IN THE INCOME TAX APPELLATE TRIBUNAL,
BANGALORE BENCH 'A'

BEFORE SHRI VIJAYPAL RAO, JUDICIAL MEMBER
AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER

ITA Nos.1356 & 1357/Bang/2013
(Asst. Year – 2008-09)

M/s Food world Supermarkets Ltd.,
No.740, Eshwari Industrial Estate,
Gate No.2, Hulimavu, Bannergatta Road,
Bangalore-560 076. . Appellant

Vs.

The Dy. Director of Income-tax,
(International Taxation) Circle-I(1),
Bangalore. . Respondent

Appellant by : Shri Padam Chand Khincha, CA

Respondent by : Shri Saravanan B, JCIT

Date of Hearing : 15-09-2015

Date of Pronouncement : 28-10-2015

O R D E R

PER SHRI VIJAYPAL RAO, JUDICIAL MEMBER

These appeals by the assessee are directed against the order dated 22/7/2013 of CIT(A) arising from the order passed u/s 201(1) and 201(1A) of the Act for the asst. year 2008-09.

2. The assessee has raised the common grounds for these two appeals which read as under:

"1.1 *The order passed by the learned CIT(A) IV, Bangalore to the extent prejudicial to the appellant is bad in law and liable to be quashed.*

2.1 The learned CIT(A) IV, Bangalore has erred in concluding that reimubursement of salary costs of seconded personnel made to M/s Diary Farm Co. Ltd., Hongkong, amounting to HK $25,82,922/- is in the nature of 'fees for technical services' u/s 9(1)(vii) of the Income-tax Act, 1961 and consequently liable for deduction of tax at source u/s 195 of the Income-tax Act, 1961 (Act).

2.2 The learned CIT(A) IV, B'lore has erred in treating the appellant as 'assessee in default' u/s 201 of the Act for not deducting tax at source in respect of the impugned payments. On facts and in the circumstances of the case and law applicable, the impugned payments were not liable for TDS u/s 195 and consequently, the appellant cannot be regarded as 'assessee in default' u/s 201.

3.1 In the view of the above and other grounds to be adduced at the time of hearing the appellant prays that:

(i) the order passed u/s 201(1) being bad in law be quashed.

Or in the alternative;

a) *the appellant be held as not liable to deduct tax at source u/s 195 and thereby not to be deemed as assessee in default u/s 201(1);*

b) *the reimbursement made to the foreign company (DFCL), benefit of profit element, be not considered as fees for technical services or income chargeable to tax in India;"*

3. The assessee is an Indian company engaged in the business of ownership and operation of supermarket chain in India. The assessee entered into an agreement dated 6/6/2007 with M/s Diary Farm Company Ltd., (in short DFCL). DFCL is a company based in Hong Kong and engaged in the identical business activity that of assessee. Under the said agreement dated 6/6/2007, DFCL agreed to assign its employees to the assessee and consequently 5 employees/expatriates were deputed by DFCL to the assessee.

4. The assessee agreed to engage these employees to assist its business operation. It was also agreed between the parties that DFCL would pay salary to the assigned personnel and the assessee would reimburse such amount to DFCL. Accordingly, salary to assigned personnel were paid by DFCL which was subjected to TDS u/s 192 of the Income-tax Act. The assessee reimbursed a sum of HC 2582922/- to DFCL towards the salary paid to the assigned personnel. The reimbursement was made without deduction of tax at source. The learned DDIT Bangalore(International taxation) initiated proceedings u/s 201 of the Act for not withholding tax at source in respect of reimbursement made to DFCL. An order u/s 201(1) and 201(1A) has been passed by the DDIT (International Taxation) on 31/7/2008, whereby it was held that remittance made by the assessee constitute fee for technical services u/s 9(1)(vii) of the Act. Therefore, the same is chargeable to tax on gross basis. The DDIT (International Taxation) was of the view that the assessee was liable to deduct tax u/s 195 @ 10%. Accordingly, he treated the assessee as 'an assessee in default' u/s 201(1) of the Act for not withholding tax at source. The AO also determined the interest u/s 201(1A) of the Act. The assessee challenged the action of the AO before the CIT(A) and contended that the amount in question is not FTS but merely

reimbursement of salaries of the seconded employees. The assessee relied upon the decision of the Spl. Bench in the case of Mahendra and Mahendra, 314 ITR (AT) (SB) 263) as well as the decision of this Tribunal in the case of IDS software Solution Software India Pvt. Ltd., 122 TTJ which was also followed in the case of M/s Abbey Business Services (India) Pvt. Ltd. The CIT(A) did not accept the contention of the assessee and after examination of the terms and conditions of the seconded agreement arrived at the conclusion that the seconded employees did not have an master servant relationship with assessee. They have provided managerial and consultancy services to the assessee within the meaning of explanation 2 to sec. 9(1)9vii) of the Act. The CIT(A) upheld the decision of the DDIT (International Taxation).

5. Before us, the learned AR of the assessee has referred to various clauses of seconded agreement and submitted that the remittance to DFCL is nothing but reimbursement of remuneration paid to the employees under seconded agreement and said salary was chargeable to tax in India. Therefore, the assessee was under the liability to deduct tax at source u/s 192 of the Act which was discharged by the assessee. He has referred the details of the payment

and submitted that the amount represents only reimbursement of salary of five employees deputed with assessee as per the secondment agreement. The learned AR have been referred debit note issued by the DFCL and submitted that the amount of note being salary to the employee matches with the payment made by the assessee. Thus the learned AR has submitted that when the assessee has already discharged its liability by deducting tax at source u/s 192 applicable on salary then the payment in question cannot be held as FTS. The learned AR has pointed out that the learned CIT(A) has issued a remand order but the impugned order has been passed without any remand report. It is, therefore, submitted that an identical issue has been considered by the Tribunal in the case of IDS Software Solution Vs. ITO (Supra) as well as the decision in the case of Abbey Business Services (India) Pvt. Ltd., 53 SOT 401 wherein tribunal has followed the decision in the case of IDS Software Solution and reaffirmed the view that the payment being reimbursement of salary cannot be treated as FTS.

6. On the other hand, the learned DR has submitted that as per the terms of the seconded agreement, the assessee did not have any control over deputed personnel. Further these employees were still on

the pay role of DFCL and, therefore, there was no relation of master and employees between the assessee and these secondees. DFCL was the actual employer hence the services rendered by this employees were actually rendered on behalf of DFCL. Thus, the learned DR has submitted that the remittance was not towards reimbursement of salary but for the services rendered by the expatriates on behalf of DFCL. The AO as well as CIT(A) after examination of expatriates qualification of the secondees have come to the conclusion that they have been involved in management and consultancy services and these services are provided as per the agreement and, therefore, the remittance made by the assessee are actually FTS and not reimbursement of salary. He has relied upon the judgment of Hon'ble Delhi High Court in the case of Centrica India Pvt. Ltd. Vs. CIT 364 ITR 336 and submitted that it has been held by the Hon'ble High Court that the secondees are imparting technical expertise to all regular employees of the assessee. Further nomenclature used in the agreement relating to the payment as reimbursement cannot be a determinative factor. The learned DR further pointed out that the SLP against the said judgment of Hon'ble High Court has been dismissed by Hon'ble Supreme Court reported in 227 Taxman 368.

7. In rejoinder, the learned AR of the assessee submitted that even if the payment are treated as FTS, the secondees would constitute a service Permanent Establishment (PE) and, therefore, only the net of the expenditure would be chargeable to tax as per the provision of sec. 44D of the Act. In support of his contention, he has relied upon the judgment of Hon'ble SC in the case of CIT Vs. Morgan Stanley and Co. Inc., 292 ITR 416 and submitted that while interpreting the definition of PE as provided u/s 92F(iii) as well as considering the CBDT Circular 14 of 2001 the Hon'ble SC has observed that the definition of PE covers services PE, agency PE, Software PE, construction PE etc. Thus, the learned AR has submitted that even in the case of the payment in question is treated as FTS there would be no tax liability because the net amount will be Nil after deducting the expenditure which is in the shape of salary of these secondees.

8. We have considered the rival submission as well as relevant material on record. The assessee is engaged in the business of ownership and supermarket chain in India. The assessee was in need of personnel to assist with its operation in India. The assessee express its desire to DFCL a Hong Kong based company engaged in

the similar line of business and operation to assign certain personnel to assist. Accordingly, the assessee and DFCL entered into an agreement dated 30/6/2007. The said agreement undoubtedly is a secondment agreement and the DFCL assigned 5 personnel/employees of secondees to assessee. The relevant part of terms and conditions of the agreement are reproduced as under:

"1.2 It is clarified that DFCL will "only depute manpower" as required by Food world under this Agreement and not be 'rendering any service; to Food world.

1.3 Details of expatriate with name and qualification as on the date of this agreement are enclosed in Annexure 1. Any change in the list of such personnel will be agreed between the parties to the agreement by exchange of letters.

1.4 DFCL shall not be responsible for or assume and risk for the performance by the secondees while on assignment to Food world. The secondees shall function under the control, direction and supervision of Food world and in accordance with the policies, rules and guidelines generally applicable to Foodworld's employees during the assignment period. EFCL will not have continuing obligation towards Foodworld with regard to the performance of the secondees. The obligation of DFCL shall cease on the acceptance by the relevant secondee of an employment letter from Foodworld.

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1.8 Foodworld shall be responsible for complying with the requirements of withholding tax and associated reporting obligations under the Indian tax laws, on the Remuneration and any other payments or benefits paid to the Secondees.

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6.1 This Agreement shall become binding upon its signature by both the parties, and shall remain in full force and effect unless it is terminated pursuant to Article 6.2 or 6.3 below.

6.2 Either party shall, without prejudice to its other right in law or equity and without any liability and judicial intervention, be entitled to terminate this Agreement forthwith by giving written notice to such effect to the other party in case the other party:

6.3 This Agreement may be terminated by either party at any time, by providing not less than 90 days written notice to the other party."

9. As per the terms of the above agreement, 5 personnel were deputed with the assessee. The details of the secondees are given at page 6 of the CIT(A) as under:

Name of Secondees; Designation	Worked during 2007-08	Qualification	Retail Experience
Norma Yum Chief Executive Officer	Apr-07 Mar-08	MBA from Newport University (Hong Kong) 1999 BA from Regents of American World University, Hong Kong 1996	Over 20 years of retail experience in Hong king; holding merchandising operation and general management roles in senior positions. Prior to secondment, the Fresh Food Director of Welcome, Hon Kogn (an entity with annual sales in excess of US$ 1 billion), reporting to CEO
Eric Law Ho Fai General Manager Projects	Apr-07-Mar-08	A Levels : Shue Ya College, Hong Knog (1981)	Over 20 years of retail experience in Hong Kong, holding a variety of merchandising and operational management positions. Prior to secondment, Fresh Operations Manager for Welcome, Hong Kong, reporting to the Fresh Food Director.
Mark Marshal Chief Operating Officer	Apr-07-Mar-08		26 years of retails experience in South Africa
Man Yee Linda Shiu Group Category Manager	Apr-07-Jan-08	BSC in Food and Nutrition, University of Hong Kong (2000)	6 years of retail experience with welcome, Hong Kong in fresh food and merchandising management positions.
Almen Aze Sing Chan Group Category Manager	Apr-07-Jan-08	Bachelor of Master in Philosophy : Food Science (2003) BSc in	2 years of retail experience with welcome, Hong Kong in fresh food and merchandising management positions.

		Food and Nutrition Science, University of Hong Kong (2000)	

10. As it is clear that all 5 secondees are not ordinary employees or workers but they are deputed the high level managerial/executive positions which shows that they are deputed because of expertise and managerial skills in the field. This fact is also reflected in the agreement. It is pertinent to note that the secondment agreement is between the assessee and DFCL and these secondees assigned to the assessee are not party to the agreement. Further the secondees are assigned by DFCL and there is no separate contract of employment between the assessee and the secondees. The secondees are under the legal obligation as well as employment of DFCL and assigned to the assessee only for a short period of time. In the absence of any contract between the assessee and the secondees, the parties cannot enforce any right or obligation against each other. The secondeess can claim their salary only from the parent company i.e DFCL and not from the assessee. Thus, the expatriates were performing their duties for and on behalf of the DFCL. Once it is found that the secondees

were rendering the marginal and highly expertise services to the assessee the payment for such services is in the ambit of FTS defined in explanation 2 to sec. 9(1)(vii) of the Act, which read as under:-

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

11. An identical issue has been considered and decided by the Hon'ble Delhi High Court in the case of Centrica (Supra). The Hon'ble High Court while dealing with the definition of FTS under Article 13(iv) of Indo UK DTAA has held that the services of the personnel deputed under the secondment agreement were in the nature of managerial consultancy services to the assessee. It is pertinent to note that the definition under Article 13(4) of the Indo UK DTAA as well as the definition under Explanation 2 to sec. 9(1)(vii) are almost

identical except the word 'managerial' is missing in the definition provided under tax treaty. For ready reference we quote the definition of FTS under Article 13(4) of Indo-UK DTAA which has been reproduced by the Hon'ble High Court in para 25 as under:-

"ARTICLE 13 – Royalties and fees for technical services-

"4. The definitions of fees for technical services in paragraph 4 of this Article shall not include amounts paid :

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in paragraph 3(a) of this Article.

(b) for service that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships, or aircraft in international traffic;

(c) for teaching in or by educational institutions;

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

(e) to an employee of the person making the payments or to any individual or partnership for professional service as defined in Article 15 (Independent personal services) of this Convention.

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12. The Hon'ble High Court while deciding the issue has observed that the assessee filed the provision of services of other personnel. The term including the provision of services of technical or 'other personnel;' is common in both definition provided under Explanation 2 to sec. 9(1)(vii) of the Act as well as in the Article 13(4) of the India UK DTA. Moreover the definition of FTS under sec. 9(1)(vii) Art 13(iv) of Indo UK DTA has similar except one extra word 'marginal deed' to the definition under Income-tax Act. The Hon'ble High Court while dealing with the issue as held in para 28 to 31, 37, 38 as under:

> **28.** *CIOP relies on the concept of economic employment as opposed to legal employment and submits that the formal jural or legal relationship of employer and employee as between the seconded employee and the overseas entity is of no significance. It is argued that for all practical purposes, CIOP is the real employer, because the content of the work or employment, the entire direction and supervision over the seconded employees work and the pay and emoluments are borne by it. For convenience, the pay is disbursed by the overseas entity, but that amount is reimbursed to the overseas entity. Reliance is firstly placed on the concept of Economic employer, discussed by Klaus Vogel in 'Double Taxation Conventions', especially the following extracts:*
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> - *"8. International hiring out of labour Paragraph 2 has given rise to numerous case of abuse through*

adoption of the practice known as International hiring out of labour. In this system, a local employer wishing to employ foreign labour for one or more periods of less than 183 days recruits through an intermediary established abroad who purports to be the employer and hires the labour out to the employer. The worker thus fulfills prima facie the three conditions laid down by paragraph 2 and may claim exemption from taxation in the country where he to temporarily working. To prevent such abuse, in situation of this type, the term "employer" should be interpreted in the context of paragraph 2. In this respect it should be noted that the term "employer" is not defined in the convention but it is understood that the employer is the person having rights on the work produced and bearing the relative responsibility and risks. In cases of international hiring out of labour, these functions are to a large extent exercised by the user. In this context, substance should prevail over form, i.e. each case should be examined to see whether the functions of employer were exercised mainly by the intermediary or by the user. It is therefore up to the contracting states to agree on the situations in which the intermediary does not fulfill the conditions required for him to be considered as the employer within the meaning of paragraph 2. In setting this question, the competent authorities may refer not only to the above mentioned indications but to a number of

circumstances enabling them to establish that the real employer is the user of the labour (and nor the foreign intermediary); The hirer does not bear the responsibility or risk for the results produced by the employee's work;

- *The authority to instruct the worker lies with the user;*
- *The work is performed or a place which is under the control and responsibility of the user;*
- *The remuneration to the hirer is calculated on the basis of the time utilized, or there is in other ways a connection between this remuneration and wages received by the employer;*
- *Tools and materials are essentially put at the employee's disposal by the user :*
- *the number and qualifications of the employees are not solely determined by the hirer....."*

The Court also notes that the Model Tax Convention on Income and on Capital (Condensed Version, July 2010) in this context, states as follows:

- *"8.14 Where a comparison of the nature of the services rendered by the individual with the business activities carried on by his formal employer and by the enterprise to which the services are provided points to an employment relationship that is different*

from the formal contractual relationship, the following additional factors may be relevant to determine whether this is really the case: Who has the authority to instruct the individual regarding the manner in which the work has to be performed.

- *Who controls and has responsibility for the place at which the work is performed;*
- *Remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided (see paragraph 8.15 below)*
- *Who puts the tools and materials necessary for the work at the individuals' disposal*
- *Who determines the number and qualifications of the individuals performing the work;*
- *Who has the right to select the individual who will perform the work and to terminate the contractual arrangements entered into with that individual for that purpose;*

29. *The issue which arises for the consideration of the Court in this case is whether the secondment of employees by BSTL and DEML, the overseas entities, falls within Article 12 of the India-Canada and Article 13 of the India-UK DTAAs, which embody the concept of a service permanent establishment (a "service PE"). In terms of those articles, the Court must determine whether the overseas entities rendered "technical services" under Article 13 of the India-UK DTAA and "included services" under Article 12 of the India-Canada DTAA. In essence, the inquiry is whether any tax liability*

of the overseas entity arises for the provision of services to CIOP in India, such that the trigger in the DTAAs comes into play. This must necessarily depend on the phrasing of each DTAA, construed on its own terms, in light of general principles as determined by the Courts. Since the question of technical services has been considered by the DTAA, this takes precedence over the taxing regime under Section 9 of the Act.

30. *The India-UK DTAA defines 'fees for technical services' as "payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel)". In this case, the overseas entities have, through the seconded employees, undoubtedly provided 'technical' services to CIOP, especially since that expression expressly includes the provision of the services of personnel. The seconded employees, who work, so to say, for CIOP are provided by the overseas entities and the work conducted by them thus, i.e. assistance in conducting the business of COIP of quality control and management is through the overseas entities. The nature of the services - cast as "business support services" by CIOP - as also clearly within the hold "technical or consultancy. These services envisage the provision of quality service by vendors to the overseas entities, which CIOP, and the secondees, are to oversee. This requires the secondees to draw from their technical knowledge, and falls within the scope of the term. This reading of 'technical' services does not limit itself only to technological services, but rather, extends to know-how, techniques and technical knowledge. This is supported by clause 4 of Article 12 itself, which*

lists these various sub-categories. Indeed, the term 'technical' has not been defined in the DTAA, and must be accorded its broader dictionary meaning, unless limited by the parties to the instrument. The AAR in Intertek Testing Services India (P.) Ltd, In re [2008] 307 ITR 418/175 Taxman 375 (AAR), considered this question in detail, and rightly held that

"What is meant by the expression 'technical'? Should it be confined only to technology relating to engineering manufacturing or other applied sciences? We do not think so. The expression 'technical' ought not to be construed in a narrow sense."

This reading was supported by the Supreme Court, in the context of Section 9(1)(iv) of the Act in Continental Construction Ltd. v. CIT [1992] 195 ITR 81/60 Taxman 429. Further, the Court notes that the distinction to be drawn by CIOP between the provision of services by the overseas entities themselves and the 'mere' secondment of employees does not make a difference, since the services provided the overseas entities is the provision of technical services through the secondees - an instance envisaged under Article 13 itself.

***31.** The issue of Article 12 of the India-Canada treaty involves a more nuanced inquiry. Article 12 also incorporates fees for "included services". Whilst this includes "technical services or consultancy service" under clause 4, it states that 'fees for included services' "means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services … make available technical*

knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design." This second qualification for the technical knowledge etc. to be 'made available' is an essential, and additional, requirement under the India-Canada DTAA. This phrasing also finds mention in Article 13 of the India-UK DTAA, this requirement is disjunctive from the rest of the provision, unlike in the India-Canada DTAA. The India-UK DTAA states that 'fees for technical services' "means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which … or make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design." In order for the amounts paid to the overseas entities in the transaction covered by the India-Canada DTAA, thus, it must not only be showed that technical services were performed, but that such knowledge etc. was 'made available'.

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37. *This brings the Court to the next issue, concerning reimbursement and the doctrine of diversion of income by overriding title. This Court notices that a case with almost identical circumstances, in In Re: AT & S India (P.) Ltd. (supra), also came up before the AAR. There, an agreement between AT&S India and its parent, AT& Austria was entered into, by which AT&S Austria undertook to assign or cause its subsidiaries to assign its qualified employees to the AT&S India. These individuals were to work for AT&S India and receive compensation substantially similar to what*

they would have received as employees of AT&S Austria. They were engaged by AT&S India on a full time basis. The question before the AAR was identical to this case:

"Whether pursuant to the secondment agreement entered into by the applicant with AT&S Austria, the payment to be made by the applicant to AT&S Austria, towards reimbursement of salary cost incurred by AT&S Austria in respect of seconded personnel, would be subject to withholding tax under Section 195 of the IT Act, in view of the facts that (1) the payments are only in the nature of reimbursement of actual expenditure incurred by AT&S Austria. (2) AT&S Austria is not engaged in the business of providing technical services in the ordinary course of its business, (3) AT&S Austria is not charging the applicant any separate fee for the secondment and (4) the seconded personnel work under the direct control and supervision of the applicant?"

In holding that the obligation under Section 195 would be triggered, the AAR held as follows:

'From the above analysis of both the agreements it is clear that pursuant to the obligation under the FCA, the AT&S Austria has offered the services of technical experts to the applicant on the latter's request and the terms and conditions for providing services of technical experts are contained in the secondment agreement which we have referred to above in great details. Though the term "reimbursement" is used in the agreements, the nature of payments under the secondment agreement has to satisfy the characteristic of reimbursement and that the term "reimbursement" in the agreement will not be determinative of nature of payments. The term

"reimbursement" is not a technical word or a word of Article In Oxford English Dictionary, to reimburse means—to repay a person who has spent or lost money—and accordingly reimbursement means to make good the amount spent or lost. However, under the secondment agreement the applicant is required to compensate AT&S Austria for all costs directly or indirectly arisen from the secondment of personnel and that the compensation is not limited to salary, bonus, benefits, personal travel, etc. though salary, bonus, etc. and the amounts referred to in para 4.2 of the secondment agreement form part of compensation. The premise of the question that the payments are only in the nature of reimbursement of actual expenditure incurred by AT&S Austria is not tenable for reasons more than one. First it is not supported by any evidence as no material (except the debit notes of salaries of seconded personnel) is placed before us to show what actual expenditure was incurred by AT&S Austria and what is being claimed as reimbursement; secondly, assuming for the sake of argument that the debit notes represent the quantum of compensation as the actual expenditure, it would make no difference as the same is payable to the AT&S Austria under the secondment agreement for services provided by it. It would, therefore, be not only unrealistic but also contrary to the terms of the agreement to treat payments under the said agreement as mere reimbursement of salaries of the seconded employees who are said to be the employees of the applicant.

To show that the real employer of such employees is the applicant and not the AT&S Austria, Mr. Chaitanya invited our attention to

various employment agreements entered into between the applicant and the seconded employees and also the certificate of deduction of tax at source on their global salary. All the employment agreements are similarly worded. We have carefully gone through the employment agreement between the applicant and Mr. Markus Stoinkellner. The duration of the employment is from 1st Sept., 2005 till 30th Aug., 2008. In Article 3 thereof salary of the employee is noted as the remuneration, perquisites and other entitlements as detailed in Appendix-A. However, Appendix-A does not specify any amount. All that it says, is that the salary will be as fixed and agreed between the employee and the company from time to time and that such salary may be paid either in India or outside India but the total salary shall not exceed the salary fixed as above, but no fixed salary is mentioned in the employment agreement. Other perquisites and entitlements are : travel expenses, transport, boarding, lodging; and annual leave of 30 days per year; and home leave which the employee will be entitled to once. The applicant shall have to organize an economic class return flight tickets to go on home leave. The employment agreement also provides that the employee will be responsible for meeting all requirements under Indian tax laws including tax compliance and filing of returns and the applicant is authorized to deduct taxes from the compensation and benefits payable.'

38. *The mere fact that CIOP, and the secondment agreement, phrases the payment made from CIOP to the overseas entity as 'reimbursement' cannot be determinative. Neither is the fact that the overseas does not charge a mark-up over and above the costs of*

maintaining the secondee relevant in itself, since the absence to markup (subject to an independent transfer pricing exercise) cannot negate the nature of the transaction. It would lead to an absurd conclusion if, all else constant, the fact that no payment is demanded negates accrual of income to the overseas entity. Instead, the various factors concerning the determination of the real employment link continue to operate, and the consequent finding that provision of employees to CIOP was the provision of services to CIOP by the overseas entities triggers the DTAAs. The nomenclature or lesser-than-expected amount charged for such services cannot change the nature of the services. Indeed, once it is established, as in this case, that there was a provision of services, the payment made may indeed be payment for services - which may be deducted in accordance with law - or reimbursement for costs incurred. This, however, cannot be used to claim that the entire amount is in the nature of reimbursement, for which the tax liability is not triggered in the first place. This would mean that in any circumstance where services are provided between related parties, the demand of only as much money as has been spent in providing the service would remove the tax liability altogether. This is clearly an incorrect reasoning that conflates liability to tax with subsequent deductions that may be claimed.

13. The SLP filed against the judgment of Hon'ble Delhi High Court has been dismissed by the Hon'ble Supreme Court in 227 Taxman 368. Therefore the view taken by the Hon'ble High Court has

attained finality. The concept of income includes positive as well as negative income or nil income. In the case of payment being FTS or royalty as per sec. 9(1) of the Act it is irrelevant whether any profit element in the income or not. It is not only a matter of computation of total income when the concept of profit element in payment is relevant. If the payment being FTS or royalty is made to non-resident, then the concept of total income becomes irrelevant and the provisions of sec. 44D recognize the gross payment chargeable to tax. Thus all the payment made by the assessee to non-resident on account of FTS or royalty an chargeable to tax irrespective of any profit element in the said payment or not. However, there is an exception to this Rule of charging the gross amount when the non-resident is having fixed place of business or PE in India and the amount is earned through the PE, then the expenditure incurred in the relation to the PE for earning said amount is allowable as per the provisions of sec. 44DA of the Act. Therefore, in view of the judgment of Hon'ble Delhi High Court in the case of Centrica (Supra), the payment made to foreign company DFCL partakes the character of FTS as per the definition under explanation 2 to sec . 9(1)(vii) of the Act. The decisions relied upon by the assessee in the case of IDS Software Solutions (Supra) and Abbey Business Solution (Supra) would not

help the case of the assessee when there is a direct judgment of Hon'ble Delhi High Court on this point.

14. The learned AR of the assessee has raised an alternative point that the secondment of employees constitute a service PE and secondly the amount would be chargeable to tax as per the provision of sec. 44DA of the Act. Admittedly there is no DTA between India and Hong Kong and under the provision of Income-tax there is no concept of service PE. However, the learned AR of the assessee has relied upon the judgment of Hon'ble Supreme Court in the case of DIT International Vs. Morgan Stanely and Co. Inc. (Supra) wherein the Hon'ble Supreme Court has observed in para 11 as under:-

> *"11. The concept of PE was introduced in 1961 Act as part of the statutory provisions of transfer pricing by the Finance Act of 2001. In sec. 92F(iii) the word 'enterprise' is defined to mean ' a person including a PE of such person who is proposed to be engaged in any activity relating to the production'. Under the Central Board of Direct Taxes Circular No.14 of 2001 it has been clarified that the term PE has not been defined in the Act but its meaning may be understood with reference to the DTAA entered into by India. Thus the*

intention was to rely on the concept and definition of PE in the DTAA. However, vide Finance Act, 2002, the definition of PE was inserted in the Income-tax Act, 1961 (for short, 'the IT Act') vide sec. 92F(iiia) which states that the PE shall include a fixed place of business through which the business of the MNE is wholly or partly carried on. This is where the difference lies between the definition of the word PE in the inclusive sense under the Income-tax Act as against the definition of the word PE in the exhaustive sense under the DTAA. This analysis is important because it indicates the intention of parliament in adopting an inclusive definition of PE so as to cover service PE, agency PE, software PE, construction PE, etc."

15. The Hon'ble Apex Court while analyzing the definition of PE u/s 92F(iii) of the Act has observed that the intention of parliament in adopting an inclusive definition of PE covers the service PE, agency PE, Software PE, Construction PE etc.

16. Since this plea has been taken by the assessee for the first time before this Tribunal and there is no DTA between India and Hong Kong therefore, this concept of service PE requires a proper examination of all the relevant facts as well as provisions on the point

whether it constitute a service PE in India. Accordingly, the issue is remitted to the record of the AO for adjudication of the plea raised by the assessee that the secondment of the employees constitute a services PE and accordingly provisions of sec. 44DA would be applicable. Needless to say, the AO to adjudicate issue after affording an opportunity of hearing to the assessee.

17. In the result, the appeal filed by the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on **28th Oct, 2015.**

Sd/-	**Sd/-**
(JASON P BOAZ)	**(VIJAYPAL RAO)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Vms.

Bangalore
Dated : 28/10/2015

Copy to :1. The Assessee
2. The Revenue
3.The CIT concerned.
4.The CIT(A) concerned.
5.DR
6.GF

By order

Asst. Registrar, ITAT, Bangalore.