IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

IT(IT)A Nos.1288, 1291, 1294, 1297, 1300, 1303 & 1306/Bang/2017
Assessment years : 2009-10 to 2015-16

The Deputy Commissioner of Income Tax, International Taxation, Circle 1(2), Bangalore.	Vs.	M/s. IBM India Pvt. Ltd., 12, Subramanya Arcade, Bannerghatta Road, Bangalore – 560 029. **PAN: AAACI 4403L**
APPELLANT		RESPONDENT

Revenue by	:	Smt. Vandana Sagar, CIT(DR)(ITAT), Bengaluru.
Assessee by	:	Shri P.C. Khincha, CA.

Date of hearing	:	05.10.2018
Date of Pronouncement	:	16.11.2018

O R D E R

Per BENCH

ITA Nos.1288, 1291, 1294, 1297,1300, 1303 and 1306/Bang/2017 are appeals by the DCIT (International Taxation) Circle 1 (1), Bangalore, against the order dated 31.3.2017 of CIT(Appeals)-12, Bengaluru, relating to assessment years 2009-10 to 2015-16. The revenue is aggrieved by two reliefs allowed to the Assessee in the common order of the CIT(A) and has filed 7 appeals for AY 2009-10 to 2015-16. This is how these 7 appeals arise for consideration before the Tribunal.

2. IBM India Pvt. Ltd., (hereinafter referred to as 'IBM India" or "Assessee" or "Respondent") is a company incorporated under the Companies Act, 1956, engaged in the business of selling computers, software, besides rendering Software Development and Information Technology Services and lease financing activities of its products. It is a wholly owned subsidiary of International Business Machines, USA (IBM USA).

3. The Assessee is part of the IBM group that has entities across the world. IBM Group has policy of sending employees of its group in one country on deputation to another group in another country on assignment. Such people sent on deputation are called "employees sent on Secondment" "Expatriate Employee" etc. The group has a standard expatriate Agreement to regulate and set out the terms and conditions on which employees of IBM group in one country will send on deputation its employee to another group in another country. The terms of the expatriate Agreement dated 1.1.2002 between IBM UK and IBM India, whereby IBM UK agreed to send its employees on request by IBM India to work for IBM India may be taken as illustrative and the terms of the said agreement relevant for adjudication of the present appeals, are as follows:-

> "Article-1 of the Agreement defines certain terms.
>
> (a) Expatriate Employee has been defined to mean a person legally employed by or through IBM UK who is assigned to render services for the benefit of IBM India and under the direction and control of IBM India.
>
> (b) Assigned or Assignment has been defined to mean the transfer of the supervision and control of a person's duties from one entity to another within an organization for the purpose of that person's providing services for the benefit of the entity to

which he/she is assigned for a temporary and fixed period of time.

(c) Confidential Information has been defined to refer to all information relating to the Agreement received by the other party.

Article-2 defines the Scope of the Agreement and it reads thus:-

ARTICLE 2

SCOPE OF AGREEMENT

2.1 Assignment — From time to time IBM Indian will request IBM UK to assign agreed-upon Expatriate Employees to IBM India for periods agreed to between the Parties. During the period of Assignment, the Expatriate Employees shall, as between UK and IBM India, be deemed in all respects to be under the supervision. direction and control of IBM India and IBM India shall provide all facilities and other amenities as may be required by the assignment of the Expatriate Employees for the purpose of the Expatriate Employees providing services to IBM India.

2.2 Assignment Relationships - For the period of the assignment, the Expatriate Employees shall be under the control and direct supervision of IBM India and functionally report to the management of IBM India or such other person as IBM India may direct, and work exclusively for the operations of IBM India, and in no way further the business of IBM UK or any other entity.

2.3 Rules and Responsibility - The Expatriate Employees will be governed by the terms of assignment, and the applicable rules and regulations of IBM India as may be in force from time to time. The working relationship between the Expatriate Employees and IBM India shall be solely determined between IBM India and the Expatriate Employee. Specific relaxations if any, may be made by IBM India in respect of the Expatriate Employee as IBM India may deem fit. IBM UK shall not be responsible for the work executed by the Expatriate Employees and all risks and

rewards of the work performed by the Expatriate Employees shall rest with IBM India.

2.4 Compliance with Laws - In performing under this Agreement, each Party shall comply with all applicable laws, rules and regulations, including, but not limited to laws, rules and regulations governing the import, export, collection, and processing of personal information.

Article-3 deals with payments and it read thus:-

3.1 Salaries and Expatriate Employee Expenses - IBM India shall reimburse total salary costs of the Expatriate Employees to IBM UK (including reimbursement of expenses as applicable). However. for ease of convenience. IBM UK shall pay the actual net salary of the Expatriate Employees and thereafter, IBM India shall reimburse IBM UK for the salaries paid on IBM India's behalf. No mark-up shall he charged by IBM UK at the time of raising a reimbursement claim on IBM India.

3.2 Reimbursement - IBM India shall reimburse IBM UK, in a form to be agreed between the Parties or the commonly accepted format of invoicing prevailing between the parties, on a monthly basis for the salary costs and any expenses paid by it to the Expatriate Employees. IBM UK shall submit such invoices by the end of the month following the relevant calendar period. IBM UK shall maintain adequate records to detail the basis for the invoices. All invoices are due and payable by IBM India within thirty days or receipt. All amounts payable under this Agreement shall be paid in U.S. currency.

Article-4 deals with confidentiality and proprietary rights and it reads thus:-

ARTICLE 4

CONFIDENTIALITY AND PROPRIETARY RIGHTS

4.1 Confidentiality - Each Party shall maintain in confidence all Confidential 'Information of the other Party, and shall not disclose such Confidential Information to any third party

except Affiliates that are subject to similar confidentiality obligations or as reasonably required in connection with such Party's activities pursuant to this Agreement or any separate agreement entered into by the Parties. In maintaining the confidentiality of the other Party's Confidential Information, each Party shall exercise the same degree of care that it exercises with its own confidential information. and in no event less than a reasonable degree of care. Each Party shall ensure that each of its Personnel holds in confidence and makes no use of the Confidential Information of the other Party for any purpose other than those permitted under this Agreement. or any separate agreement entered into by the Parties, or otherwise permitted by this Agreement.

4.2 Exceptions - The obligation of confidentiality contained in this Agreement shall not apply to the extent that (i) either Party (the "Receiving Party") is required to disclose information by order or regulation of a governmental agency or a court of competent jurisdiction: provided, however, that the Receiving Patty shall not make any such disclosure without firm informing the other Party and allowing the miter Party a reasonable opportunity to seek relief from the obligation to make such disclosure or (ii) the Receiving Party can demonstrate that (a) the disclosed information was at the time of such disclosure to the Receiving Party already in (or thereafter enters) the public domain other than as a result of actions of the Receiving Party, its directors, officers, employees or agents in violation hereof: (b) the disclosed information was rightfully known to the Receiving Party prior to the date of disclosure to the Receiving Party: or (c) the disclosed information was received by the Receiving Party on an unrestricted basis from a source unrelated to any Party to this Agreement and not under a duty of confidentiality to the other Party.

4.3 Unauthorized Disclosure - Each Party acknowledges and confirms that the Confidential Information (lithe other Party constitutes proprietary lamination and trade secrets valuable to the other Party, and that the unauthorized use, loss or outside disclosure of such Confidential Information may cause irreparable injury to the other Party. Each Party shall inform the other Party immediately upon discovery of

any unauthorized use or disclosure of Confidential Information, and will cooperate with the other Party in every reasonable way to help regain possession of such Confidential Information and to prevent its further unauthorized use. Each Party acknowledges that monetary damages may not be a sufficient rented s for unauthorized disclosure of Confidential Information of the other Party and that the other Party shall be entitled, without waving the other rights or remedies, to such injunctive or equitable relief as may be deemed proper by a court of competent jurisdiction. Each Party shall be entitled to recover all reasonable costs and expenses, including reasonable attorneys' fees for any action arising out of or relating to a disclosure of that Party's Confidential Information by the other Party.

4.4 Return of Information - Without prejudice to any other rights provided herein. upon the termination of this Agreement. each Party shall, upon request and unless otherwise agreed. return to the other Party or destroy all of the other Party's Confidential Information in its possession or control, including any copies of reproductions thereof, subject to the terms of separate agreement between the Parties.

Article-5 deals with Taxes and it reads thus:-

ARTICLE 5

TAXES

5.1 Taxes - With respect to salaries of Expatriate Employees under this Agreement, IBM India shall be responsible for ensuring withholding and payment of appropriate taxes properly due to Indian tax authorities as would otherwise be payable on the entire salary of the Expatriate Employees and IBM UK shall be responsible for ensuring appropriate withholding and payment of taxes properly due to United Kingdom tax authorities."

4. A reading of Article 2 of the Expatriate Agreement shows that the control and supervision of the seconded employee is with IBM India. As per Article 3 of the expatriate Agreement salary of the expatriate employee will be paid by the IBM Oversees entity and the same shall be reimbursed by IBM India to the concerned IBM Oversees entity. As per clause-4 of the expatriate Agreement, IBM India as well as the expatriate employee shall not disclose confidential information of the other party. Article 5 of the expatriate Agreement imposes obligation of compliance with tax deduction at source as per the Act on salaries paid to expatriate employees on IBM India.

5. The process of secondment of employees by IBM Oversees entities to IBM India is initiated when IBM India requires services of expatriate employees of the IBM oversees group entities for its business projects by IBM India making a request on IBM Overseas companies to send its employee on assignment to IBM India. The request for such assignment is made in the form of an Assignment Initiation Request (AIR) wherein details of the Assignee, job profile of the assessee, etc., would be mentioned. IBM India gives offer letter to the seconded employee. By way of illustration, we may take the case of one Mrs. Nancy Thomas who is a national of United States of America and who is on the rolls of IBM (USA). She is already on deputation/assignment to IBM's group company at Japan. She was sent on assignment/deputation from Japan to IBM India. The offer letter dated 5.3.2015 of IBM India addressed to Mrs. Nancy Thomas contains the following features:-

1. She is employee of IBM (USA) and during her assignment to IBM India her employment responsibilities with IBM(USA) will remain suspended during the period of assignment.

2. That she will be under the control and supervision of IBM India.

3. That her unique and specialized knowledge of IBM's processes was vital for the assignment with IBM India and upon completion of the assignment, she is to return to IBM (USA) to resume her responsibilities.

4. That during the assignment period, salary (excluding allowances and expenses paid locally by IBM India) will be paid in home country (i.e. USA) which will be reimbursed by IBM India.

5. That during the period of assignment with IBM India all other terms and conditions as per IBM polices were applicable.

6. IBM India deducted tax at source u/s.192 of the Act on the salary paid to the seconded employees and paid the same to the credit of the Central Government. As we have already seen IBM India had to reimburse the salary cost of the expatriate employees to the concerned IBM oversees entity. At the time of making payment of such reimbursement, no taxes were deducted at source by IBM India in respect of reimbursements made to IBM Overseas companies in respect of salary paid to seconded employees as, according to IBM India, the same was in the nature of cost-to-cost reimbursements and no element of income was involved. The Deputy Commissioner of Income-tax, International Taxation, Circle 1(1) ("DCIT") issued notices calling for details in respect of reimbursements made by IBM India to IBM Overseas companies during the years under consideration and also required IBM India to show cause as to why reimbursements made to IBM Overseas companies should not be treated as Fees for Technical Services (FTS) and why IBM India should not be treated as an assessee in default in respect of reimbursements made to IBM Overseas companies on which no taxes were deducted at source.

7. It was the plea of IBM India that the said reimbursements do not constitute FTS in the hands of IBM Overseas companies as contemplated under the provisions of the Income-tax Act, 1961 (The Act') and also as per the provisions of the Double Taxation Avoidance Agreement entered between India and other respective countries (the Treaty'). It was therefore submitted that IBM India was not required to deduct tax from these payments under section 195 of the Act.

8. The DCIT passed an order under section 201(1) and section 201(1A) of the Act, dated March 6, 2016 (served on IBM India on March 7, 2016) holding that reimbursements made to IBM Overseas companies would be covered under the definition of "FTS" as per the provisions of section 9(1)(vii) of the Act and also as per the provisions of the Treaty and consequently treating IBM India as an `assessee-in-default' under the provisions of section 201(1) of the Act on account of alleged failure to withhold taxes in respect of the aforesaid payments.

9. The following were the conclusions of the DCIT on the nature of payment in the form of reimbursement made by IBM India to IBM oversees entities:-

1. IBM oversees entities continued to be the employer in respect of the deputed/assigned employees and continued to pay their salaries. That IBM India only reimbursed the salary costs of the concerned expatriate, deputed employee to the concerned IBM Oversees entity. Therefore the sum reimbursed was not salary paid by IBM India to the expatriate employees but was FTS paid to the IBM Oversees entity which is taxable in India and therefore IBM India ought to have deducted tax at source on the reimbursement made to IBM oversees entity. Tax deducted at source u/s.192 of the Act were made by IBM India for and on behalf of the IBM oversees entity, who were even otherwise bound to comply with the withholding tax obligation in India, as the salary received by the expatriate employees were for

services rendered in India, which income accrues and arises to them in India and were therefore taxable in India in their hands.

2. The nature of services rendered by the expatriate employees was FTS within the meaning of Expln.2 to Sec.9(1)(vii) of the Act. In this regard the DCIT found that all the deputed employees had technical skills and imparted their skill while on deputation to India to further the business projects of IBM India and therefore the payment in the form of reimbursement by IBM India to IBM oversees entity was in the nature of FTS. In coming to the above conclusion, the DCIT referred to the Assignment Initiation Request (AIR) raised by IBM India from time to time requesting IBM Overseas entities to assign secondees for stipulated period in relation to its business projects wherein details of the assignee, job profile of the assignees, etc. would be mentioned. According to the DCIT, on analysis of AIR, the requirement of the IBM India is not to carry out its regular or normal business activities. It expresses it requirement of highly qualified, experienced, skilled employees the overseas companies. The seconded employees are not ordinary employees or workers. The overseas companies are assigning certain employees because of their expertise and managerial/consultancy skills which requires IBM India for its business development/improvement/growth._Therefore, the payment towards such services are fall within the ambit of FTS as defined in Explanation 2 to section 9(1)(vii) of the Act. According to DCIT Any consideration paid for rendering of a managerial, technical or consultancy services which include provision of services of technical or other personnel, falls within the meaning of fees for technic0 services subject to one exception that is when the consideration would be income of the recipient chargeable under the head "Salaries". According to the DCIT, IBM India is not the real employer of the seconded employees. The subject-matter of payments is not merely the salaries of such employees, which have suffered tax, but compensation which, as noted above, takes in its ambit other items also which the SECONDER is entitled to receive from the applicant under the expatriate agreement. And further the recipient of the consideration of compensation is the SECONDER and not the seconded employees and the compensation is not the income of the SECONDER chargeable under the head "Salaries". The fact that the employees of the SECONDER have received their salaries from the SECONDER and have paid tax under the head "Salaries" is of no consequence. According to DCIT, the fact that the sum paid by IBM India as reimbursement was equivalent of salary

payable to expatriate employees and that there is no profit element involved in such payments that accrues to IBM oversees entity was not an essential ingredient of a receipt to be taxable as an income. He held that once the income falls in the category described under 9(1)(vii) then the TDS sections will come into operation irrespective of the fact whether the amount paid by IBM India is equal to the cost incurred by the SECONDER or whether the SECONDER is having any taxable in its hands or not. These questions are irrelevant for deciding the taxability of the income from Fees for Technical Services.

3. Some of the IBM oversees entities to who the Assessee made reimbursements were tax residents of USA, UK, Australia, Canada and France. As per the Double Taxation Avoidance Agreement (DTAA) with these countries, FTS received by the resident of the aforesaid countries is taxable in India only when the services rendered by the IBM oversees entitles "make available" the technical skill or expertise for use with some degree of permanence by IBM India. The DCIT came to the conclusion that services were made available by the oversees entitles. The DCIT held that from the job justification given by IBM India for assignment of employees from overseas companies demonstrated that

   - IBM India is lacking in technical, managerial and consultancy skills/experience in some of its business strategic or development areas.
   - The request for overseas assignees is for Development of needed capabilities or technological **skill in** India for its business
   - **The** seconded employees were requested in critical areas to support the growth of specific area **or** business
   - IBM India CATEGORICALLY mentioned in AIR that the assignment of certain overseas employees ensuring a **long - last return** on investment **in** the GMU
   - IBM India needed **Managerial** Skills in **some** critical role to lead the large delivery organization in India.
   - IBM India required to bring as assignee with in depth experience in delivery

- The company needed assignees to Lead development of technical strategy and to work with management on **talent development**
- ***To transfer knowledge and best design practices* to *the Bangalore team.***

4. The DCIT also referred to the job assignment description that were given in the AIR which was as under-

   - Oversee all major technical plans and activities.
   - Lead development of technical strategy.
   - Work with management on talent development and new hiring.
   - Collaborates with other leaders across the ICS division and across SWG to create consistency.
   - Manage end to end delivery for SO Global delivery India center.
   - Provides leadership to four regional delivery center leaders across the country; other competencies leaders, delivery account.

   According to the DCIT, if one analyzes the above job justification and description it was clear that the secondees are provided their skills, experience and technical skills and knowledge to IBM India and made available their skills, experience to the business of IBM India management and other functions. Therefore, make available clause was also satisfied as the work done by the secondees has resulted in technical knowledge, experience, skill, know-how or processes per Article 12(4)(b) of the Treaty. The DCIT placed reliance on the decision of the Hon'ble Delhi High Court in the case of *Centrica India Offshore Pvt. Ltd. 348 ITR 45 (Delhi)* in coming to his conclusion that the reimbursement was FTS and that services provided make available technical skill or knowledge for use by IBM India.

5. One of the contention of the Assessee before DCIT was that there was no FTS clause in the DTAA between India and Philippines and therefore payment made to IBM Philippines, a tax resident of Philippines, was to be regarded as income falling within Article 23(1) of the DTAA between India and Philippines which deals with "other income" and as per the said Article,

other income is taxable only in the country of residence i.e., Philippines and therefore reimbursements made to IBM Philippines is not taxable in India. This contention was rejected by the DCIT by holding that in the absence of FTS clause in the treaty, the Act will apply and invoked Expln.2 to Sec.9(1)(vii) and held that FTS was taxable in India.

6. There was also dispute was with regard to the rate of tax on FTS since the IBM oversees entities to whom IBM India made payments did not have Permanent Account Number (PAN) in India and in view of the provisions of Sec.206AA of the Act, the DCIT held that tax had to be deducted at source at the higher rate of tax at 20% in view of the provisions of Sec.206AA of the Act.

7. The final computation of tax payable u/s.201(1) & interest payable u/s.201(1A) of the Act was computed by the DCIT as per the table given as Annexure-1 to this reference. This annexure also gives the TDS paid by the Assessee on salary u/s.192 of the Act.

10. Aggrieved by the order of the DCIT, IBM India filed appeal before CIT(A), who confirmed the order of the AO on points 1 to3 as given above. On point 4 and 5 given above, the CIT(A) held in favour of the Assessee. Aggrieved by the order of the CIT(A) on points 4 & 5 the revenue has filed these appeals before the Tribunal.

11. We have heard the rival submissions. There are two common issues which arise for consideration in these appeals by the revenue. The first issue is as to whether the CIT(A) was right in holding that even if the reimbursement by IBM India to IBM Philippines are regarded as “FTS”, yet in so far as payments by IBM India to IBM Philippines is concerned, the same would not be chargeable to tax in the hands of IBM Philippines in India, the source country and therefore there would be no obligation to deduct tax at source u/s.195 by IBM India when it makes payment to IBM

Philippines in view of the absence of article in DTAA between India and Philippines (DTAA) dealing with FTS, can it be taxed in the source country as “other income” under Article 23(1) of the DTAA or u/s.9(1)(vii) Expln.2 of the Act as “FTS” has been concluded in several decisions of Tribunal in the context of DTAA clauses which are identical with DTAA between India and Philippines. The Assessee made payments to IBM Philippines by way of reimbursement of salary of expatriate employees sent on secondment to IBM India. One of the IBM Oversees entity to whom IBM India made payments was a tax resident of Philippine. It is in that context the issue came before the CIT(A) as to whether IBM India was obliged to deduct tax at source u/s.195 of the Act, when making payment. In fact in the case of IBM India Pvt. Ltd. Vs. DDIT in IT(IT)A Nos.489 to 498/Bang/2013 chargeability to tax of income in the nature of FTS when there is no such provision of taxing for Fees for Technical Services in the Indo-Phillipines Treaty was considered and decided by the Bangalore Bench of ITAT in favour of the Assessee (vide Paragraph 7.3.1. to 9.1.5 of the said order).

12. In the aforesaid decision of the Tribunal in *IBM India Pvt. Ltd. (supra)*, the admitted position is that there is no specific clause in DTAA regarding income in the nature of FTS. The assessee contended that in the absence of an 'FTS' clause in the DTAA, Article 7 (business profits) thereof would be applicable since IBM-Philippines is providing services in the course of its business and since it does not have a PE in India, payments made to IBM-Philippines are not chargeable to tax in India. Alternatively it was contended that if Article 7 of the DTAA is not applicable, the payments would be covered by Article 23 (1) of the DTAA which deals with 'Other Income' which lays down the rule that it is only the State of residence of the recipient (Philippines) that would have right to tax ‘other income’ therefore payments to IBM- Philippines a tax resident of

Philippines, would be taxable in Philippines and not in India. Per contra, Revenue contended that in the absence of 'FTS' clause in the DTAA, as per Article 24(1) thereof, the taxability of the said payments would be governed by the domestic laws i.e. Section 9(1)(vii) of the Act and consequently these payments are chargeable to tax in India and liable for TDS u/s.195 of the Act.

13. The Tribunal after referring to Article 23 and 24 of the DTAA observed that the purpose of Article 24 was elimination of Double Taxation. The Tribunal referred to Article 24(1) of the DTAA which provided that the laws in force in either of the Contracting States shall continue to govern the taxation of income in the respective Contracting States except where provisions to the contrary are made in this Convention. The tribunal observed that at first sight, it may appear that Articles 23 and 24(1) of the DTAA are in conflict with each other and that Article 23 is an omnibus clause covering all items of income not dealt with in Articles 6 to 22 but it was not so because Article 24(1) specifically refers only to income which are not covered under any of the clauses in the DTAA and therefore Article 24 would be rendered redundant if Article 23(1) were to be construed as covering all other incomes which are not specifically dealt with any of the clauses of the DTAA. The Tribunal observed that if one were to interpret Article 24(1) as conferring right to tax 'FTS' in accordance with the domestic law of a contracting state, which is the contention of revenue in the case on hand, then Article 23 would become redundant since it ceases to be a residuary / omnibus clause covering items of income, wherever arising, not dealt with in the foregoing Articles of the Treaty. The tribunal held that provisions of law or treat need to be interpreted in such a way as to avoid conflict between the various provisions and referred to the decision of Hon'ble Supreme Court in the case of CIT Vs. Hindustan Bulk Carriers

(2003) 259 ITR 449. The Tribunal referred to decision of Hon'ble Bombay ITAT in the case of BNB Paribas SA V DCIT (2013) Tax Corp (AT) 32700, which dealt with identical clause in DTAA between India-UAE which is similar to Article 24(1) of DTAA, wherein the Mumbai ITAT held that the purpose of Article 25(1) of the India-UAE DTAA which is similar to Article 24(1) of the India-Philippines Treaty was to (i) eliminate double taxation and it is for this purpose, it has been provided that the 'laws in force' in either of the Contracting States shall continue to govern the taxation of the income unless express provision to the contrary are made in this Agreement (ii)provides for deductions or credit of the taxes paid in either of the states based on either exemption method or providing for credit for taxes paid in the other country and that Article 25 by itself does not provide any rules on the mechanism for computing relief. It is only for such purposes the domestic laws may have to be referred and it cannot be extended to tax business income falling under Article 7 as per domestic law. The Tribunal referring to the aforesaid decision held that Article 24(1) of the India- Philippines DTAA, which is similar to Article 25(1) of the India-UAE Treaty, does not confer a right to invoke the provisions of domestic laws for classification or taxability of income which is governed by Article 6 to 23 of the India-Philippines Treaty and that Article 24(1) operates in the field of computation of doubly taxed income and tax thereon in accordance with the domestic laws of each contracting state and is not part of Articles 6 to 23 which deal with the classification of income into different heads. Para 2 of CBDT Circular NO.333 dt.2.4.1982 exemplifies what is stated in Article 24 of the India-Philippines DTAA; providing that the Mode of Computation of income as provided in the DTAA should be followed and where there is no specific provision in the treaty, the Income Tax Act will govern the same. Both Article 24 of the India-

Philippine DTAA and CBDT Circular NO.332 dt.2.4.1982 have no role to play in classification of income and allocation of right to tax such income to one or both of the contracting states as the same are to be dealt with in accordance with Article 6 to 23 of the DTAA. Even though the India-Philippines DTAA does not have an Article dealing with 'FTS', its taxation would be governed by Articles 7 or Article 23 as the case may be, depending on the facts and circumstances of each case. If Article 24(1) of the DTAA is interpreted as dealing with taxation of items of income not dealt within the foregoing Articles 6 to 23 of the India-Philippines DTAA, as per domestic laws, it would render Article 23 thereof redundant. The Tribunal ultimately held that there is no merit in the contention put forth by revenue that in the absence of 'FTS' Article under the India-Philippines Treaty, payments made to IBM-Philippines are taxable in India as per Article 24(1). Consequently, the findings of the authorities below that the payments made to IBM Philippines are taxable under Section 9(1)(vii) of the Act on the basis of Article 24(1) of the India-Philippines DTAA, was held to be incorrect and unsustainable.

14. The Tribunal has also examined whether Article 23(1) would apply at all to the facts of the case. Article 23 begins with the words items of income not expressly covered' by provisions of Article 6-22. Therefore, it is not the fact of taxability under article 6-22 which leads to taxability under article 23, but the fact of income of that nature being covered by article 6-22 which can lead to taxability under article 23. There could be many such items of income which are not covered by these specific treaty provisions, such as alimony, lottery income, gambling income, rent paid by resident of a contracting state for the use of an immovable property in a third state, and damages (other than for loss of income covered by articles 6-22) etc. The tribunal therefore held that article 23 does not apply to items of income

which can be classified under sections 6-22 whether or not taxable under these articles, and the income from consultancy charges on is covered by Article 7, Article 12 or Article 14 when conditions laid down therein are satisfied. The Tribunal clarified that the fact that the remuneration paid to the assessee may be in the nature of technical fee within the scope of section 9(l)(vii) does not make a difference. Fees of this nature can be earned in business or otherwise. If earned in the course of business, they constitute income from business. There is no incompatibility between recognizing the receipts as royalties or technical fees and also looking upon them as the profits of a business. Judicial decisions have recognized the principle in regard to other types of receipts such as dividends and interest. That being so, when technical fees are received in the course of business, one cannot deny them the treatment envisages by Article 7 specifically intended for application to business income. That apart as pointed out earlier, there are several DTAA's which prescribe different modes of taxation for business and for royalties and fees for technical services, but they are dear that the provisions of the "business" clause of the treaty (Article 7 here) will govern where such technical fees are earned in the course of business with a permanent establishment in the State in question. See for e.g., the DTAA's between India and Australia (Article 11(4), Canada [Article XIII (SC)] or USA [Article 12(6)]. These indicate that even where royalties and fees for technical services receive separate treatment under a DTAA, it is the Article relating to computation of business income that would apply where such royalties or fees arise in the course of business carried on by the recipient. The Tribunal came to the conclusion that receipts were in the course of business of the Assessee and were therefore business income falling within Article 7 of the DTAA and would therefore not fall within the ambit of Article 23(1) of the DTAA. Since IBM

Philippines did not have Permanent Establishment (PE) in India, the receipt was not chargeable to tax in India.

15. The aforesaid decision would squarely apply to the present case as IBM Philippines received the monies in the course of their business and did not have PE in India and therefore the receipt in question cannot be brought to tax under Article 7 of DTAA as well. In view of the above decision of the co-ordinate bench in the case of IBM India Pvt. Ltd. Vs. DDIT (I.T) (supra), we are of the considered opinion that in the absence of the provision in the DTAA to tax Fees for Technical Services the same would be taxed as per the Article 7 of the DTAA applicable for business profit and in the absence of PE in India, the said income is not chargeable to tax in India. Consequently, we hold that there is no merit in the appeals by the revenue on this issue.

16. The other issue regarding rate of tax at which TDS has to be deducted in the event of the non-resident payee not obtaining Income Tax PAN in India has been settled by a Special Bench ITAT Hyderabad in the case of *Nagarjuna Fertilizers & Chemicals and Another Vs. ACIT (*2017) 49 CCH 0053 (Hyd-Trib). The Special Bench held that the non-obstante clause contained in machinery provision of section 206AA of the Act was required to be assigned restrictive meaning and same could not be read so as to override even relevant beneficial provisions of Treaties, which override even charging provisions of the Income Tax Act by virtue of section 90(2) of the Act. Therefore, an Assessee could not be held liable to deduct tax at higher of rates prescribed in section 206AA in case of payments made to non-resident persons having taxable income in India in spite of their failure to furnish Permanent Account Numbers. There is, therefore, no merit in appeals by the revenue on this issue also.

17. In the result, the appeals by the revenue are dismissed.

Pronounced in the open court on this 16th day of November, 2018.

Sd/-	Sd/-
(JASON P. BOAZ) Accountant Member	(N.V. VASUDEVAN) Vice President

Bangalore,
Dated, the 16th November, 2018.

/ Desai Smurthy /

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.