IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI N.K. CHOUDHRY, JUDICIAL MEMBER

ITA No. 434/DEL/2019 [A.Y 2014-15]
ITA No. 3826/DEL/2019 [A.Y 2015-16]

M/s Springer Verlag GmbH C/o Springer Nature India Pvt. Ltd 7th Floor, Vijaya Building 17, Barakhamba Road New Delhi	Vs.	The D.C.I.T International Taxation Circle -3(1)(2), New Delhi
PAN: AAOCS 4799 R		
(Applicant)		(Respondent)

Assessee By	:	Shri Himanshu Sinha, Adv Shri Bhuvan Dhoopar, Adv Shri Vibhu Gupta, Adv
Department By	:	Shri Sanjay Kumar, Sr. DR

Date of Hearing	**:**	**14.07.2022**
Date of Pronouncement	**:**	**23.08.2022**

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above two captioned separate appeals by the assessee are preferred against the order of the ld. CIT(A) – 43, New Delhi dated 19.10.2018 for Assessment Year 2014-15 and 01.02.2019 for Assessment Year 2015-16. Since common grievances are involved in both the appeals, they were heard together and are disposed of by this common order for the sake convenience and brevity.

2. The common grievance in both the appeals relates to the treating of commission income received by the assessee from Springer Nature India Private Limited [SNIPL] as fee for technical services [FTS] under Article 12 of the India-Germany DTAA by the CIT(A) by changing the color of income, which was treated as royalty by the Assessing Officer.

3. The representatives of both the sides were heard at length, the case records carefully perused and relevant documentary evidences brought on record duly considered in light of Rule 18(6) of the ITAT Rules.

4. Briefly stated, the facts of the case are that the assessee is a company incorporated in accordance with the German laws and is a tax resident of Germany. The assessee is engaged in the business of publishing of books and journals in the field of research, education, and professional business.

5. On 02.01.2013, the assessee entered into a Commissionaire Agreement with SIPL by which the assessee was appointed as a non-exclusive sales representative on a global basis to promote, grant and distribute the products of SIPL.

6. As per the terms of the Commissionaire Agreement, the assessee provided services relating to Customer service, Order handling, Address maintenance, Invoicing, Delivery, physical as well as online, Debtor management services, Contract management, Processing of complementary copies and translated published copies.

7. While completing the scrutiny assessment, the Assessing Officer formed a strong belief that the entire receipt claimed as commission income is nothing but royalty taxable u/s 9(1)(vi) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] and also under the

DTAA with Germany and concluded assessment by taking the same as royalty @ 10% under India Germany DTAA.

8. The matter was challenged before the ld. CIT(A). The ld. CIT(A) was convinced with the challenge that the commission so received is not royalty but changed the color of assessment by treating the commission received as FTS as per India Germany DTAA by holding as under:

> "It is absolutely clear that the role of the appellant is to manage and provide managerial sendee to the Indian entity on a global basis. The said managerial services are clearly classifiable as FTS under the India- Germany Treaty. The appellant has quoted a number of judgments to suggest that the amount does not classify as FTS. However the judgments are with reference to the specific facts of the cases and specific to the nature of services being rendered by the parties for which the consideration was given. The appellant has not tried to explain as To how the services rendered by it are similar to the services of the parties whose judgments have been quoted. In the appellant's case, the facts of the nature of work being done by the appellant have been discussed above. The commissionaire agreement clearly shows that the services being rendered by the appellant are managerial in nature. The consideration for such services is taxable in the hands of the appellant as fee for technical services both in terms of the DTAA

with Germany and also the domestic law. The amount of Rs. 2,98,54,664 is therefore taxable @ 10% as FTS in the case of the appellant".

9. The undisputed fact is that the assessee was appointed as a non-exclusive sales representative on a global basis to promote, grant and distribute the products of SIPL. As mentioned elsewhere, the services provided by the assessee were in respect of customer and sale support. It is true that the definition of FTS under India Germany DTAA is similar to the one provided under the Act.

10. In our considered view, to construe any payment as FTS, payment should be a consideration for rendering of any managerial services. The ld. CIT(A) was of the firm belief that the assessee was involved in rendition of managerial services to SIPL and, therefore, the commission received for such services is in the nature of FTS.

11. Interestingly, the concept of FTS is not present in the OECD Model Convention. However, it finds mention in the UN Model Convention wherein Article 12A grants the source country a primary right to tax such fee from technical services. In fact, the Commentary to the UN Model Convention lays down clear guidance in respect of the

meaning of the term 'managerial services' which is evident from the following extract:

> *"63. The ordinary meaning of the term "management" involves the application of knowledge, skill or expertise in the control or administration of the conduct of a commercial enterprise or organization. Thus, if the management of all or a significant part of an enterprise is contracted out to persons other than the directors, officers or employees of the enterprise, payments made by the enterprise for those management services would be fees for technical services within the meaning of paragraph 3. Similarly, payments made to a consultant for advice related to the management of an enterprise (or of the business of an enterprise) would be fees for technical services. "*

12. The Hon'ble Jurisdictional High Court in the case of Panalfa Autoelektrik Ltd 227 Taxman 351, in relation to "Managerial, technical and consultancy services", has observed as under:

> "14. The expressions "managerial, technical and consultancy services" have not been defined either under the Act or under the General Clauses Act, 1897. The said terms have to be read together with the word „services" to understand and appreciate their purport and meaning. We have to examine the general or common usage of these words or expressions, how they are interpreted and understood by the persons engaged in business and

by the common man who is aware and understands the said terms. The expression "management services" was elucidated upon by this Court in J.K. (Bombay) Limited versus CBDT and Another, [1979] 118 ITR 312 in the following terms:-

"6. It may be asked whether management is not a technical service. According to an Article on "Management Sciences", in 14 Encyclopaedia Britannica 747, the management in organisations include at least the following: "(a) discovering, developing, defining and evaluating the goals of the organization and the alternative policies that will lead toward the goals,

(b) getting the organization to adopt the policies,

(c) scrutinizing the effectiveness of the policies that are adopted,

(d) initiating steps to change policies when they are judged to be less effective than they ought to be."

Management thus pervades all organisations. Traditionally administration was distinguished from management, but it is now recognised that management has a role even in civil services. According to the Fontana Dictionary of Modern Thought, page 366, management was traditionally identified with the running of business. Therefore, management as a process is practised throughout every organization from top management through middle management to operational management."

Recently this Court in CIT versus Bharti Cellular Limited and Others, [2009] 319 ITR 139 had observed:-

"The word "manager" has been defined, inter alia, as: "a person whose office it is to manage an organization, business establishment, or public institution, or part of one; a person with the primarily executive or supervisory function within an organization, etc., a person controlling the activities of a person or team in sports, entertainment, etc."

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

Reference can be also made to the decision of the Authority for Advance Rulings in In Re: Intertek Testing Services India Private Limited, [2008] 307 ITR 418, wherein it was elucidated:-

"First, about the connotation of the term "managerial". The adjective "managerial" relates to manager or management. Manager is a person who manages an industry or business or who deals with administration or a person who organizes other people"s activity [New Shorter Oxford Dictionary]. As pointed out by the Supreme Court in R. Dalmia v. CIT [1977] 106 ITR 895, "management" includes the act of managing by direction, or regulation or superintendence. Thus, managerial service essentially involves controlling, directing or administering the business."

15. The services rendered, the procurement of export orders, etc. cannot be treated as management services provided by the non-resident to the respondent-assessee. The non-resident was not

acting as a manager or dealing with administration. It was not controlling the policies or scrutinising the effectiveness of the policies. It did not perform as a primary executor, any supervisory function whatsoever. This is clear from the facts as recorded by the Commissioner of Income Tax (Appeals), which have been affirmed by the Tribunal. The Commissioner of Income Tax (Appeals) has quoted excerpts of the agreement between the respondent-assessee, who has been described as „PAL", and the non-resident, who has been described as „AGENTA". The relevant portions thereof read as under:-

"2. Appointment (1) PAL hereby appoint AGENTA as its commission agent for sale of its products within the territory to the purchaser(s) during the terms of this agreement, subject to and in accordance with terms and conditions set out herein and AGENTA agrees to and accepts the same.

(2) It is agreed by and between the parties that AGENTA"S representations and acts on behalf and for PAL viz-a-viz any third party shall be legally binding on PAL only when the same are authorized by virtue of a written and signed authorisation executed by PAL in favour of AGENTA.

XXXXX

4. Commission

(a) PAL agrees and AGENTA accepts that the amount of commission payable to it shall be the difference between consideration which PAL receives in terms of the purchase contract/order form the purchaser(s) and the pre determined

guaranteed consideration settled and agreed between the parties, as described in Annexure 1 annexed hereto;

(b) The parties agree that all the taxes applicable and required to be deducted in India to the transaction contemplated herein at the date of execution of this agreement and at any time in future during the terms of this agreement shall be deducted from the commission (as described herein above) before the same is paid and transferred to the bank account of AGENTA (herein referred to as the commission payable)"

16. The non-resident, it is clear was appointed as a commission agent for sale of products within the territories specified and subject to and in accordance with the terms set out, which the non-resident accepted. The non-resident, therefore, was acting as an agent for procuring orders and not rendering managerial advice or management services. Further, the respondent-assessee was legally bound with the non-residents" representations and acts, only when there was a written and signed authorization issued by the respondent-assessee in favour of the non-resident. Thus, the respondent-assessee dictated and directed the non-resident. The Commissioner of Income Tax (Appeals) has also dealt with quantification of the commission and as per clause 4, the commission payable was the difference between the price stipulated in the agreement and the consideration that the respondent-assessee received in terms of the purchase contract or order, in addition to a pre-determined guarantee consideration. Again, an indication contra to the contention that the non-resident was providing management service to the respondent-assessee.

17. The Revenue, which is the appellant before us, has not placed copy of the agreement to contend that the aforesaid clauses do not represent the true nature of the transaction. The Assessing Officer in his order had not bothered to refer and to examine the relevant clauses, which certainly was not the right way to deal with the issue and question.

18. It would be incongruous to hold that the non-resident was providing technical services. To quote from Skycell Communications Ltd. and Anr. Vs. Deputy Commissioner of Income Tax and Ors.

(2001) 251 ITR 53 (Mad), the word „technical" has been interpreted in the following manner:-

"Thus while stating that "technical service" would include managerial and consultancy service, the Legislature has not set out with precision as to what would constitute "technical" service to render it "technical service". The meaning of the word "technical" as given in the New Oxford Dictionary is adjective 1. of or relating to a particular subject, art or craft or its techniques: technical terms (especially of a book or article) requiring special knowledge to be understood: a technical report. 2. of involving, or concerned with applied and industrial sciences: an important technical achievement. 3. resulting from mechanical failure: a technical fault. 4. according to a strict application or interpretation of the law or the rules: the arrest was a technical violation of the treaty.

Having regard to the fact that the term is required to be understood in the context in which it is used, "fee for technical services" could only be meant to cover such things technical as are

capable of being provided by way of service for a fee. The popular meaning associated with "technical" is "involving or concerning applied and industrial science"."

19. The said term was also interpreted by this Court in case of Bharti Cellular Limited and Others (supra) where emphasis was laid on the element of human intervention, but we are not concerned with the said aspect in the present case. The non-resident had not undertaken or performed "technical services", where special skills or knowledge relating to a technical field were required. Technical field would mean applied sciences or craftsmanship involving special skills or knowledge but not fields such as arts or human sciences (see paragraph 24 below).

20. The moot question and issue is whether the non-resident was providing consultancy services. In other words, what do you mean by the term "consultancy services"? This Court in Bharti Cellular Limited and Others (supra) had referred to the term "consultancy services" in the following words:-

"14. Similarly, the word "consultancy" has been defined in the said Dictionary as "the work or position of a consultant; a department of consultants." "Consultant" itself has been defined, inter alia, as "a person who gives professional advice or services in a specialized field." It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the said Dictionary as "ask advice for, seek counsel or a professional opinion from; refer to (a source

of information); seek permission or approval from for a proposed action". It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant."

The AAR in the case of In Re: P.No. 28 of 1999, reported as [1999] 242 ITR 208 had observed:-

"By technical services, we mean in this context services requiring expertise in technology. By consultancy services, we mean in this context advisory services. The category of technical and consultancy services are to some extent overlapping because a consultancy service could also be technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it."

21. The word „consultant" refers to a person, who is consulted and who advises or from whom information is sought. In Black"s Law Dictionary, Eighth Edition, the word „consultation" has been defined as an act of asking the advice or opinion of someone (such as a lawyer). It may mean a meeting in which parties consult or confer. For consultation service under Explanation 2, there should be a provision of service by the non-resident, who undertakes to perform it, which the acquirer may use. The service must be rendered in the form of an advice or consultation given by the non-resident to the resident Indian payer.

22. In the present, case commission paid for arranging of export sales and recovery of payments cannot be regarded as consultancy service rendered by the non-resident. The non-resident had not rendered any consultation or advice to the respondent-assessee. The non-resident no doubt had acquired skill and expertise in the field of marketing and sale of automobile products, but in the facts, as notice by the Tribunal and the Commissioner of Income Tax (Appeals), the non-resident did not act as a consultant, who advised or rendered any counseling services. The skill, business acumen and knowledge acquired by the non-resident were for his own benefit and use. The non-resident procured orders on the basis of the said knowledge, information and expertise to secure "their" commission. It is a case of self-use and benefit, and not giving advice or consultation to the respondent-assessee on any field, including how to procure export orders, how to market their products, procure payments etc. The respondent-assessee upon receipt of export orders, manufactured the required articles/goods and then the goods produced were exported. There was no element of consultation or advise rendered by the non-resident to the respondent-assessee.

23. Decision in the case of M/s Wallace Pharmaceuticals Private Limited (supra) is clearly distinguishable as in the said case the non- resident consultant had to perform several services in the nature of attending meetings on mutually agreeable dates and providing advice and counseling, which were in the nature of consultancy services as they entailed support from a product team, compliance with all legal and administrative formalities, including

registration and marketing strategy, creation of entry into new markets, development and distribution channels, etc. The work being rendered was in the nature of services as a consultant to the Indian assessee. It included an element of advice and was certainly recommendatory in nature.

24. The OECD Report on e-commerce titled, Tax Treaty Characterisation Issues arising from e-commerce: Report to Working Party No.1 of the OECD Committee on Fiscal Affairs dated 01st February 2001, has elucidated:-

"Technical services

39. For the Group, services are of technical nature when special skills or knowledge related to a technical field are required for the provision of such services. Whilst techniques related to applied science or craftsmanship would generally correspond to such special skills or knowledge, the provision of knowledge acquired in fields such as arts or human sciences would not. As an illustration, whilst the provisions of engineering services would be of a technical nature, the services of a psychologist would not.

40. The fact that technology is used in providing a service is not indicative of whether the service is of a technical nature. Similarly, the delivery of a service via technological means does not make the service technical. This is especially important in the e-commerce environment as the technology underlying the internet is often used to provide services that are not, themselves, technical (e.g. offering on-line gambling services through the internet).

41. In that respect, it is crucial to determine at what point the special skill or knowledge is used. Special skill or knowledge may be used in developing or creating inputs to a service business. The fee for the provision of a service will not be a technical fee, however, unless that special skill or knowledge is required when the service is provided to the customer. For example, special skill or knowledge will be required to develop software and data used in a computer game that would subsequently be used in carrying on the business of allowing consumers to play this game on the internet for a fee. Similarly, special skill or knowledge is used to create a troubleshooting database that customers will pay to access over the Internet. In these examples, however, the relevant special skill or knowledge is not used when providing the service for which the fee is paid, i.e. allowing the consumer to play the computer game or consult the troubleshooting database.

42. Many categories of e-commerce transactions similarly involve the provision of the use of, or access to, data and software (see, for example, categories 7, 8, 9, 11, 13, 15, 16, 20 and 21 in annex 2). The service of making such data and software, or functionality of that data or software, available for a fee is not, however, a service of a technical nature. The fact that the development of the necessary data and software might itself require substantial technical skills is irrelevant as the service provided to the client is not the development of that data and software (which may well be done by someone other than the supplier) but rather the service of making the data and software available to that client. For example, the mere provision of access to a troubleshooting database would

not require more than having available such a database and the necessary software to access it. A payment relating to the provision of such access would not, therefore, relate to a service of a technical nature.

Managerial services

43. The Group considers that services of a managerial nature are services rendered in performing management functions. The Group did not attempt to give a definition of management for that purpose but noted that this term should receive its normal business meaning. Thus, it would involve functions related to how a business is run as opposed to functions involved in carrying on that business. As an illustration, whilst the functions of hiring and training commercial agents would relate to management, the functions performed by these agents (i.e. selling) would not.

44. The comments in paragraphs 40 to 42 above are also relevant for the purposes of distinguishing managerial services from the service of making data and software (even if related to management), or functionality of that data or software, available for a fee. The fact that this data and software could be used by the customer in performing management functions or that the development of the necessary data and software, and the management of the business of providing it to customers, might itself require substantial management expertise is irrelevant as the service provided to the client is neither managing the client"s business, managing the supplier"s business nor developing that data and software (which may well be done by someone other than the

supplier) but rather making the software and data available to that client. The mere provision of access to such data and software does not require more than having available such a database and the necessary software. A payment relating to the provision of such access would not, therefore, relate to a service of a managerial nature.

Consultancy services

45. For the Group, "consultancy services" refer to services constituting in the provision of advice by someone, such as a professional, who has special qualifications allowing him to do so. It was recognised that this type of services overlapped the categories of technical and managerial services to the extent that the latter types of services could well be provided by a consultant."

We broadly agree with the aforesaid observations. However, in the case of selling agents, we add a note of caution that taxability would depend upon the nature of the character of services rendered and in a given factual matrix, the services rendered may possibly fall in the category of consultancy services. Paragraphs 41 and 42 do not emanate for consideration in the present case, and effect thereof can be examined in an appropriate case [However, see Commissioner of Income Tax vs. Estel Communication P. Ltd. (2009) 318 ITR 185 (Del) and Skycell Communications Ltd. (supra)].

25. Thus, the technical services consists of services of technical nature, when special skills or knowledge relating to technical field are required for their provision, managerial services are rendered for performing management functions and consultancy services

relate to provision of advice by someone having special qualification that allow him to do so. In the present case, the aforesaid requisites and required necessities are not satisfied. Indeed, technical, managerial and consultancy services may overlap and it would not be proper to view them in water tight compartments, but in the present case this issue or differentiation is again not relevant."

13. Similarly, the Authority for Advance Rulings in Intertek Testing Services India [P] Ltd 307 ITR 418 has observed as under:

"As pointed out by the Supreme Court in R. Dalmia vs. CIT 1977 CTR (SC) 130 : (1977) 106 ITR 895 (SC), 'management' includes the act of managing by direction, or regulation or superintendence. Thus, managerial service essentially involves controlling, directing or administering the business. Seemingly, some services can be classified either under managerial or some other head. In such a situation, the test to be applied is whether they are predominantly managerial in nature. Whatever services are enumerated under the head "Administrative management" cannot automatically be brought within the purview of the managerial services. In fact, many of them may not appropriately fall under managerial services. To give some examples, the maintenance of trade marks register and arranging renewals, preparation and distribution of brochures and other promotional material, maintenance of central claims register or providing professional tax advice, are not predominantly

managerial services. Yet, they were included under the head "Administrative management". To give few instances of managerial services, we may make mention of coordination of public relations issues and audit services and advice on global income-tax policies. Arrangement and coordination of global insurance can perhaps fall under this category, though in the absence of details, we do not want to express firm view. Another point we would like to clarify is that from the nomenclature used in the invoice i.e. 'management fee', it cannot be inferred that all the services under the agreement rendered to the applicant are managerial services. The label given in the invoice is not important, much less decisive. In fact, the expression 'management fee' is not found in the agreement. It is described in the agreement as service charge or fee and the same description is given in the application also. In the note, the applicant stated that management charges relate to 'support services'. Support services are not necessarily equivalent to services of managerial nature.

14.1 Keeping the above observations in view, the classification of services as managerial may have to be undertaken in an appropriate proceeding.

15. There are certain services which may not come under either technical or consultancy or managerial. At any rate, a doubt arises in regard to their classification in the absence of sufficient particulars. For instance, preparation and circulation of business sector reports, negotiation of discounts and best service levels in procurement policies especially income-taxhardware and services

and coordination of audit services, fall within such doubtful category.

16. A contention has been raised by the counsel for the Revenue that the recipient of FTS shall be the beneficial owner of fees and if the non-resident entity which ostensibly receives the fee is a mere conduit for the other related companies and the amount received by it is simply made over to those companies, then no benefit can be sought from art.13 of the Treaty. If the beneficial owner is someone other than the immediate recipient of fee, the legal position has to be examined in light of the relevant Treaties governing the country of residence of the real and beneficial owner. It is argued that the ITM, UK acts as a coordinating or central point agency to requisition the services from various other Intertek groups subsidiaries and, therefore, the ITM, UK presumably passes on the amount charged to various other entities, while retaining at the most, the mark-up charge of 7.5 per cent In the absence of the applicant furnishing any details of services actually rendered by ITM, UK, it is submitted that a conclusion cannot be drawn that the UK company is the real beneficial owner. It appears that the omission on the part of the applicant in spelling out the details of the actual services received by it from the payee of the fee i.e. ITM, UK has given scope for this argument. The argument is evidently based on certain assumptions. It is not proper to proceed on the assumption that the ITM, UK is incapable of rendering any technical or consultancy services and that its role is merely that of a conduit, in the absence of definite material leading to such inference. The omission on the part of the applicant

in furnishing the details of actual services cannot be stretched too far. On the basis of the facts appearing on the record, it is not possible to arrive at a finding in this proceeding that the beneficial owner of fee is someone else.

17. In view of the foregoing discussion, the first question defies a precise answer-either in the affirmative or negative. Many of the services catalogued in the agreement and in the note are technical/consultancy services which do not 'make available' technical knowledge, experience etc. and therefore do not fall within the ambit of cl. (c) of art. 13.4. But, some of them satisfy the test of making available 'technical knowledge' etc. and therefore taxable as FTS under art. 13.4 of Treaty. There are also services which can be categorized as managerial. There are some which do not fall under either of the three categories. We have given sufficient indication of all such services, on a broad analysis.

17.1 It is made clear that nothing in this ruling shall preclude the concerned IT authorities to determine the cost of services etc. on arm's length basis by taking resort to the provisions of s. 92 of IT Act, 1961.

18. 2nd Question : As indicated earlier, while discussing question No. 1, it is not possible to hold, on the basis of the material placed before this Authority, that all the services rendered do not fall under FTS and that the entirety of service fee charged to the applicant does not constitute the income of ITM, UK under the Treaty. There is some grey area in respect of certain services, as

pointed out in the course of discussion supra. However, we have interpreted art.13(4)(c) of the Treaty and laid down the principle. We have also indicated broadly whether in relation to the listed services, the said provision is attracted. Further, we have attempted at the classification of various services by giving examples. It is for the applicant to approach the competent authority to determine the issue of TDS by filing an application under s. 195 of IT Act. It is settled law that any order passed under s. 195 is tentative and the rights of the payee or recipient are not thereby adversely affected [vide TransmissionCorporation of AP Ltd. vs. CIT (1999) 155 CTR (SC) 489 : (1999) 239 ITR 587 (SC)]. To what extent and at what rate the tax deduction has to be made by the applicant will be determined by the appropriate authority expeditiously in the light of the principles laid down and observations made in this ruling."

14. Similar view was taken by the co-ordinate bench at Mumbai in the case of Endemol South Africa [Proprietary] Ltd 67 ITR (T) 520. The relevant findings read as under:

"16. We may herein observe, that a similar view had earlier been arrived at by the ITAT, Mumbai, in the case of Yashraj Film Pvt. Ltd. Vs. ITO (IT) (2012) 231 ITR (T) 125 (Mum.). On a perusal of the facts involved in the aforementioned case, it emerges that the Tribunal had observed that as the services rendered by the non-resident service providers for making logistic arrangements were in the nature of commercial services, thus, the same cannot be

treated as managerial, technical or consultancy services within the meaning given in Explanation 2 to Sec. 9(1)(vii) of the Act. In the aforementioned case, the assessee had made payments to various overseas services providers belonging to U.K, Poland, Brazil, Canada & Australia for services availed in connection with the shooting of different films. The services rendered by the aforementioned non-resident service providers included arranging for extras, arranging for the security, arranging for locations, arranging for the accommodations for the cast and crew, arranging for necessary permissions from local authorities, arranging for makeup of the stars, arranging for insurance cover etc. The Tribunal after deliberating on the nature of the aforementioned services concluded, that as the same were purely commercial services falling in the category of logistic arrangement services, thus, the consideration received as regards rendering of such services would constitute business profits of the said overseas service providers. It was further observed, that as the said service providers had no Permanent Establishment (P.E) in India during the year under consideration, hence the business profits were not taxable in India in their hands as per Article 7 of the respective tax treaties between India and the abovementioned countries. We have deliberated at length on the facts involved in the case before us, and find that the nature of services rendered P a g e | 15 ITA No. 1732/Mum/2016 AY 2012-13 M/s Endemol South Africa Vs. DCIT (IT),Circle-2(2)(1) by the overseas service providers in the aforementioned case of Yashraj Films Pvt. Ltd.(supra) are somewhat similarly placed and rather overlapping to some extent, as in comparison to the services rendered by the assessee in the

case before us. In terms of our aforesaid observations, we find that our view that the services rendered by the assessee are administrative services and not in the nature of managerial, technical or consultancy services, also stands fortified by the aforesaid order of the coordinate bench of the Tribunal. We thus, in the backdrop of our aforesaid deliberations, and finding ourselves to be in agreement with the view taken by the Tribunal in the aforesaid case viz. Yashraj Films Pvt. Ltd. (supra), herein conclude that the consideration received by the assessee for rendering of the services to Endemol India Pvt. Ltd. cannot be held as "FTS".

17. Still further, we also find that the issue of taxability of amount received outside India for rendering Line production services to the assessee company viz. Endemol India Pvt. Ltd, had also been considered and decided by the Hon"ble Authority for Advance Ruling (for short „AAR"), vide its rulings rendered in the case of Endemol Argentina (Non-resident) [AAR No. 1082 of 2011; dated 13.12.2013] and Utopia Films (Non-resident) [AAR No. 1081 and 1082 of 2011; dated 19.02.2014]. In the aforementioned rulings, it was observed, that the consideration received outside India by the concerned overseas service providers by providing line production services to the assessee, viz. providing line producer, local crew, stunt services, transport etc. would not qualify as "FTS" under the Act. We find that in the present case, the A.O/DRP had declined to rely on the aforesaid rulings of the AAR, for the reasons viz. (i). that as per Sec. 245S, the advance ruling is pronounced on the basis of facts of a particular case and hence, it is binding on only

the applicant in respect of the transactions in relation to which advance ruling was sought; and (ii). that the ruling was rendered by the Hon"ble AAR in context of different DTAA"s, as against that involved in the case of the assessee. We have deliberated at length on the aforesaid observations of the lower authorities and are unable to persuade ourselves to accept the same. We find that though it is an admitted fact that an P a g e | 16 ITA No. 1732/Mum/2016 AY 2012-13 M/s Endemol South Africa Vs. DCIT (IT),Circle-2(2)(1) „advance rulings" having been rendered on the basis of the facts of a particular case, thus, would only be binding on the applicant, and that too in respect of the transactions in relation to which the same was obtained, however, such ruling would still have a persuasive value in respect of other parties as well and accordingly, may be relied upon by the authority itself or by the applicant/department. We find that our aforesaid view is fortified by the judgment of the Hon"ble Supreme Court in the case of Columbia Sportswear Company Vs. DIT, Bangalore (2012) 346 ITR 161 (SC). We are further of the considered view, that though the lower authorities had declined to take cognizance of the observations of the Hon"ble AAR on the ground that the „tax treaties" involved in the said case were different as against that involved in the present case, however, there is no mention of any such material fact which could persuade us to conclude that the definition of "FTS" in the said respective tax treaties would be absolutely unworkable, and hence could not be applied in the case before us. We thus, are of the considered view, that the lower authorities had erred in failing to appreciate that the ruling rendered by the Hon"ble AAR in the case of Endemol Argentina and

> Utopia Films, though was not binding, but did have a persuasive value while adjudicating the issue under consideration. Be that as it may, we are not impressed by the outright scrapping by the lower authorities of the aforesaid rulings rendered by the Hon"ble AAR in context of taxability of Line production services provided by the overseas service providers viz. (i). Endemol Argentina (Non-resident);and (ii). Utopia Films (Non-resident) to the assessee company viz. Endemol India Pvt. Ltd. However, we are of the considered view, that as we have already observed that the services rendered by the assessee to Endemol India Pvt. Ltd. are not in the nature of a managerial, technical or consultancy services, therefore, we refrain from further adverting to and adjudicating upon the observations arrived at by the A.O/DRP in context of the rulings of the Hon"ble AAR.

15. In the aforementioned judgment, the co-ordinate bench has negated both, royalty and FTS.

16. Similarly, the co-ordinate bench at Mumbai in the case of UPS SCS [Asia] Limited ITA No. 2426/MUM/2010 order dated 22.02.2012 has held as under:

> "7. First we will consider the ambit of `managerial services' to test whether the instant services can qualify to be so called. Ordinarily the managerial services mean managing the affairs by laying down

certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down. The managerial services contemplate not only execution but also the planning part of the activity to be done. If the overall planning aspect is missing and one has to follow a direction from the other for executing particular job in a particular manner, it cannot be said that the former is managing that affair. It would mean that the directions of the latter are executed simplicity without there being any planning part involved in the execution and also the evaluation of the performance. In the absence of any ITA No.2426/Mum/2010 M/s.UPS SCS (Asia) Limited. 6 specific definition of the phrase "managerial services" as used in section 9(1)(vii) defining the "fees for technical services", it needs to be considered in a commercial sense. It cannot be interpreted in a narrow sense to mean simply executing the directions of the other for doing a specific task. For instance, if goods are to be loaded and some worker is instructed to place the goods on a carrier in a particular manner, the act of the worker in placing the goods in the prescribed manner, cannot be described as managing the goods. It is a simple direction given to the worker who has to execute it in the way prescribed. It is quite natural that some sort of application of mind is required in each and every aspect of the work done. As in the above example when the worker will lift the goods, he is expected to be vigilant in picking up the goods moving towards the carrier and then placing them. This act of the worker cannot be described as managing the goods because he simply followed the direction given to him. On the other hand, `managing' encompasses not only the simple execution of a work, but also certain other

aspects, such as planning for the way in which the execution is to be done coupled with the overall responsibility in a larger sense. Thus it is manifest that the word `managing' is wider in scope than the word `executing'. Rather the later is embedded in the former and not vice versa.

8. Adverting to the facts of the instant case it is observed that the assessee performed freight and logistics services outside India in respect of consignments originating from India undertaken to be delivered by Menlo India. The role of the assessee in the entire transaction was to perform only the destination services outside India by unloading and loading of consignment, custom clearance and transportation to the ultimate customer. In our considered opinion, it is too much to categorize such restricted services as managerial services. We, therefore, jettison this contention raised on behalf of the Revenue."

17. A perusal of the aforementioned judgments of the Hon'ble High Court and co-ordinate benches show that managerial services entail the element of management of the business of the service recipient in a substantial manner. In our view, mere provision of support services cannot be labeled as managerial services. Hiring of outside parties to receive support in respect of the operational aspects of a business cannot qualify as managerial services unless the service provider lays

down policies or executes such policies by managing the personnel of the service recipient.

18. In light of the afore-stated judgments, we do not find any merit in the findings of the ld. CIT(A) by treating the commission as 'managerial service' under the India Germany DTAA.

19. There is no dispute that the assessee has received commission as per the Commissionaire Agreement with SIPL which is nothing but export commission/sales commission, which has been treated as FTS.

20. Similar quarrel was considered by the Hon'ble Jurisdictional High Court of Delhi in the case of Hero Motocorp Ltd 394 ITR 403. The relevant findings read as under:

> 20. In this context, the Court concurs with the following findings of the ITAT:
>
> "Therefore, by export agreement, the assessee has not been transferred or permitted to use any patent, invention, model, design or secret formula. Similarly, HMCL, by way of export agreement, has not rendered any managerial, technical or consultancy services . In view of the above, we hold that export commission was neither royalty nor fee for technical services and, therefore, the assessee was not required to deduct tax at source

on the payment of export fee. Once the assessee was not required to deduct the tax at source, it cannot be said that the assessee failed to deduct tax at source so as to apply Section 40(a)(ia)."

21. Similarly, the Hon'ble Madras High Court in the case of Farida Leather Company 238 Taxmann.com 473 has held as under:

"11. In the instant case, it is seen, admittedly that the non-resident agents were only procuring orders abroad and following up payments with buyers. No other services are rendered other than the above. Sourcing orders abroad, for which payments have been made directly to the non-residents abroad, does not involve any technical knowledge or assistance in technical operations or other support in respect of any other technical matters. It also does not require any contribution of technical knowledge, experience, expertise, skill or technical know-how of the processes involved or consist in the development and transfer of a technical plan or design. The parties merely source the prospective buyers for effecting sales by the assessee, and is analogous to a land or a house / real estate agent / broker, who will be involved in merely identifying the right property for the prospective buyer / seller and once he completes the deal, he gets the commission. Thus, by no stretch of imagination, it cannot be said that the transaction partakes the character of fees for technical servicesas explained in the context of Section 9 (1) (vii) of the Act.

12. As the non-residents were not providing any technical services to the assessee, as held above and as held by the Commissioner of Income Tax (Appeals), the commission payment made to them does not fall into the category of fees of technical servicesand therefore, explanation (2) to Section 9 (1) (vii) of the Act, as invoked by the Assessing Officer, has no application to the facts of the assessee's case.

13. In this case, the commission payments to the non-resident agents are not taxable in India, as the agents are remaining outside, services are rendered abroad and payments are also made abroad.

14. The contention of the learned counsel for the Revenue is that the Tribunal ought not to have relied upon the decision reported in G.E.India Technology's case, cited supra, in view of insertion of Explanation 4 to Section 9 (1) (i) of the Act with corresponding introduction of Explanation 2 to Section 195 (1) of the Act, both by the Finance Act, 2012, with retrospective effect from 01.04.1962.

15. The issue raised in this case has been the subject matter of the decision, in the recent case, reported in (2014) 369 I.T.R. 96 (Mad) (Commissioner of Income Tax v. Kikani Exports Pvt. Ltd.) wherein the contention of the Revenue has been rejected and assessee has been upheld and the relevant observation reads as under:-

> ... the services rendered by the non-resident agent could at best be called as a service for completion of the export commitment and would not fall within the definition of "fees for technical services" and, therefore, section 9 was not applicable and, consequently, section 195 did not come into play. Therefore, the disallowance made by the Assessing Officer towards export commission paid by the assessee to the non-resident was rightly deleted.
>
> 16. When the transaction does not atract the provisions of Section 9 of the Act, then there is no question of applying Explanation 4 to Section 9 of the Act. Therefore, the Revenue has no case and the Tax Case Appeal is liable to be dismissed."

22. In light of the above, we set aside the findings of the ld. CIT(A) and direct the Assessing Officer to delete the impugned addition. Ground Nos. 1 to 5 in Assessment Year 2014-15 and Ground No. 1 to 3 in Assessment Year 2015-16 are allowed.

23. The other grievance in Assessment Year 2014-15 relates to non grant of credit of TDS claim as per the return of income. We direct the Assessing Officer to consider the claim as per the provisions of law and allow full credit of TDS after due verification. This ground is allowed for statistical purposes.

24. In the result, the appeals of the assessee are disposed of as under:

ITA No. 434/DEL/2019 - Allowed in Part for statistical Purposes

ITA Nos. 3826/DEL/2019 - Allowed

The order is pronounced in the open court on 23.08.2022.

[N.K. CHOUDHRY]	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 23rd August, 2022.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	