against the assessee.

27. Regarding cross appeals for the AYs 2002-03 to 2008-09, it has been admitted by both the parties that the aforesaid issues as discussed above, are common and identical to the grounds raised in all the impugned appeals and are arising out of identical set of facts, therefore, the finding given above for the AY 2001-2002 will apply *mutatis mutandis* in all the appeals impugned before us. Regarding attribution of business income in India, the AO will work out the income in the manner indicated above. Accordingly, the grounds raised in all the appeals by the assessee are treated as partly allowed, whereas the grounds raised by the revenue in all its appeal are treated as dismissed.

Order pronounced in the open court on 15th June, 2015.

Sd/-	**Sd/-**
(आर.सी. शर्मा)	(अमित शुक्ला)
लेखा सदस्य	न्यायिक सदस्य
(R C SHARMA)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 15th June, 2015

प्रति/Copy to:-

1) अपीलार्थी /The Appellant.

2) प्रत्यर्थी /The Respondent.
3) The CIT(A) -31/XXXI, Mumbai.
4) The CIT Concern___/DIT(International Taxation), Mumbai.
5) विभागीय प्रतिनिधि "एल", आयकर अपीलीय अधिकरण, मुंबई/
   The D.R. "L" Bench, Mumbai.
6) गार्ड फाईल
   Copy to Guard File.

आदेशानुसार/By Order

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I.T.A.T., Mumbai

*चव्हान व.नि.स
*Chavan, Sr.PS