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[2016] 67 taxmann.com 370 (Mumbai - Trib.)

IT/ILT : Where assessee, Indian company entered into Specific Purchase Contract with Chinese Company for supply of cranes and a Service Contracts for rendering installation and commissioning services in relation to such cranes according to which Chinese company transported cranes to designated site, provided installation and commissioning services as also after sales services and spare parts, since services were intrinsically connected to sale of goods, same could not be treated as FIS or FTS and they would constitute part of business income

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[2016] 67 taxmann.com 370 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'L'

Gujarat Pipavav Port Ltd.

v.

Income-tax Officer (International Taxation)*

RAJENDRA, ACCOUNTANT MEMBER
AND RAM LAL NEGI, JUDICIAL MEMBER
IT APPEAL NO. 7878 (MUM.) OF 2010
[ASSESSMENT YEAR 2008-09]
MARCH 23, 2016

Section 9 , read with section 195 of the Income-tax Act, 1961 and article 12 of DTAA between India and China - Income - Deemed to accrue or arise in India (Fee for technical services) - Assessment year 2008-09 - Assessee, an Indian company, entered into Specific Purchase Contract with Chinese company for supply of cranes - It also entered into a Service Contract for rendering installation and commissioning services in relation to such cranes - As per said contracts, Chinese company transported cranes to designated site, provided installation and commissioning services as also after sales services and spare parts - Whether since services were intrinsically connected to sale of goods, same could not be treated as FIS or FTS and they would constitute part of business income - Held yes [Para 5.4][In favour of assessee]

Section 9 , read with section 195, of the Income-tax Act, 1961 and articles 12 of DTAA between India and China and India and USA - Income - Deemed to accrue or arise in India (Fees for technical services) - Assessment year 2008-09 - Assessee, an Indian company, entered into Specific Purchase Contract with a Chinese Company for supply and commissioning of cranes while engaging a US entity for rendering of engineering services to review of predetermined design and construction audit - Said US entity got their part of contract executed through a Chinese sub-contractor - Whether payment made to US entity was not royalty or FIS or FTS; and, thus, assessee was not supposed to deduct tax at source for making payment to said US entity - Held, yes [Para 5.4][In favour of assessee]

Circular and Notification : CBDT Circular No. 3/2008, dated 12-3-2008

FACTS

- The assessee had entered into a Main Purchase Agreement (MPA) with ZPMC, a Chinese Company, for supply of cranes to its affiliates. Consequent to MPA, it also entered into a separate Service Contracts with ZPMC for rendering the installation and commissioning services in relation to such cranes. It engaged Liftech, a USA based entity, for rendering of engineering services to review of pre-determined design and construction audit, which got its part of contract executed through a sub-contractor, namely, Leader which was a resident of China. The assessee paid a certain sum to Liftech for the services availed. ZPMC had provided installation and commissioning services of the cranes and it also provided after sales services and spare parts and the assessee had paid ZPMC for installation and commissioning of crane.
- The AO held that the services performed by Liftech were technical/consultancy and managerial services, that same were utilized in assessee's business being carried on in India, and that payment was chargeable as Fees for technical Services (FTS) as per Explanation to section 9(2) and as explained in CBDT Circular, dated 12-3-2008.
- He opined that such services might also fall under 'Royalty' under the India-USA DTAA as those involved imparting of information concerning their industrial commercial or scientific experience in the field of quality checking of cranes, that the activity would fall under royalty under Article 12(3)(a) of DTAA and that ZPMC had PE in India under Article 5(2)(j); as per Article 5(2) of the Tax Treaty installation and assembly project which continued for a period of more than 183 days would constitute a PE in India. He treated the assessee as an 'Assessee-In Default' for not deducting tax from such payments. As a result, a demand was raised upon the assessee.
- The First Appellate Authority upheld the order passed by the A.O.
- On appeal:

HELD

FIS v. FTS/Royalty

- All the services related with audit and construction of cranes were availed out of India. Liftech had appointed Leader as its sub-contractor, and the assessee was not party to that contract. Therefore, there was not any transfer of technical plan/design by Liftech to assessee and that nothing was 'made available' to the assessee in India. Once it is held that provisions of article 12 of the DTAA are not applicable, the next step is to determine as to whether the disputed amount can be taxed as business income of Liftech. The Assessing Officer or the FAA has not proved that Liftech had any PE including functional PE in India. So, in absence of PE, there would not be business income to Liftech and the assessee would not be required to deduct tax from the payments made to Liftech. Here, one more thing has to be considered that the assessee had availed a commercial service pertaining to review of pre-determined designs and construction audit of cranes while they were being manufactured. In other words, Lifetech had not provided any know-how to the assessee for manufacturing of cranes. A plain reading of the Protocol to the Indo-US DTAA and the example cited in it leave no doubt that the services rendered by Liftech were not technical services within the meaning of article 12(4)(b)/12(7). As far as CBDT instruction is concerned, it is found that it deals with carrying on business of oil exploration and production in India. The Instruction is of use to decide the issue. [Para 5]
- The payment made to Liftech was not royalty or FIS or FTS and the assessee was not supposed to deduct tax at source for making the payment to Lifetech and therefore cannot be treated as assessee in default. [Para 5]

Specific Service Agreement

- The FAA had upheld the decision of the Assessing Officer that part of the basic instalment and purchase agreement included element of service contract also, that the job done under the basic agreement could be termed FIS. The FAA had also held that the assessee had PE/Installation PE in India, as the employees of the non -resident company stayed in India for more than 180 days. There was no justification in holding that the services provided under the basic agreement were akin to services rendered by specific services agreement-rather they were part and parcel of the service contracts dated 26-5-2006 and 9-12-2006. The project started on 30-10-2007 and was commissioned on 15-1-2008. Thus,the installation job took 78 days and the employees of ZMPC stayed in India for 21 days commissioning took place. In these circumstances, the effective stay of the employees in India was 99 days only. Whereas, the FAA has taken into consideration the entire period of after sales service for computing the threshold limit of the stay. If the actual period of after sales service is excluded from the total period then the stay of the employees of ZMPC would be less than 183 days, there would not be any PE of ZPMC in India as per article-5(2)(j) of the DTAA. [Para 5.1]

- One of the issues before the Tribunal was to determine the method of calculating the period of stay for PE purposes. It was held that threshold limit of 183 days under article 5(3) would be calculated from date of actual activity for installation purpose and not from the date of signing of contract. The letter of ZMPC has confirmed that none of its employees were present in India after 24-3-2008. Details of employees visiting for after sales services are also available. These documents clearly prove that actual number of days of the employees of ZMPC were less than183 days. [Para 5.1]

- The basic principle, in this regard, lays down the rule that when there is a specific PE clause in relation to a particular type of service (construction/installation/assembly) and where such services are also covered within the scope of article 12, the provisions of that article will not be applicable. [Para 5.2]

- FAA was not justified in holding that a part of income was liable to be taxed in India on account of service part of supply contract in addition to services contract and that services rendered in respect of installation/commissioning or assembly services were not taxable in India-even though such services were embedded in the invoice value of the installed cranes. [Para 5.2]

- The assessee had entered into two specific service contracts on 26-5-2006 and 9-12-2006 in respect of unloading, installation and commissioning, testing and training services in connection with purchase of cranes. The FAA had held that Specific Purchase Contract and Service Contract were part of entire contract as defined in the MPA, and that all the three contracts were part of a composite agreement and he held that services were embedded in the purchase agreement. The assessee had deducted tax at the rate of 10 per cent in respect of the services enumerated in the service contract. The Assessing Officer and the FAA have held that certain services rendered in pursuance of service contract were part of the purchase contract and hence the assessee was liable to deduct tax with regard to such services. [Para 5.3]

- The other clauses give details of services and what would not be part of services. Considering the above terms, that services to be availed by the assessee under the above mentioned two agreements were in nature of taxable-service and the assessee had deducted tax at source for such services. The assessee had entered into separate specific purchase agreement. Article 7 of the said agreement deals with after sales service and spare parts and the next clause is about project schedule. Both the agreement deal with separate things and services rendered as per the purchase agreement be considered part of the above mentioned two Service Contracts. [Para 5.3]

- Now, the issue is regarding of SPC dated 29-10-2005. If the services rendered by the supplier

are examined, it becomes clear that such services are inextricably connected to the sales of cranes. It is true for other SPC.s. also. Settled law governing such contracts, stipulate that if services are intrinsically connected to the sale of goods, same cannot be treated as FIS or FTS and they would constitute part of business income. [Para 5.4]

- The FAA had held that UBCB had performed activities on behalf of ZPMC, that it was an agent of Chinese co. in India, that UBCB constituted agency PE of ZPMC in India. It is found that UBCB was sub-contractor of ZPMC, but it had no authority to conclude any contract on behalf of ZPMC, that it had rendered services relating to the installation and commissioning of crane not only to assessee but to other parties also. Therefore was no agency PE in India under article-5(4) of the India China DTAA of the non-resident entity-*i.e.* ZPMC considering the above, the said issues are decided in favour of assessee. [Para 5.5]

CASE REVIEW

Diamond Services International (P.) Ltd. v. *Union of India* [2008] 304 ITR 201/169 Taxman 201 (Bang.) (para 5); *J. Ray McDermott Eastern Hemisphere Ltd.* v. *Jt. CIT* [2010] 39 SOT 240 (Mum.); *Kreuz Subsea Pte. Ltd.* v. *Dy. DIT (International Taxation)* [2015] 69 SOT 368/58 taxmann.com 371 (Mum.) (para 5.1); *Birla Corporation Ltd.* v. *Asstt. CIT* [2015] 153 ITD 679/53 taxmann.com 1 (Jabalpur) (para 5.2); *UPS SCS (Asia) Ltd.* v. *Asstt. DIT* (International Taxation) [2012] 18 taxmann.com 302/50 SOT 268 (Mum.) and *ITO* v. *Prasad Production Ltd.* [2010] 125 ITD 263 (Chennai) (SB)*followed*.

CASES REFERRED TO

CESC Ltd. v. *Dy. CIT* [2003] 87 ITD 653 (Kol.) (TM) (para 3), *Diamond Services International (P.) Ltd.* v. *Union of India* [2008] 304 ITR 201/169 Taxman 201 (Bang.) (para 3), *Worley Persons Services Pty. Ltd.,* In re [2008] 301 ITR 54/170 Taxman 91 (AAR - New Delhi) (para 3), *ITO* v. De *Beers India Minerals (P.) Ltd.* [2008] 115 ITD 191 (Bang.) (para 3), *Anapharm Inc.,* In re [2008] 305 ITR 394/174 Taxman 124 (AAR) (para 3), *Taxation Departmen, ICICI Bank Ltd.* v. *Dy. CIT (International Taxation)* [2008] 20 SOT 453 (Mum.) (para 3), *Dy. CIT* v. *Andhra Pradesh Power Generation Corporation Ltd.* [2014] 52 taxmann.com 300/[2015] 67 SOT 183 (Hyd.) (para 3), *CIT* v. *Sundwiger EMFG and* Co. [2003] 262 ITR 110/129 Taxman 776 (AP.) (para 3), *LG Cable Ltd.* v. *Dy. DIT* [2008] 113 ITD 113 (Delhi) (para 3), *Xelo Pty Ltd.* v. *Dy. DIT (International Taxation)* [2009] 32 SOT 338 (Mum.) (para 3), *Gentex Merchants (P.) Ltd.* v. *Dy. DIT (International Taxation)* [2005] 94 ITD 211 (Kol.) (para 3.3), *SNC-Lavalin International Inc.* v. *DIT, International Taxation* [2008] 26 SOT 155 (Delhi) (para 3.3), *Dy. DIT, International Taxation* v. *Tata Iron & Steel Co. Ltd.* [2009] 34 SOT 83 (Mum.) (para 3.3), *CIT* v. *Swedshi Telecoms International AB* [2009] 318 ITR 280/181 Taxman 148 (Bom.) (para 3.3), *J. Ray McDermott* Eastern *Hemisphere Ltd.* v. *Jt. CIT* [2010] 39 SOT 240 (Mum.) (para 4), *Birla Corporation Ltd.* v. *Asstt. CIT* [2015] 153 ITD 679/53 taxmann.com 1 (Jabalpur) (para 4), *Kreuz Subsea Pte. Ltd.* v. *Dy. DIT (International Taxation)* [2015] 69 SOT 368/58 taxmann.com 371 (Mum.) (para 5.1), *UPS SCS (*Asia*) Ltd.* v. *Asstt. DIT (International Taxation)* [2012] 18 taxmann.com 302/50 SOT 268 (Mum.) (para 5.2), *Ishikawajma - Harima Heavy Industries Ltd.* v. *DIT* [2007] 288 ITR 408/158 Taxman 259 (SC) (para 5.4), *Andrew Yule & Co. Ltd.* v. *CIT* [1994] 207 ITR 899 (Cal.) (para 5.4) and *ITO* v. *Prasad Production Ltd.* [2010] 125 ITD 263 (Chennai) (SB) (para 5.4).

Sunil Moti Lala *for the Appellant.* **Pankaj Kumar**, Sr. A.R. *for the Respondent.*

ORDER

Rajendra, Accountant Member - Challenging the order dated 31.08.2010 of the CIT(A)-10,Mumbai the Assessee has filed the present appeal raising following grounds of appeal:

'The grounds stated here under are independent of, and without prejudice to one another, Payment made to M/s Liftech Consultants Inc, United States of America ('Liftech') treated as

taxable in India and thereby liable to withholding tax.

1. The learned CIT(A) has erred on facts and in law in upholding the order of the AO, treating the Appellant as an "assessee in default" under section 201 of the Income-tax Act, 1961 ('the Act') by treating the payments made to Liftech as Royalty / Fees for Technical Services under Article12(3)(a) /12(4), respectively of the India-USA Double Tax Avoidance Agreement ('DTAA'). Payment made to Shanghai Zhenhua Port Machinery Co Ltd, China ('ZPMC') for purchase of cranes treated as taxable in India and thereby liable to withholding tax.

2. On facts and in the circumstances of the case and in law, the learned CIT(A) has erred in upholding the action of the AO in treating the Appellant as an "assessee in default" under section 201 of the Act by treating 10 percent of the consideration paid for the purchase of the cranes from ZPMC . China to be taxable in India, without appreciating that the appellant did not have a Permanent Establishment in India and also that the said sum could not be treated as Fees for Technical Services both under Section 9(1)(vii) of the Act and under Article 12 of the India - China DTAA.

   Payments made by ZPMC to APM Terminals BV, Netherlands (APMT) treated as indirect payment made by the Appellant on which was is required to be withheld.

3. On fact and in the circumstances of the case and in law, the learned CIT(A) has erred in upholding the action of the AO in treating the appellant to be an "assessee in default" under section 201 of the Act in respect of payments made by ZPMC to APMT as Fees for technical services / Royalty under the India - China / India - Netherlands DTAA.'

Assessee is a resident Indian company in terms of section 6 of the Act and is in the business of developing, constructing, operating and maintaining the port on a Build Own Operate Transfer (BOOT)basis. It had made certain payments to non-resident entities. The Assessing Officer (AO), while passing the order u/s.201r.w.s. 195 of the Act on 24.7.2008,held that it had failed to deduct tax from income chargeable to tax in India from payments made to non-residents.

Brief facts:

2. During the assessment proceedings, the AO found that the assessee is an affiliate to M.s A.P. Moller Maersk A/S(APMM),a global group, that the APMM had entered in to a Main Purchase Agreement(MPA),dated 17-2-2004 with Shanghai Zhenhua Port Machinery Co. Ltd., China (ZPMC)for supply of cranes to its affiliates for a total consideration of USD 3,83,00,000,that consequent to MPA the assessee had entered in to Specific Purchase Contract(SPC)with ZPMC for supply of cranes, that it also entered in to a separate Service Contracts with ZPMC for rendering the installation and commissioning services in relation to such cranes, that it engaged M/s Liftech Consultant Inc USA(Liftech),vide LOI, dated 3.7.2006,for rendering of engineering services to review of pre-determined design and construction audit, that it had purchased eight Rubber Tired Gantry Cranes(USD$94,00,000),three Rail Mounted Quay Cranes(USD$1,68,00, 000)and one Q-Eeo Rubber Tired Gantry Crane(USD $1, 21,00,000),that in addition to the above contracts, the assessee had also entered into two service contracts amounting to USD 11,00,000 with ZPMC for installation and commissioning services certain cranes, that the assessee had claimed that all the above agreements for purchase of cranes were based on the MPA entered in between the group company of APMM and ZPMC, that all the above cranes were to be manufactured/fabricated in China. The assessee was of the view that the above mentioned purchase consideration was not taxable in the hands of ZPMC in India and hence, it was not duty bound to deduct any tax from payments made to ZPMC for the purchase of above cranes, whereas it withheld tax @10% for remitting USD11,00,000.As per the assessee decision of not deducting tax at source, for purchase

of cranes, was taken on the basis of the Chartered Accountant's certificates.

The AO quoted Annexure-I of Service-Agreement,dtd.3-7-2006 and held that the services performed by Liftech were technical/consultancy and managerial, that same were utilised in assessee's business being carried on in India, that the payment was chargeable as Fees for technical Services(FTS)as per Explanation to section 9(2) of the Act and as explained in CBDT Circular, dated 12-3-2008, that the source of income was business of assessee in India, that services were utilised by assessee in India, that the services of Liftech were not related to assessee's business outside India, that the payee was resident of India, that the consultancy services of Liftech fell under FTS as per provisions of the Act, that the amount paid by the assessee was for the development and transfer of technical plan or technical design and therefore was covered as Fees for included services(FIS) under the second limb of Article 12(4) (b) of the India-USA DTAA, that such services might also fall under 'Royalty' under the India-USA DTAA as those involved imparting of information concerning their industrial commercial or scientific experience in the field of quality checking of cranes, that the activity would fall under royalty under Article 12(3)(a)of DTAA, that ZPMC had PE in India under Article 5(2)(j) of India-China Tax Treaty, that for the purpose of the said Article the period of project should include the period of installation and commissioning as well as the period for providing after sales services which was six months from the date of commissioning of the project, that as per Article 5(2) of the Tax Treaty installation and assembly project which continued for a period of more than 183 days would constitute a PE in India, that the commissioning of the project started on 30.10.2007,that it was finally completed on 15.01.2008,that the amount attributable to services performed in India was income derived from India and chargeable as FTS. He treated the assessee as an 'Assessee-In-Default'(A-I-D) for not deducting tax from such payments. As a result, a demand of Rs.4,53, 751/-including interest under Section 201(1A),was raised. The AO, while calculating amount attributable for services performed in India, relied on the Instruction No. 1767,dtd.01.07.1987, issued by the CBDT.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority(FAA)and submitted that Liftech was appointed purely to review the designs and construction audit of cranes and to monitor that the cranes meet the pre-determined set standards which were already agreed between appellant and ZPMC, that the assessee did not possess the requisite technical expertise to closely monitor the adherence of set standard by ZPMC during the manufacturing of the cranes, that during the year under consideration it had paid Liftech Rs.92,19,240/-for the services rendered,that the services rendered by Liftech neither involved development of any technical plan/technical design nor was there any transfer of technical plan/technical design developed by Liftech to assessee, that the services rendered by Liftech did not fall under the ambit of development and transfer of a technical plan/technical design, that such services did not also fall within the definition of FIS under India-US DTAA, that all these services were rendered in USA and in China i.e. out of India, that no employees of Liftech visited in India to render these services to assessee, that it had made an arm's length agreement only with Liftech and was not privy to parties to any contract which Liftech had entered into, that the AO had not distinguished the decisions relied on by the assessee,that he had not rebutted the contention of the assessee that the payment made by it to Liftech was not covered by the "make available" clause as per Article 12(4)(b)of the India-USA DTAA.It relied upon the cases of *CESC Ltd.* v. *Dy. CIT* [2003] 87 ITD 653 (Kol.) (TM) and *Diamond Services International (P.) Ltd.* v. *Union of India* [2008] 304 ITR 201/169 Taxman 201 (Bang.), *Worley Parsons Services Pty Ltd.*, In re [2008] 301 ITR 54/170 Taxman 91 (AAR - New Delhi), *ITO* v. *De Beers India Minerals (P.) Ltd.* [2008] 115 ITD 191 (Bang.)*Anapharm Inc.*, In re [2008] 305 ITR 394/174 Taxman 124 (AAR) and Taxation Deperatment *ICICI Bank Ltd.* v. *Dy. CIT (International Taxation)* [2008] 20 SOT 453 (Mum.) and argued that such payment was in the nature of business income and in absence of PE of Liftech such payment could not be taxed in India, that the assessee's contract was not for the purpose of obtaining any know-how but to avail a commercial service pertaining to review of pre- determined designs and construction audit of cranes while they were being manufactured.

The assessee further contended that UBC Balaji(UBCB)was sub-contracted by ZPMC in the work

relating to the installation and commissioning of cranes, that UBCB did not render services exclusively to ZPMC, that it provided similar services to other parties as well, that UBCB was not having an authority to conclude contracts on behalf of a ZPMC, that the question of ZPMC constituting Agency-PE in India under Article 5(4) of India-China DTAA did not arise, that by merely selling the cranes to appellant in India under supply contracts ZPMC did not automatically created its PE in India, that the cranes were fabricated outside India and they were bought and procured from outside India, that the installation and commissioning of cranes was carried out in India, that separate service contracts were entered in to in that regard, that tax had been deducted on such service contracts, that the total period of stay of employees and other personnel of ZPMC in India in connection with installation and commissioning of cranes supplied to the assessee was less than 183 days, that the employees of ZPMC visited India from 30.10.2007 and completed installation and commissioning on 15.01.2008,that the cranes were accepted by the assessee on 15.01.2008,that it had issued an acceptance certificate to ZPMC, that the employees of ZPMC were not present in India during the period 24. 03.2008 to 15.06.2008,that the aggregate period of stay of employees in India from 16.01.2008 to 15.01.2008 (after excluding the period of 24.03.2008 to 15.06.2008 when none of these employees were present in India) for the purpose of carrying out 'after sales service' was actually only 99 days, that the stay was less than the threshold limit of 183 days, that ZPMC would not constitute a PE in India under Article 5 of India-China tax treaty, that the AO had erred in calculating the period of stay of employees of ZPMC in India, that the AO had inadvertently calculated the number of days from 30.10.2007 to 15.01 2008 as 93 days, that the total number of days of stay of employees of ZPMC in India was 78 days (2+30+31+15),that the AO, for purpose of computing threshold number of days i.e. 183 for constituting PE, had considered the stay period related to after sales services (under the supply agreement)along with the period of time spent in installation and commissioning, that period of contract covering after sales service is covered by the exception provided under Article 5(3)(e) i.e. maintenance of fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character, that the main business activity of the ZPMC with regard to the purchase contracts with the assessee was supply of machinery, that after sales service is just an additional support to it to rectify any problems if any that could arise after commissioning the cranes.

Without prejudice to the above contention, the assessee made an alternate submission and stated that the aggregate stay of the employees of ZPMC during the contract period was not more than 177 days(78+ 99 days),that 78 days were spent during installation period i.e. from 30.10. 2007 to 15. 01.2008 and 99 days were spent for the purpose of carrying out 'after sales service' (i.e. from 16.01.2008 to 15.07.2008), that for the period of 24.03.2008 to 15.06.2008 none of the employees of ZPMC were present in India, that the period of stay of employees of ZPMC in India under the contractual obligation had not exceeded the threshold limit of 183 days as per the Article 5(2)(j) of the India-China DTAA. It was further argued that the CBDT instruction was applicable for AY.1987-88 and that the instruction was not applicable in case of DTAA. It placed reliance on the cases of *Dy. CIT* v. *Andhra Pradesh Power Generation Corporation Ltd*. [2014] 52 taxmann.com 300/[2015] 67 SOT 183 (Hyd.), *CIT* v. *Sundwiger EMFG and Co.* [2003] 262 ITR 110/129 Taxman 776 (AP.), *LG Cable Ltd.* v. *Dy. DIT* [2008] 113 ITD 113 (Delhi) and *Xelo Pty Ltd.* v. *Dy. DIT (International Taxation)* [2009] 32 SOT 338 (Mum.). The assessee also referred the Protocol to the India-US DTAA, which contained example as similar to very facts of the assessee, the facts that technical skills were required by the performer of the services-in order to perform the commercial information-did not make the service technical services within the meaning of paragraph 4(b).

3.1. The FAA, after perusing the contentions of the assessee and the assessment order, held that APMM had entered in to MPA contracts on 17-2-2004 and 17-6-2004 to buy cranes from ZPMC, that ZPMC had to construct, deliver and commission the cranes in accordance of terms and conditions set out in MPA, that the cranes were to be fabricated, delivered and commissioned by ZPMC for the assessee being one of the affiliate of APMM, that the assessee entered into MPA for buying other cranes that the terms and conditions of subsequent MPA(dtd.17-06-04) were similar to the MPA dated 17-2-2004,that the assessee had entered in to Crane Advisory Services Agreement

(CASA)with Liftech,that in common parlance those services could be technical consultancy and managerial, that services rendered under CASA fell under FIS, that technical personnel were deployed to render technical services, that the Liftech would do independent structural analysis and check stress level and wheel loads, that the members of its team would visit Pipavav port for testing the cranes for which separate fee had been laid out, that Liftech was to make independent structural analysis of the crane using a particular Program, that it was providing services of development of plan and design, model which amounts to fees for technical services and also covered as fees for included services defined under Article 12(4)(b) of DTAA. Reffering to the fee estimate clause, he observed that it also included fees for commissioning at Pipavav and documentation, that the services were also rendered in India, that the Liftech had awarded sub-contract to Leader but what kind of services were rendered by Leader to the assessee was not made available, that services provided by Leader to assessee were in the nature of FIS ,that the copy of report forwarded by Liftech through the letters dated 15.12. 2006,12.01.07,09.02.07,09.03.07, 13. 04.07,11.05.07, 08.06.07,06.06.07,03-08-07,05-10-07 and 10.01.07 showed that it had suggested development or improved technical plan,that the payments were in the nature of FIS and were covered by Article 12(4) (b)of India-US DTAA, that Lifetech had made available to the assessee the knowledge of all aspects in the construction activity of cranes and the assessee had got those information so that it could apply the same without any permission from Liftech, that Liftech got their part of contract executed through sub-contractor Leader which was resident of China, that the Reports of the Chinese sub-contractor were collected by Liftech through internet and were forwarded to assessee as well as to ZMPC, that the imparting of any information concerning technical/ Industrial/commercial/ scientific experience would fall under as royalty under Article 12(3)(c) of India-USA DTAA.

3.2. The FAA referred to the Acceptance Certificate and held that MPA was a composite contract, that it determined the purchase price and envisaged that it was the Seller's responsibility to fabricate cranes, that the artificially bifurcated contracts(i.e. Specific Purchase Contract and Services contract after sales and service)were nothing but part of MPA dated 17-2-2004 and 17-6-2004,that purchase consideration passed on to ZPMC was for turnkey contract as per the clause 21 of MPA, that the activities rendered by ZPMC in India were in the nature of managerial, technical and consultancy services in respect of labour, equipment and material cost associated with supply of cranes in India, that technical services in respect of equipment and commissioning of spare party in India were also in nature of technical and consultancy, that the activities included construction of cranes in China involving material and other costs, that it also involved assembling of cranes in China, that transporation of cranes to the port in China and port activities of loading, clearance in China were part of the activities undertaken by the supplier, that shipping cost, labour, equipment and material costs associated with supply of cranes in India, that material costs associated with cranes were associated with the activities carried out by ZMPC, that the cost of the activities performed in India was also included the lump sum consideration on account of technical services and business consideration, that income from such activities was liable to charge in India under section 5(2) of the Act, that contract of sales consideration also included cost of labour, equipment and material cost with supply of cranes, that the AO had rightly held that a part of income was liable to be taxed in India on account of service part of supply contract in addition to services contract.

3.3. He further held that for the purpose of constituting the PE in India the aggregate duration of entire contract had to be counted, that the period of presence of employees for commissioning of cranes and up to the date of contractual obligation provided under the MPA has to be considered for deciding the issue of PE, that total stay of the employees of ZPMC worked out at 260 days(78+91 +91 assessee260) which far exceeded the threshold limit of 183 days, that the activity of supply of cranes was rightly held FTS by the AO, that technical services were taxable in India, that some of the activity provided in purchase contract were done in India, that the nature of services clearly pointed out that they were managerial, technical and consultancy services in respect of labour, equipment and material cost, that there was an element of FTS in the purchase contract of cranes, that same were intrinsically woven in the after sales and service and spare parts/utilities, that

ZPMC had been paid fees for FTS for the provisions of services other than sale of cranes covered in the contract, that the assessee had submitted that ZPMC had only considered the estimation of cost of USD 44,100 after mark up of 5%,that the submission of the assessee clearly confirmed that the value of after sales and support services was included in sale consideration of the contract, that ZPMC had only considered cost of its employees and had not considered any other services, that UBCB had performed activity on behalf of the appellant, that UBCB constituted agency PE under Article 5(4) of DTAA, that the element of FTS was taxable in India even without there being no PE of the ZPMC in India, that the payer was Indian resident, that the payment made on account of technical, managerial services was taxable u/s.9(1) (vii)(b) read with Explanation 2 of the Act. The FAA referred to the para2(6) of attachment I-A of design and Structural agreement .He analysed the provisions of Article12(4)(b) of the DTAA and held that the payment for rendering any technical or consultancy service was FIS, that the payment made by the assessee was for development and transfer of a technical plan or technical design, that the words 'make available' meant technical know-how, experience, skill, know-how or process etc., that it did not go with constraints of the development and transfer of a technical plan or a technical design', that the second limb in clause (b) of sub-article (4) of Article 12 of DTAA could be invoked when the amount was paid in consideration for rendering of any technical or consultancy services and if such services consisted of the development and transfer of a technical plan of a technical design also, that the condition of making available technical knowledge was not sin qua non for considering the question as to whether the amount if FIS or not, that it was rightly considered as FIS within the meaning of Article 12(4)of the DTAA. He relied upon the cases of *Gentex Merchants (P.) Ltd.* v. *Dy. DIT (International Taxation)* [2005] 94 ITD 211 (Kol.), *SNC-Lavalin International Inc.* v. *DIT, International Taxation* [2008] 26 SOT 155 (Delhi), *Dy. DIT, International Taxation* v. *Tata Iron & Steel Co. Ltd.* [2009] 34 SOT 83 (Mum.) and *CIT* v. *Swedshi Telecoms International AB* [2009] 318 ITR 280/181 Taxman 148 (Bom.) and held that payment had been made on account of imparting of information concerning industrial, commercial or scientific experience in the field of quality checking of cranes, structural analysis, that Liftech had provided various reports, containing copy of CD.s,soft copy as well as hard copy, that it was royalty as defined in the Article12(3)of DTAA, that the Liftech had rendered services as development of technical design and plan which itself amounted as make available services. Finally, he held that the payment made to Liftech by the assessee was in the nature of FIS chargeable to tax in India under section 9(1)(vii)(b) and under 12(4)(b) read with Article 12(7) of the DTAA.

4. Before us, the Authorised Representative(AR)contended that assessee had purchased cranes from ZMPC, that the non-resident company had no PE in India including agency PE, that the employees of the Chinese company had not stayed in India for more than 182 days, that for computing the period of stay only actual days should be considered and not the entire period mentioned in the agreement, that during the after sales service period employees of the non-resident company were not in India for a very long time, that services rendered by the Chinese company were not FTS/FIS, that the cranes were constructed as per the designs given by the Netherland company, that Lifetech was not hired by the assessee to supervise the manufacturing of cranes, that services were rendered outside India, that the AO and the FAA were not justified in holding that it was development of design,that no services were made available to the assessee .He relied upon the cases of *J.Ray McDermott Eastern Hemisphere Ltd*. v. *Jt. CIT* [2010] 39 SOT 240 (Mum.), *Birla Corporation Ltd.* v. *Asstt. CIT* [2015] 153 ITD 679/53 taxmann.com 1 (Jabalpur) and further argued that the assessee had entered into two separate service contracts in the months of May and December 2006 in respect of unloading, installing, commissioning and testing in connection with the purchase of cranes in pursuance of specific purchase agreements, that nothing was attributable from the purchase contracts towards services, that in respect of services the assessee had deducted tax @10%, that the services alleged by the AO to be part of purchase contract were in fact separately covered by the service contracts, that if services were inextricably linked to supply of goods same could not be treated as FIS/FTS, that the services would be part of business income. He referred to Article-5(2)(j) of India-China DTAA, that where there was a specific PE Clause the provisions of Article 12 were not applicable, that activity of supply,

installation and commissioning and after sales services independently did not amount to FTS. The Departmental Representative (DR)supported the order of the FAA and argued that employees of the Chinese company stayed for more than the stipulated period in India, that the assessee had installation PE in India, that the services availed by the assessee were in the nature of FTS.

5. We have heard the rival submissions and perused the material before us. We find that that the assessee is an affiliate to APMM who had entered into a MPA, dated 17-2-2004,with ZPMC for supply of cranes to its affiliates, that consequent to MPA the assessee had entered in to SPC with Chinese Company for supply of cranes, that it also entered in to a separate Service Contracts with ZPMC for rendering the installation and commissioning services in relation to such cranes, that it engaged Liftech a USA based entity for rendering of engineering services to review of predetermined design and construction audit, that Liftech got their part of contract executed through a sub-contractor namely Leader which was a resident of China, that the assessee paid Rs.92.19 lakhs to Liftech for the services availed, that ZPMC had arranged for transport of cranes to the designated site, that it had provided installation and commissioning services of the cranes that it also provided after sales services and spare parts, that the assessee had paid ZPMC $11,00,000 for installation and commissioning of crane, that the AO held that a part of the services rendered by Liftech under the purchase contract was to be considered FIS as per the provisions of Article 12 of the India-USA tax treaty. Alternatively, the AO held that the payment could be taxed as Royalty also. In short he held that besides the specific service agreement a part of the purchase and installation contract were assessable as FIS/Royalty as per the India American tax treaty or as per the provisions of section 9 of the Act.

We find that all the services related with audit and construction of cranes were availed out of India, that Liftech had appointed Leader its sub-contractor, that the assessee was not party to that contract. Therefore, in our opinion, there was not any transfer of technical plan/design by Liftech to assessee and that nothing was 'made available' to the assessee in India.Once it is held that provisions of Article 12 of the DTAA are not applicable the next step is to determine as to whether the disputed amount can be taxed as business income of Liftech. We find that the AO or the FAA has not proved that Liftech had any PE including functional PE in India. So, in absence of PE, there would not be business income to Liftech and the assessee would not be required to deduct tax for the payments made to Liftech. Here, one more thing has to be considered-the assessee had availed a commercial service pertaining to review of pre-determined designs and construction audit of cranes while they were being manufactured. In other words, Lifetech had provided any know-how to the assessee for manufacturing of cranes. A plain reading of the Protocol to the Indo-US DTAA and the example cited in it leave no doubt that the services rendered by Liftech were not technical services within the meaning of Article 12(4)(b)/12(7)of the treaty. As far as CBDT instruction is concerned it is found that it deals with carrying on business of oil exploration and production in India. In our opinion, the Instruction is of use to decide the issue before us. Here, we would like to refer to the case of *Diamond Services International (P.) Ltd.* (*supra*). Facts of the case were that Gemological Institute of America (GIA) was engaged in the activity of grading and certification of diamonds which were shipped to its laboratory through an international network of participants, that Grading report issued by GIA was a statement of fact as to the characteristics of the diamond, that it included an analysis of the diamond's dimensions, clarity, colour, polish, symmetry and other characteristics, that GIA did not assign or transfer any industrial or commercial experience to its customers, that the AO had held that services rendered by GIA were in the nature of Royalty and that tax had to be deducted by the assessees before making payment to GIA. The Hon'ble Bombay High Court, deciding the matter in favour of the assessee, held that there was no transfer of any skill or knowledge of GIA to the customers in the issuance of grading reports, that payment received was not for the use or the right to use the industrial, commercial or scientific experience but for the application of experience to a certain factual situation, that GIA applied its expertise to determine the true features of the diamonds of its clients which were offered for certification or grading, that the nature of the transaction between GIA and its client did not invest the party making payment with any right as regards the use of the cumulated experience of GIA, that the payment in question did not involve a payment for the use or the right to use the industrial,

commercial or scientific experience of GIA, that the activity of grading or certification was merely the application of the knowledge/ experience in a professional stream, that the definition of royalty under the DTAA under art. 12(3) useed the expression "or for information concerning industrial, commercial or scientific experience", that there was no parting of information concerning industrial, commercial or scientific experience by GIA when it issued the grading certificate, that under sub-cl. (4) the payments received must be in consideration for services of managerial, technical or consultancy nature, that it would include the application or enjoyment of the right, property or information, that it was not making available technical knowledge, experience, skill, etc. to enable the person acquiring the service to apply the technology contained therein, that GIA was not imparting its technical knowledge, experience, skill, etc. to its customers, that when there was no transfer of right to use, payment cannot be treated as royalty within the meaning of art. 12 of the DTAA, that payment received by the petitioner a Singaporean company, as a sub-participant of GIA's network from Indian clients for collecting and shipping diamonds and certification thereof by GIA did not fall within the expression royalty. In light of above discussion and respectfully following the judgment of *Diamond Services International (P) Ltd.* (*supra*),we reverse the order of the FAA. We hold that the payment made to Liftech was not royalty or FIS or FTS and the assessee was not supposed to deduct tax at source for making the payment to Lifetech and therefore cannot be treated as assessee in default. Ground no.1 is decided in favour of the assessee.

5.1 Now,we would like to discuss the issues raised in grounds no.2&3.The FAA had upheld the decision of the AO that part of the basic installment and purchase agreement included element of service contract also, that the job done under the basic agreement could be termed FIS. The FAA had also held that the assessee had PE/Installation PE in India, as the the employees of the non - resident company stayed in India for more than 180 days. In our opinion, there was no justification in holding that the services provided under the basic agreement were akin to services rendered by specific services agreement-rather they were part and parcel of the service contracts dt.26.5.06 and 9.12.2006.We also find that the project started on 30.10.2007 and was commissioned on 15.1.2008.Thus,the installation job took 78 days and the employees of ZMPC stayed in India for 21 days commissioning took place. In these circumstances, the effective stay of the employees in India was 99 days only. Whereas, the FAA has taken into consideration the entire period of after sales service for computing the threshold limit of the stay. If the actual period of after sales service is excluded from the total period then the stay of the employees of ZMPC would be less than 183 days, there would not be any PE of ZPMC in India as per Article-5(2)(j) of the DTAA.Here, we would like to refer to the case of *J. Ray McDermott Eastern Hemisphere Ltd.* (*supra*) and *Kreuz Subsea Pte. Ltd.* v. *Dy. DIT (International Taxation)* [2015] 69 SOT 368/58 taxmann.com 371 (Mum.). In the second matter the one of the issues before the Tribunal was to determine the method of calculating the period of stay for PE purposes It was held that threshold limit of 183 days under Article 5(3)would be calculated from date of actual activity for installation purpose and not from the date of singing of contract. We have perused the letter of ZMPC(pg.523 of the PB)wherein ZMPC has confirmed that none of its employees were present in India after 24.03.2008.Details of employees visiting for after sales services are available on pgs.522 and 526-28.These document clearly prove that actual number of days of the employees of ZMPC were less than 183 days.

5.2 We will also like to discuss the issue of installation PE from another angle. The basic principle, in this regard, lays down the rule that when there is a specific PE clause in relation to a particular type of service(construction/installation/assembly)and where such services are also covered within the scope of Article 12,the provisions of that Article will not be applicable. In the case of *Birla Corporation Ltd*. (*supra*) the issue has been dealt extensively. The Tribunal has recorded the facts of the case as under:

> 'To adjudicate on these grievances, a few material facts need to be taken note of. The assessee before us is a unit of Birla Corporation Limited, and is engaged in the business of manufacturing and selling cement. During the scrutiny of tax deduction at source returns filed by the assessee, for the relevant financial period, the Assistant Commissioner of Income Tax-TDS, Jabalpur(AO-TDS in short)noticed that the assessee has made certain foreign

remittances without deducting tax at source. When assessee was asked the reasons of doing so, it was explained to the AO-TDS that the income embedded in these payments was not chargeable to tax in India as these payments were for imports of plant, equipment and machinery. It was also contended that as the payments were made for purchases, which did not give rise to taxability of related income in India, there was no requirement of tax withholding requirement from these payments. The AO-TDS, however, did not share this perception of facts. He was of the view that the payment was not only for purchases but also for incidental services in connection with installation and commissioning of these machines, and, accordingly, the assessee was required to deduct tax at source from these payments. He was also of the view that even if a part of income included in these payments was liable to be taxed in India, it was incumbent upon the assessee to approach the Assessing Officer, under section 195(2), for determination of income in respect of which tax is to be deducted at source. The AO-TDS noted that these payments were admittedly for composite contracts which includes all the services and other charges and that "contracts entered into by the ……. (assessee) for design, manufacture, supply, installation, testing and commissioning of plant would fall under the category of 'works contracts' and leviability of TDS thereon would be effective". The AO-TDS also was of the view, after going through the agreements and purchase orders submitted by the assessee, that all the orders were not in nature of mere 'supply' of machinery, but "in addition to the supply part, the orders/ agreements obviously had supervision, inspection and commissioning charges element etc, for which, in the agreement/order itself, it was admitted that such payments shall be liable to income tax". The AO-TDS further observed that "certainly there were payments inherent in the nature of services along with each supply type of payments". He was of the view that "it was duty of the assessee to approach the income tax authorities for apportionment of taxable/non-taxable part of any remittance made to the foreign parties but it (the assessee) failed to do so". The AO-TDS once again noted that "the orders of supply are not mere supply orders" and that "there are also some traits/ inherent clauses which connote that the order is of composite nature as services parts are also (present) therein".

… The AO-TDS also referred to the order dated 14.10.2009 placed by the assessee with Shenyung Heavy Machinery Co. Ltd, China, which was said to have a specific clause with respect to erection and commissioning of the system, and noted that no taxes have been deducted at source from payments made to this supplier either.

….. The AO-TDS, on the basis of the above discussions, concluded that the contract is a composite contract for supply of plant and machinery and also for ancillary services of installation, commission Assessment years 2010-11 and 2011-12 Page 6 of 51 and erection of such plant and machinery.

… Learned CIT(A) then analyzed each of the purchase contract and noted that even though there is a mention about reimbursement of certain expenses and related per diem payments in the contracts, for visits in connection with the installation and commissioning, each of these contracts puts the vendors under certain obligations with respect to installation and commissioning. On this basis, he concluded that all the contracts are composite contracts for purchase of goods as also the related services for installation and commissioning etc.

.....It was submitted that whenever any services rendered by the vendors for the purposes of installation, commission and supervision services, taxes are duly deducted from the same, and that so far as these payments before us are concerned, these payments are simply for purchase of machines, and plant and machinery.

It was also pointed out that the revenue's case before us is not that taxes have not been deducted from the payments for installation, commissioning and supervision charges, but that a part of the payment for machines, plant and machinery represents payment of consideration for services rendered in India as there is no separate consideration, save and except for nominal reimbursement of actual costs and allowances of technical personnel visiting the installation site, for services rendered in India.

According to learned Departmental Representative, as long as vendor is associated with any work, or its supervision, to be carried out in India and no separate consideration is paid for the same, the sale consideration for such machine, plant and machinery must be held to have an embedded payment for these services which is taxable in India.'

After considering the above facts, the Tribunal decided the matter in following manner:

"We have noted that the basic plea of the Assessing Officer, based on which the impugned demands have been raised, is that since a part of consideration paid for the equipment and machinery is towards installation, commissioning or assembly of plant and equipment, such a consideration is liable to tax in India under sections 4 and 5 of the Income Tax Act, 1961.

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We have noted that so far as the transactions impugned in these appeals are concerned, these transactions pertain to the vendors fiscally domiciled in (1) Austria, (2) Belgium, (3) China, (4) Germany, (5) Switzerland, (6) United Kingdom, and (7) United States of America.

....The recipients of these payments, as is the undisputed factual position, are engaged in the business of manufacturing and selling related equipment, plant or machinery. As to what should be the scope of taxation of such business income, as all the related DTAAs provide, that the profits non-resident vendor shall not be taxable in India, unless the non-resident vendor carries on business in India through a permanent establishment in India, and where the non-resident vendor carried on business through the permanent establishment, taxability of income shall be confined, except in the cases in which limited force of attraction principle is specifically extended in article 7(1) i.e. Belgium, Germany and US, to the income as is attributable to that permanent establishment.

…. The case of existence of the PE thus hinges on whether by the virtue of, what is normally termed as, installation PE as could come up by the nature of the activities leading to the income impugned before us . The related provisions in respect of all these jurisdictions above are as follows:

.. ……. (j) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities (together with other such sites, projects or activities, if any) continue for a period of more than 188 days; …

.....The underlying principle in all the above definition, even as there is a variance on the threshold time limits, is that unless the installation or assembly project or supervisory activities in connection therewith cross the specified threshold time limit,..... There is nothing on record to establish, or even suggest, that this condition is satisfied in the cases before us.

....In our considered view, therefore, it is plain on principle that as long as threshold time limit for PE is not satisfied, the consideration for such installation or assembly activities, or supervisory activities in connection therewith, cannot be brought to tax in the source country. During the course of hearing and at the instance of the bench, learned counsel for the assessee has filed details of the work carried on at the installation and assembly site in respect of all the transactions, as it did take place in the relevant financial period, and, as evident from even a cursory look at these details, in none of these cases the conditions for creation of PE are satisfied.

....In view of the above discussions, even if a part of the income, embedded in the impugned payments made to non-resident vendors, can indeed be attributed to the installation, assembly or commissioning activities of the plant, machinery or equipment purchased, such an income, on the facts of this case, cannot be brought to tax as business income under article 7 read with article 5 of the respective DTAAs.

44. One common factor in all the above treaty provisions is that the expression 'fees for technical services', which is also referred to as 'fees for included services' in some the treaties i.e. Indo Swiss and Indo US tax treaties, describes these services in a rather general manner whereas the expression 'construction, installation or assembly project or supervisory activities in connection therewith' find a specific mention in the PE clauses in all the related treaties. Generally speaking, and de hors the restricted meanings assigned by 'make available' clause or exclusion clauses, installation or commission activities are a particular type of technical services. There is thus a general provision for rendering of technical services and a specific provision for rendering of technical services in the nature of construction, installation or project or supervisory services in connection therewith.

47. The same principle must apply in the treaty situations as well. What is the point of having a PE threshold time limit for construction, installation and assembly projects if such activities, whether cross the threshold time limit or not, are taxable in the source state anyway. If we are to proceed on the basis that the provisions of PE clause as also FTS clause must apply on the same activity, and even when the project fails PE test, the taxability must be held as FTS at least,

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In view of the above discussions, in our considered view, in a situation in which there are specific PE clauses in relation to a particular type of services, which are covered in the scope of services covered by the scope of the 'fees for technical services' or 'fees for included services', the taxability of consideration for such services must remain confined to taxability of profits under the relevant specific PE clause. In our humble understanding, the provisions for taxability as FTS or FIS will not come into play in such cases.

.....Viewed thus, the FTS or FIS provisions cannot be invoked for taxing a non-resident on the basis of accrual of liability, whether credited or not, or on the notions of fiction of an element of FTS or FIS being embedded in the business receipts for sale of plant, equipment or machinery. The receipts in the hands of the vendors are in the nature of business income, and the deeming fiction, as sought to be canvassed by the revenue, has no application in the matter. The business income can be taxed under article 7 read with article 5, and, as we have seen earlier in this order, the conditions precedent for taxability under article 7 r.w.a. 5 are not fulfilled on the facts of this case. In many of the cases, as noted in the orders of the authorities below, the related installation and commissioning services, and supervision services in connection therewith, have been rendered by the domestic entities and payments made to those entities have already been subjected to tax withholding under other provisions of chapter XVII D but, disregarding this reality, the CIT(A) has proceeded on the basis that "cost of services is also vested in the cost of material" whether such services are performed or not. When admittedly no such services were rendered, there not have been any occasion to bring fictional 'consideration' for those services to tax.

58. In view of the above discussions, in our considered view, under the scheme of allocation of taxing rights under the related tax treaties, India does not have the right to tax income, even if any, in respect of rendition of installation, commissioning or assembly services, embedded in the invoice value of the related equipment, plant or machinery."

Considering the above decision, we are also of the opinion that FAA was not justified in holding that a part of income was liable to be taxed in India on account of service part of supply contract in addition to services contract, that services rendered in respect of installation/commissioning or assembly services were not taxable in India-even though such services were embedded in the invoice value of the installed cranes.

We would also like to discuss the decision of *UPS SCS (Asia) Ltd.* v. *Asstt. DIT (International Taxation)* [2012] 18 taxmann.com 302/50 SOT 268 (Mum.). The facts of the case were that the

assessee-company incorporated under the laws of Hong Kong, was engaged in the business of provision of supply chain management, that it entered into a Regional Transportation Services Agreement with Menlo Worldwide Forwarding (India) Private Limited for providing freight and logistics services to each other, that each party agreed to render services to the other in respect of import and export of consignments, that income arising under the agreement was claimed by the assessee to be not chargeable to tax in India as per the provisions of section 5 read with section 9 of the Act, that the AO held that services were covered under the provisions of section 9(1)(vii), being FTS, that the FAA upheld the order of the AO stating that the transportation fees received by the assessee was taxable in India as FTS as it was in the nature of managerial/technical or consultancy services. Deciding the appeal, the Tribunal held as under:

'5. A bare perusal of Explanation 2 to section 9(1)(vii) indicates that the "fees for technical services" means any consideration for rendering of any "managerial, technical or consultancy services" but does not include the consideration for any construction, assembly etc. The learned CIT(A) has held the services rendered by the assessee as 'fees for technical services' coming with in the sweep of "managerial, technical or consultancy services". On the contrary, the contention of the assessee has remained before the authorities below as well as us that the such services do not fall within the ambit of any of the categories taken note of by the authorities below. Tribunal will examine as to whether the services so provided by the assessee fall within the scope of 'managerial, technical or consultancy services' as per Explanation 2 to section 9(1)(vii).

8. 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. It is too much to categorize such restricted services as managerial services. The Bench, therefore, jettisons this contention raised on behalf of the Revenue.

9. The nature of services, being freight and logistics services provided by the assessee to Menlo India has not been disputed by the authorities below. There is nothing like giving any consultation worth the name. Rather such payment is wholly and exclusively for the execution in the shape of transport, procurement, customs clearance, delivery, warehousing and picking up services. That being the position, payment in lieu of freight and logistics services cannot be ranked as consultancy services.

11. On going through clause 2 of the Agreement, it is obvious that Menlo India shall 'separately execute a technology and software license agreement' for the provision of computer equipment and software supplied by the assessee. It is nobody's case that the consideration in question relates to the supply of any computer equipment and software by the assessee to Menlo India. Tribunal fails to appreciate as to how this clause 2 makes the services provided by the assessee as "technical". Rather clause 2 mandates to execute a separate Technology and Software license agreement for the provision of computer equipment and software. How is it that the consideration for the services can be attributed to a proposed agreement, which has yet to see the light of the day.

17. Thus it can be noticed that the payment made to the assessee in question is not a consideration for managerial or technical or consultancy services. That being the position, it cannot fall within the ambit of section 9(1)(vii).

18.Unless a non-resident earns income from business operations carried out in India, such income cannot be deemed as accruing or arising in India. Reverting to the facts of the instant case, it is crystal clear that the assessee rendered "International services" outside India which required the payment in question. If this is the position, which has not even been disputed by the learned Departmental Representative, then there can be no question of roping such income within the ken of section 9(1)(i).

19. It is, therefore, patent that the payment received by the assessee neither falls u/s 9(1)(i) nor u/s 9(1)(vii). Since the income cannot be described as deemed to accrue or arise in India and there is no doubt about such income having not been received or deemed to be received or accruing or arising in India, the taxability of such income fails. The amount in question cannot be charged to tax."

5.3 We further find that the assessee had entered in to two specific service contracts on 26.05.2006 and 09.12.2006 in respect of unloading, installation and commissioning, testing and training services in connection with purchase of cranes, that the FAA had held that Specific Purchase Contract and Service Contract were part of entire contract as defined in the MPA, that all the three contracts were part of a composite agreement, that he held that services were embedded in the purchase agreement, that the assessee had deducted tax @10% in respect of the services enumerated in the service contract, that the AO and the FAA have held certain services rendered in pursuance of service contract were part of the purchase contract and hence the assessee was liable to deduct tax with regard to such services. In our opinion, it would be useful to refer to the pages 488-92,505-06 of the Paper book(PB)in that regard. Scope of services has been defined as under:

"The services means the following

a. Removal of sea fastening, reinstallation of the disk assembled parts of the cranes removed for sea transportation (if any);

b. unloading the cranes from the ship to terminal's wharf

c. placement of the cranes on their permanent rail

d. poking up the claim to the electric power

e. testing all functionalities of the cranes on their proper operations

f. preparing the crane four, shall operations according to the operating criteria of the terminal

g. removing all defects that may be observed occur to during or through the above

h. training the terminal operations and mechanical staff in operating and maintenance and fault finding

i. handing over the crane in the required state to the terminal to proceed with, shall operations

j. bank guarantee, custom duties and custom clearance charges on temporary import of tools and tackles required for election and installation of cranes

k. all this election insurance policy and insurance for ZP MC's personal for the entire period of the contract."

Clause 3 of the agreement describes the services that were not part of services. We find that pages 505-06 also deals with similar kind of services and talk about payments also. We would like to reproduce the clauses dealing with recitals, total contract price and services to be rendered and same reads as under:

"The Terminal procured 10(ten) rubber tired gantry cranes-(as described in schedule I)-(the cranes) for development of Pipavav Port India (the site) and the Terminal will be the owner of the cranes. ZPMC has offered to the terminal the provision of services of unloading, installation, commissioning trial tests of the cranes and training of terminal's personnel as set out in clause (the services) at the site.

The Terminal has agreed to place an order and pay for the services from ZPMC.

Now, therefore,the Terminal has agreed to hire the aforesaid services from ZPMC and said ZPMC has agreed to provide the services to the terminal in relation to the cranes which shall be owned by the terminal subject to the terms and conditions set forth below

1. Total contract price

For and in considering of the amount of USD 500,000 (US dollars 500,000 only) for all RTG (which means 50,000 USD for each single RTG) ZPMC agrees to provide the terminal services at the site. The amount is mentioned in the billing schedule in schedule III."

The other clauses gives details of services and what would not be part of services. Considering the above terms, we are of the opinion that services to be availed by the assessee under the above mentioned two agreements were in nature of taxable-service and the assessee had deducted tax at source for such services. The assessee had entered in to separate specific purchase agreement. Article 7 of the said agreement (pg.467of the PB.)deals with after sales service and spare parts and the next clause is about project schedule. In our opinion, both the agreement deal with separate things and services rendered as per the purchase agreement cannot be considered part of the above mentioned two Service Contracts,as held earlier.

5.4 Now,we would like to take up the issue of SPC dated 29.10.2005(Pg.464-471 of the PB).If the services rendered by the supplier are examined it becomes clear that such services are inextricably connected to the sales of cranes. We want to clarify that it is true for other SPC.s. also. Settled law,governing such contracts, stipulate that if services are intrinsically connected to the sale of goods same cannot be treated as FIS or FTS and they would constitute part of business income. The Hon'ble Apex Court in the case of *Ishikawajma-Harima Heavy Industries Ltd*. v. *DIT* [2007] 288 ITR 408/158 Taxman 259 has upheld the above principle. The Hon'ble Calcutta High Court in the matter of *Andrew Yule & Co. Ltd.* v. *CIT* [1994] 207 ITR 899 (Cal.) has also dealt with the identical issue. In that matter a German Company had supplied certain machinery to the Indian assessee and had rendered certain services in setting up of the machinery. Considering those facts, the Hon'ble Court held that services rendered in setting up of machine could not be treated as personal service even if the agreement for rendering the services was embodied in a separate agreement, that the German Company had no PE in India, that in view of the Indo-German DTAA no income had accrued in India, that there was no liability to deduct tax at source. Finally, we would like to refer to the order of the Special Bench of the Chennai Tribuanl, delivered in the case of *ITO* v. *Prasad Production Ltd.* [2010] 125 ITD 263. In that matter the assessee had purchased Considering the above, we hold that the FAA was not justified in holding that services rendered in pursuance of the purchase agreement can be taxed as FIS/FTS.

5.5 Finally, we would like to deal with the issue of UBCB. We find that the FAA had held that UBCB had performed activities on behalf of ZPMC, that it was an agent of Chinese co. in India, that UBCB constituted agency PE of ZPMC in India. It is found that UBCB was sub-contractor of ZPMC, but it had no authority to conclude any contract on behalf of ZPMC, that it had rendered services relating to the installation and commissioning of crane not only to assessee but to other parties also. Therefore, in our opinion there was no agency PE in India under Article-5(4) of the India China DTAA of the non-resident entity-i.e. ZPMC. Considering the above discussion, ground nos. 2 and 3 are decided in favour of the assessee.

pooja

*In favour of assessee.