Digest Of Important Judgments on International Tax

(January to December 2016) By Sunil Moti Lala, Advocate

International Tax

- ***Permanent Establishment ('PE')***
  - *Agency PE – Cases 1 to 6*
  - *Installation PE – Case 7 to 10*
  - *Fixed Place PE – Case 11 to 12*
  - *Service PE – Case 13 to 15*
  - *Multiple PEs – Case 16 to 19*
  - *Attribution of Profits – Case 20*
  - *General – Case 21 to 23*
- ***Royalty / Fees for technical services***
  - *Royalty – Case 24 to 40*
  - *Fees for Technical Services – Case 41 to 71*
- ***Capital Gains –*** *Case 72 to 81*
- ***Dividend Income*** *– Case 82 to 84*
- ***Article 8 / Section 44BB / Section 44D –*** *Case 85 to 95*
- ***Independent Personal Services*** *– Case 96*
- ***Withholding Tax –*** *Case 97 to 112*
- ***Miscellaneous***

- *Assessment – Case 113*
- *AAR- Maintainability of Application – Case 114 to 116*
- *Individuals – Case 117 to 118*
- *Others – Case 119 to 121*

a. Permanent Establishment

Agency PE

1. The Court held that where the assessee, a UAE based company availed marking information services from a company in India, since the said company was not authorized to conclude contracts on behalf of the assessee, no dependent agent PE was constituted. Additionally, the Court held that where the assessee company, in order to carry out its contract with ONGC for the fabrication and installation of petroleum products, opened a project office in Mumbai, the said project office would not constitute a fixed place PE since it was merely acting as a communication channel and therefore fell within the exclusionary clause (e) of Article 5 viz. auxiliary activities. Further, it held that even if a fixed place of business falls squarely under Paragraph 1 of Article 5 and is specifically listed in Paragraph 2 (i.e. Project office), it would not constitute a PE if it fell under any exclusionary clause of Article 5(3) of the DTAA. (i.e. preparatory or auxiliary activity)
   National Petroleum Construction Company v DIT - (2016) 66 taxmann.com 16 (Del) [India - UAE DTAA]

2. The Tribunal held that where the assessee received services from UK and UAE based entities in running a duty free retail outlet at international terminals under an Exclusive Procurement Agreement, it was not liable to deduct tax at source on payments made to such entities as alleged by the AO on the ground that the UK / UAE companies had a business connection in India, since the agreement did not envisage exercise of absolute control over the business of duty free shops by the UK / UAE entities and that they did not have the right to determine retails prices at the ships. The Tribunal also noted that the title and risk to the merchandise was transferred outside India and the fact that the commission paid was directly linked to sales was not a relevant factor.
   Cochin International Aiport Ltd v ITO - TS-73-ITAT-2016 (Cochin) [India - UK DTAA , India - UAE DTAA]]

3. The Apex court granted leave to the departments SLP against High Court's ruling that where assessee, a Mauritius based telecaster of TV channels, carried out entire activities from Mauritius, its affiliates/agents in India who were remunerated on arm's length basis for carrying out only routine functions in India, did not constitute assessee's PE in India.
   DIT v. B4U International Holdings Ltd - (2016) 71 taxmann.com 182 (SC) - SPECIAL LEAVE TO APPEAL (C) NO. 10482 OF 2016

4. The Tribunal held that the company engaged in manufacturing products developed by the assessee as well as marketing the products manufactured by the assessee, in which the assessee held 50 percent share capital, did not constitute a PE of the assessee under Article 5 of the India-USA DTAA, since (i) the said company did not have the right to conclude contracts on behalf of the assessee, (ii) the assessee did not have access to the premises of the said company and (iii) the final decision of pricing of the product along with the term / conditions therein were taken by the assessee.
   DDIT (IT) v Lubrizol Corporation USA - (2016) 47 CCH 0435 (Mum - Trib) - ITA No. 1247/Mum/2014 [India - US DTAA]

5. The Tribunal held that distribution revenue accruing to the assessee, a Mauritian company, by virtue of an agreement with Taj India was not taxable in India, absent a PE in India. It noted that Taj India, appointed as an exclusive distributor, was acting independently qua its distribution rights and that

the agreement was ostensibly on principal to principal basis and therefore Taj India did not constitute a Dependent Agent PE under Article 5(4) of the India- Mauritius DTAA.
ADIT (IT) v Taj TV Ltd-TS-428-ITAT-2016 (Mum) - ITA No. : 4678/ Mum/2007, : 412/Mum/2008, 4176/Mum/2009 [India - Mauritius DTAA]

6. The Tribunal held that that revenue earned by assessee (an Israel company) from contract with HPCL (an Indian petroleum company) for implementing automated systems was taxable in India, since the assessee's project office ('PO') incorporated in India to oversee implementation of project constituted assessee's dependent agent PE in India. It rejected the assessee's stand that contract can be split into supply of equipment which took place outside India and installation of systems at HPCL sites which was sub- contracted to another Indian company since the assessee supplied equipment to subcontractor, which in turn installed the same at the HPCL petrol pumps and that the assessee received the entire contract revenues from HPCL and compensated sub-contractor for the works carried out by it. Therefore it held that the contract was composite. It also rejected the contentions of the assessee viz (i) that PO did not constitute assessee's PE in India as it was merely coordinating the activities carried by sub-contractor (ii) the subcontractor did not constitute PE as it was an agent of independent status.
Orpak Systems Ltd. vs. ADIT - TS-94-ITAT-2016 (Mum)

Installation PE

7. 396. The Tribunal held that though service of installation is covered by the FTS clause as well as Installation PE clause of the India China treaty and though the installation contract (including period of after sales service) exceeded 183 days, the income from installation activity was neither taxable as FTS nor as business income since the specific installation PE clause in India China Treaty would override General FTS clause and the aforesaid threshold limit of 183 days would have to be applied to the actual period of installation (which was less than 183 days) and not the contractual period.
Gujarat Pipavav Port Ltd v ITO - (2016) 67 taxmann.com 370 (Mumbai - Tribunal)

8. The AAR held that the entire contract revenue arising to the Applicant, a Singaporean company from L&T towards supply of goods and rendition of services was taxable in India as it was attributable to its PE in India and rejected the contention of the Applicant that the contract was bifurcated into two parts viz. (i) offshore supply of goods and (ii) provision of services since there was no division on the basis of supply and services and the payment was not separately linked with services and supply but was made on the basis of stages of completion of the contract irrespective of goods and materials brought in the premise and that the intention of the applicant was that the property in the goods will pass only when the installation and erection of entire works was completed.
MERO Asia Pacific Pte Ltd - TS-489-AAR-2016 - A.A.R. No 981 of 2010 [India - Singapore DTAA]

9. The Tribunal held that for the purpose of computing number of days stay for examining the threshold limit of 9 months under section 5(2)(i) of the India- Mauritius DTAA, each building site, construction, assembly project or supervisory activities was to be viewed independently on stand-alone basis and no aggregation was to be done. Accordingly, since the duration of the project did not exceed 9 months, the Tribunal held that there was no PE in India. Further, with regard to the assessee's Liaison office premises, it held that the office maintained by the assessee was in the form of an auxiliary unit to provide back up support and other auxiliary services for the purpose of maintaining coordination and aid to the functioning of the project and therefore did not constitute a PE as the activities were preparatory or auxiliary in nature.
J Ray Mc Dermott Eastern Hemisphere Ltd - TS-250-ITAT-2016 (Mum)

10. The Tribunal held that the contract revenue arising to the assessee, a US based company engaged in the manufacture and sale of equipment used in the seismic industry from offshore supplies pursuant to a contract entered into with ONGC was not taxable in India since the title in the goods passed offshore and therefore no part of the consideration could be attributed to supplies in India. It rejected the finding of the AO that the contract entered into by the assessee, which included supply of offshore supplies, equipment etc as well as installation and commissioning services, was a composite contract and held that the contract was divisible into different components, the consideration for which was separately contemplated. Further, since the Revenue failed to substantiate the presence of assessee's employees in India for more than 120 days (for providing training to ONGC), it held that the assessee did not have a installation PE in terms of Article 5(2)(j) / (k) of the India -US DTAA.
Ion Geophysical Corporation - TS-455-ITAT-2016 (Del) - ITA no.1607/Del/2015

Fixed Place PE

11. The Tribunal held that where the assessee, a Japanese company engaged in business of manufacturing consumer products, opened a liaison office in India, since power of attorney did not authorize employee of LO to do core business activity or to sign and execute contracts etc., on behalf of assessee, it could not be regarded as assessee's PE in India.
Kawasaki Heavy Industries Ltd. vs. ACIT - [2016] 67 taxmann.com 47 (Delhi-Trib)

12. Where the assessee a UK based company granted to Jaypee Sports, the right to host and promote Formula F1 Race at motor racing circuit owned by Jaypee and the assessee had full access to circuit and it could dictate as to who was authorized to access circuit and organising any other event on circuit was not permitted, the Court held that the said circuit, constituted permanent establishment of assessee in India. Further, it held that the sum received by the assessee from Jaypee Sports on the transfer of the right to host and promote 'Formula F1 Race to Jaypee Sports, would not amount to royalty as the use of rights by Jaypee had been strictly confined and limited to the promotion of the event and for no other purpose.
Formula One World Championship Ltd. vs. Commissioner of Income-tax, International Taxation [2016] 76 taxmann.com 6 (Delhi)

Service PE

13. The Tribunal held that in order to determine as to whether assessee, a German company, rendering services in field of exploration, mining and extraction to Indian companies, had PE in India, it was continuous period of stay of its employees in India which had to be taken into consideration and not entire contract period.
Rheinbraun Engineering Und Wasser GmbH v DDIT - (2016) 68 taxmann.com 34 (Mumbai-Trib.) [India - Germany DTAA]

14. The Tribunal held that where all the conditions of Article 5(2)(k) of the DTAA were satisfied i.e. (i) there was furnishing of services including managerial services (ii) such services were other than those taxable under Article 13, (iii) such services were rendered out of India (iv) such services were rendered by 'other personnel' and (v) such activities continued for a period of more than 90 days within 12 months, the assessee was said to have a Service PE in India.
JC Bamford Investments Ltd v DCIT(IT) - (2016) 46 CCH 0435 (Del Trib) [India - US DTAA]

15. The Tribunal held that the AO was incorrect in treating the assessee as an "assessee in default" under section 201 by considering the payment made by it to Precision Energy Associates LLC represented by its proprietor Joe Mitchell, a professional consultant. It held that the provisions of the India- US DTAA would override the provisions of the Act and therefore taxability of the services

would have been governed either by Article 15 viz. independent personal services or Article 16 viz. dependent personal services. It noted that if the services provided by Joe Mitchell were considered as dependent personal services, the same would not be taxable under Article 16 since the period of stay of Joe Mitchell in India did not exceed 183 days. Alternatively, it held that if the services were to be treated as independent personal services, for the purpose of determining the number of days stay in India, either the date of arrival or the day of departure was to be excluded and since Joe Mitchell had made seven visits to India, a period of 7 days was to be excluded. Accordingly, the number of days stay in India of Mr Mitchell would amount to 86 days as opposed to the 93 days erroneously computed by the CIT(A) and therefore the payment to Joe Mitchell would not be taxable under the India-US DTAA.

Spectrum Power Generation Ltd v ACIT – (2016) 48 CCH 0261 (Hyd – Trib) (ITA No 1101 / Hyd / 2016) (India-US DTAA)

Multiple PEs

16. The Tribunal held that where assessee secured order on behalf of its Indian entity and outsourced work thereto, such entity constituted assessee's business connection in India. Also, where assessee received BPO services from its Indian entity, it did not constitute fixed place PE in India. Further, where Assessing Officer alleged that expatriate employees of assessee were providing services in India but could not render any evidence in this regard, it was held that there was no service PE in India.

DCIT v Vertex Customer Management Ltd - [2016] 67 taxmann.com 105 (Delhi-Tribunal) [India - UK DTAA]

17. The Court held that the assesee's liaison office and subsidiary company in India could not be considered as a Fixed Place PE since neither were their premises at the disposal of the assessee, nor did they act on behalf of the assessee in negotiating and concluding agreements. Further, the Court held that the Indian subsidiary company could not be treated as a Dependent Agent PE since it did not have the authority to conclude contracts on behalf of the assessee. Additionally, the Court held that the Indian subsidiary could not be considered as an Installation PE or a Service PE since the subsidiary carried out the tasks of installation and testing on its own accord and not on behalf of the assessee and that there was no material to hold that it performed services on behalf of the assessee. Therefore, the Court held that the supply of equipment to a third party overseas was not taxable in the hands of the assessee.

Nortel Networks India International Inc v DIT - (2016) 96 CCH 0001 - (Delhi) [India - US DTAA]

18. The Court held that where the subsidiary company of the assessee was compensated at ALP for international transactions with the assessee (its AE), assuming that the subsidiary company was the PE of the assessee, no further profits could be attributed to the assessee's operations in India.
Without prejudice to the above, the Court held that the assessee's subsidiary in India did not constitute a fixed place PE since there was no evidence that the assessee had the right to use its premises or any fixed place at its disposal. The Court held that held that in the absence of any evidence that any of the assessee's employees provided services in India, there could be no Service PE and merely because the assessee had the right to audit the Indian subsidiary, it could not be concluded that the employees of the assessee provided services in India. Further, it held that there was no allegation that the Indian subsidiary was authorized to conclude contracts on behalf of the Petitioner and therefore could not be considered as a Dependent Agent PE.

Adobe Systems Incorporated v ADIT - (2016) 96 CCH 0012 (Del) [India - US DTAA]

19. The Tribunal held that the amount received by assessee (a Switzerland company) pursuant to NHPC project was taxable in India for AY 2008-09 as the assessee's Indian subsidiary ('CIWSPL') represented through its MD constituted it's fixed place PE in India. It noted that CIWSPL's MD was

the project coordinator and represented the non-resident assessee at site and signed all the documents on behalf of assessee and that the assessee's business was conducted from the address of the project coordinator and all correspondences relating to prospecting of client, participation in bids, correspondence with customers, signing of contract document, execution of the project and closure of the project etc. were initiated or routed through such address. Therefore, it rejected the assessee's stand that since the project duration was only of 40 days, the assessee could not be said to have any PE in India in view of Article 5.2(j) of India-Swiss DTAA (which prescribes 182 days threshold for construction/installation/assembly PE). It observed that the "fixed place test" was positive for the assessee and it was not required to go for special inclusion for the purpose of determination of PE, more so since the contract was not related to a building site, construction, installation or assembly project and the work largely being in the nature of repair and supply of material.

Carpi Tech SA [TS-587-ITAT-2016(CHNY) – (India-Swiss DTAA)

Attribution of Profits

20. The Tribunal applied the indirect method of attribution of profits as per Rule 10 of the Rules to attribute the profits of the assessee (a Chinese company) to its PE in India in respect of supply of telecom equipment and mobile handsets, since the assessee did not maintain any books of accounts relating to the PE in India. It held that for the purpose of attribution of profits to a PE, the most important aspect to be kept in mind is the level of the PE's participation in the economic life of the source country and the nexus between the source country and the PE's activities. Referring to the activities performed by the Indian PE, the Tribunal held that the level of operatins carried by the PE were considerable enough to conclude that almost the entire sales and after sales function were carried out by the PE in India and accordingly attributed 35 percent of the net global profits to the impugned PE. Further, it rejected the assessee's contention that no further attribution of profits could be made to the PE as the transactions were accepted to be at ALP by the TPO, since the post- sale activities carried out by the Indian entity surfaced only during survey carried out by the Department and were not subject matter of TP proceedings.

ZTE Corporation v ADIT - (2016) 70 taxmann.com 1 (Del - Trib) [India- China DTAA]

General

21. The Tribunal held that as interest payment by Permanent establishment (Branch office) to its head office (a foreign company) was a payment by a foreign company's Indian PE to foreign company itself; it could not give rise to any income, in hands of foreign company.

BNP Paribas SA v. ADIT - [2016] 69 taxmann.com 6 (Mumbai - Tribunal) [India - France DTAA]

22. The Tribunal held that where UK-based non-resident company received non-compete fee, a business receipt, the same could not be taxed in India in the absence of a PE.

Trans Global PLC vs DIT (IT) - [2016] 68 taxmann.com 146. (Kolkata - Tribunal) [India - UK DTAA]

23. The Tribunal held that amount received by assesseee, a Singaporean company engaged in business of making / accepting / executing and discounting of financial instruments, from its Indian associated enterprises by discounting their Promissory Notes was assessable as discounting charge and not as interest under section 2(28A) of the Act / Article 11 of India-Singapore DTAA. The same was business income of assessee which could not be taxed in India in absence of its PE in India. It further held that this was a case where assessee had merely discounted the sale consideration receivable on sale of goods and not a case where any money had been borrowed or debt had been incurred.

Cargill financial Services Asia Pte. Ltd, In Liquidation v ADIT - [2016] 67 taxmann.com 266 (Delhi-Tribunal)

b. Royalty / Fees for technical services

Royalty

24. The Court held that software purchase payments by the assessee, in the capacity of a Value Added Reseller did not amount to royalty as payments made for purchase of a software as a product could not be considered to be for the use or the right to use the software. It held that it was necessary to make a distinction between cases where consideration as paid to acquire the right to use a patent or copyright and cases where payment was made to acquire patented or copyrighted products / material and where the payment was for copyrighted products / materials, the consideration was to be treated as a purchase of product. Accordingly, the disallowances made under section 40(a)(i) and 40(a)(ia) of the Act were deleted.
Pr CIT v M Tech India Pvt Ltd - (2016) 67 taxmann.com 245 (Del)

25. The Tribunal held that consideration received by assessee for sale of software supplied as part of machine to end user was not royalty under article 12 of DTAA between India and Israel as there was no transfer of copyright or any rights therein nor was there any situation giving rise to any type of infringement of copyright by customers of assessee. It held that the amendment made in section 9(1)(vi) by way of insertion of an Explanation by Finance Act, 2012, for extending scope of term 'Royalty', could not be read into provisions of Article 12(3) of the Indo-Israel tax treaty as amendment made in provisions of Act cannot be automatically read into articles of treaty unless corresponding amendment is made in treaty as well.
Galatea Ltld v DCIT - [2016] 67 taxmann.com 190 (Mumbai-Trib) [India - Israel DTAA]

26. The Court held that unless the DTAA was amended jointly by both parties to incorporate income from data transmission services as partaking of nature of royalty, Finance Act, 2012 which inserted Explanations 4,5 and 6 to section 9(1)(vi) by itself would not affect meaning of term 'royalties' as mentioned in article 12 of India - Thailand DTAA.
DIT v New Skies Satellite BV - [2016] 68 taxmann.com 8 (Delhi) [India - Thailand DTAA]

27. The Court held that where the assessee had entered into a contract with IOCL for offshore construction work involving mobilization / demobilization and installation services, the Revenue was incorrect in separating the mobilization / demobilization services from the installation services since the payment made to the assessee was for the execution of a composite contract.
It held that since the equipment used by the assessee while providing services to IOCL were in the exclusive control of the assessee and IOCL did not have any dominion or control over the same, the payment received by the assessee could not be taxed as equipment royalty under Article 12(3) of the India- Singapore DTAA. Further, it rejected the contention of the Revenue that the installation services were incidental to mobilization / demobilization services and therefore taxable under Article 12(4)(a) of the DTAA and held that since the demobilization / mobilization services were not taxable under Article 12(3), the installation services even if considered ancillary, would not be taxable. Further, it held that the said services were neither taxable under the DTAA since they didn't make available any technology nor under the Act since it fell under the exclusionary clause to Explanation 9(1)(vii).
Technip Singapore Pte Ltd v DIT - TS-301-HC-2016 (Del) [India - Singapore DTAA]

28. The Tribunal held that payments made by assessee to non-residents for downloading of photographs for exclusive one time use for publication in assessee's magazine in India did not amount to Royalty under article 12 of DTAA between India and was not liable for tax deduction at source since admittedly a) photographs had been given to assessee for limited purpose of its one time use in magazine b) assessee could neither edit photograph nor could it make copies of photograph to be

sold further or to be used elsewhere c) assessee was not permitted to make resale of these photographs to any other person for any other use.
DCIT v VJM Media (P.) Ltd - [2016] 68 taxmann.com 305 (Mumbai- Trib.) [India - UK DTAA]

29. The Tribunal held that the amount received by a UK Resident company from its Indian affiliate under a Management and Administration Services agreement for services such as business policy advice, market research, market analysis, evaluation of business opportunities etc constitutes royalty towards the supply of commercial information concerning commercial experience under the Act as well as the India-UK DTAA. It held that since some of the services under the said agreement were charged based on gross turnover, it indicated that the services were in relation to information, knowledge or expertise as well as experience already in existence and in possession of the assessee. In dealing with the contention of the assessee that the agreement was a composite agreement and some of the services were purely business / commercial practice, it held that since the assessee failed to provide a bifurcation of the same, then the other part of the services could also be given the tax treatment as given to one part of the services provided which constitutes the principle purpose of the contract.
TNT Express Worldwide UK Ltd v DDIT (IT)- TS-253-ITAT-2016 (Bang) [India - UK DTAA]

30. The Tribunal held that the definition of royalty under the DTAA and the Act was not paramateria since the Act defines royalty to include computer software which was not so in the relevant DTAAs. Further, it held that the difference between the term 'use of copyright in a software' and 'use of software' was to be appreciated and held that to constitute royalty under the DTAA the consideration paid should have been for the transfer of use of copyright in the work and not the use of the work itself. It held that the sale of a CD ROM / diskette containing software was not a license but was a sale of product which was a copyrighted product. Further, it relied on the decision of the Apex Court in the case of Sedco Forex International Drill INC. & Others v. Commissioner of Income Tax & another wherein it was held that if an explanation added to a provision changed the law, then it could not to be presumed to be retrospective irrespective of the fact that the phrase used were'it is declared' or 'for the removal of doubts', and held that payments made prior to Finance Act, 2012, to Hong-Kong entities for which there was no DTAA, would not be subject to deduction of tax, as Explanation 4 to Section 9(1)(vi) of the Act, though introduced as retrospective in nature with effect from 1.6.1976, had the effect of change in law and consequently was to be given prospective effect.
DDIT (IT) v Reliance Industries Ltd - (2016) 69 taxmann.com 311 (Mumbai - Trib) [DTAA between India and Australia / Canada / Singapore / Netherlands / Germany / US / UK / UAE

31. The Tribunal held that revenue earned from 'software sale' by assessee an India branch of a UK company to Indian customers was in nature of business receipts and not royalty as same was consideration for sale of a copyrighted product and not for use of any copyright . All Intellectual property rights to products remained with UK company and assessee could not use it or pass it over to anyone except by way of sale of software products Further, 'royalty' definition under India-UK DTAA did not include consideration for use of computer software. Furthermore, retrospective insertion of Explanation 4 to section 9(1)(vi) vide Finance Act, 2012 which included consideration for right to use a computer software within ambit of 'royalty' also could not be read into DTAA as a country which was party to a treaty could not unilaterally alter its provisions. Also the Tribunal further held that receipts from annual maintenance contract having same character as that of original software would be covered under business profits under article 7. Also, where training to employees of end users of software sold by assessee for which consideration had been received was ancillary and subsidiary to sale of software; it was to be treated as business receipts under article 7 of DTAA between India and UK.
Datamine International Ltd v ADIT - [2016] 68 taxmann.com 97 (Delhi-Tribunal)[India - UK DTAA]

32. The Tribunal held that payment of Inter-connect Usage Charges ('IUC') by Bharti Airtel ('assessee') to Foreign Telecom Operators ('FTO') in connection with its International Long Distance ('ILD') telecom service business was neither FTS nor royalty (including process royalty) u/s 9(1)(vi)/(vii) of the Act and therefore Section 195 of the Act was not applicable on the ground that for it to constitute technical services there should be an involvement/ presence of human element. It also observed that the 'inter connection facility' was a standard facility. Further, it rejected the Revenue's alternate stand that payment was in the nature of 'royalty' as it was made for 'use of process' since the assessee merely delivered the call that originates on its network to one of the inter connection locations of the FTO and FTO carries and terminates the call on its network and the assessee was nowhere concerned with the route, equipment, process or network elements used by the FTO. It clarified that the term "process" used under Explanation 2 to Sec 9(1)(vi) in the definition of 'royalty' does not imply any 'process' which is publicly available and not exclusively owned by grantor and that it implied an item of intellectual property and that the word "process" must also refer to a specie of intellectual property applying the rule of ejusdem generis or noscitur a sociis, the expression 'similar property' used at the end of the list further fortifies the stand that the terms 'patent, invention, model, design, secret formula or process or trade mark' are to be understood as belonging to the same class of properties viz. "intellectual property. It also clarified that the retrospective insertion of Explanations 5 & 6 to Sec 9(1)(vi) did not alter this position and moreover retrospective amendment in domestic legislation cannot affect royalty definition under DTAA which is very 'restrictive'.
Bharti Airtel Limited v ITO - (2016) 46 CCH 0304 (Del Trib) [India - UK DTAA]

33. The Tribunal held that where assessee received reimbursement from its India entity for use of equipments situated outside India and it could not be established that same was on cost to cost basis, it was taxable in India as royalty.
DCIT v Vertex Customer Management Ltd - [2016] 67 taxmann.com 105 (Delhi-Tribunal) [India - UK DTAA]

34. The Tribunal held that where assessee was granted license by two foreign companies (licensors) based out of US and UK and licensors provided data relating to geophysical and geological information and they were not responsible for accuracy or usefulness of such data, since licensors had only made available data acquired by them but did not make available any technology available for use of such data by assessee, payments made by assessee to said licensors was not in nature of 'Royalty' as per respective DTAA.
GVK Oil & Gas Ltd v ADIT - [2016] 68 taxmann.com 134 (Hyderabad- Tribunal) [India - US DTAA, India - UK DTAA]]

35. The Tribunal held that the amount received by Baan Global BV, a Dutch company, for supply of 'off the shelf' software to its Indian distributor for onward supply to Indian customers was not taxable as royalty under the India- Netherlands DTAA since what was supplied was only copyrighted products and there was no transfer of right to use copyright in computer software since the agreement between the assessee and ultimate customers forbade customers from decompiling, modifying, reverse engineering or disassembling the software. It rejected the contention of the DRP that sharing of source code of software amounted to the use of 'process' and held that the customers were only permitted to use the source code for internal computing operations and was subject to riders and limitations. It also rejected the contention of the Revenue that the retrospective amendment to the Act was to be read into the DTAA and held that in the absence of a corresponding negotiation between the two sovereign nations to amend the specific provision of royalty in the DTAA, the amendment in the Act could not be read into the DTAA.
ADIT v Baan Global BV - TS-351-ITAT-2016 (Mum) - ITA No 7048/ Mum/2010 [India - Netherlands DTAA]

36. The Court held that consideration received by assessee on sale of pre packaged software was not royalty. It further held that there is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle the Court held that a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of USA DTAA.
CIT & ANR vs. Halliburtion Export Inc. & ANR - (2016) 96 CCH 0060 (Del HC) - ITA 363/2016, 365/2016 [India - US DTAA]

37. The Tribunal held that payment made by the assessee to a US company for transponder charges and linking up charges could not be treated as consideration for use or right to use any copyright or the other various terms used in Article 12(3) of the India-US DTAA and was therefore not taxable as royalty. Further, as regards the contention of the revenue, that the amended definition of royalty under the Act was to be read into the DTAA, the Tribunal, relying on the decision of the Court in New Skies Satellite, held that the definition of royalty under domestic law would not have any impact on the DTAA.
ADIT (IT) v Taj TV Ltd - TS-428-ITAT-2016 (Mum) - ITA No. : 4678/ Mum/2007, : 412/Mum/2008, 4176/Mum/2009 [India - US DTAA]

38. The Tribunal held that royalty income earned by the asssessee, an Italian company under technical collaboration and license agreement with an Indian company was taxable on gross basis @ 20 percent under Article 13 of the India-Italy DTAA and not as business income @ 41.82 percent by treating its Indian branch as its PE. It dismissed the contention of the Revenue that since the employees of the assessee's Indian branch were technically qualified, they assisted the assessee in providing such services and held that the Revenue did not show any material evidencing that services were provided by employees of the Indian branch. Further, it held that to connect royalty with a PE one has to evaluate the asset test which failed in the instant case.
Iveco Spa v ADIT - TS-450-ITAT-2016 (Del) - ITA No. 5447/Del/2010, ITA No. 5696/Del/2012 [India - Italy DTAA]

39. The Tribunal held that payments made by assessee (an Indian company engaged in software development) to Verizon USA for providing internet and bandwidth services and for providing equipment ('CPE') which was to be installed at the customers' premises for accessing network connection, did not amount to royalty. It rejected the Revenue's stand that payment was for use of scientific or commercial equipment within the meaning of 'royalty' under the Act and held that the CPE was not a personalized/sophisticated modified equipment for specific and exclusive use of the assessee and therefore the payment could not be said to be for use of equipment.
Quaolcomm India Private Limited [TS-605-ITAT-2016(HYD)] (ITA Nos.1664 to 1667/Hyd/2011) (India-USA DTAA)

40. The Tribunal held that payment by the assessee to various companies in USA, UK, Germany etc. for use of software licenses neither amounted to royalty, both under the Act and respective DTAAs, nor Fees for Technical Services ('FTS') as it could not be said that assessee was granted a right to utilize the copyright embedded in the software, but was only granted a right to use the software product. It further observed that assessee purchased end user software license packages which were used as tools in its software development activity, and held that it was a case of purchase of copyrighted article and not use of copyright itself.
Quaolcomm India Private Limited [TS-605-ITAT-2016(HYD)] (ITA Nos.1664 to 1667/Hyd/2011) (India – USA, UK, Germany DTAA)

Fees for Technical Services

41. The AAR held that fees received by the UK based applicant on account of supply management services such as ensuring market competitive pricing from suppliers, maintaining contract supply agreement with suppliers after identifying products availability, competitive pricing, provided to its Indian Group company could not be treated as fees for included services as the same did not impart any technical knowledge and expertise to its Indian Group company such that the Indian company could make use of it in the future, failing the condition of making available the technology as contained in Article 13 of the India UK DTAA. Further since managerial services were excluded from the ambit of Fees for technical services, the payment was not subject to tax.
Cummins Ltd In re - [2016] 65 taxmann.com 247 (AAR - New Delhi) [India - UK DTAA]

42. The Court held that agency commission paid by the assessee to non- resident agents for procuring orders for the assessee outside India, would not be taxable as fees for technical services under section 9(1)(vii) of the Act and therefore section 195 of the Act would not be applicable, since obligation to deduct tax at source under section 195 only arises if the payment is chargeable to tax in the hands of the non-resident recipient.
CIT v Farida Leather Company - (2016) 66 taxmann.com 321 (Mad)

43. The Tribunal held that the payment made by the assessee to its overseas group company as reimbursement of expenses incurred by them for recruitment of employees on behalf of the assessee did not come within the purview of Article 12(4) of the India-USA DTAA as the payments were pure and simple reimbursement of recruitment expenses. Accordingly, the Tribunal deleted the disallowance made under section 40(a)(i) of the Act.
ACIT v Lehman Brothers & Advisors Pvt Ltd - (2016) 67 taxmann.com 225 (Mum- Trib) [India - US DTAA]

44. The Tribunal held that where the assessee, a foreign company provided consultancy services for highway projects in India, it would not amount to technical service as it was related to construction activity, which was specifically excluded from the scope of fees for technical services under the Act and thus it would not be subjected to presumptive taxation under section 44D of the Act but would be taxed as regular business profit.
DDIT v MSV International Inc - [2016] 67 taxmann.com 156 (Delhi- Trib).

45. The Tribunal held that where the assessee, engaged in engineering and construction works, availed services of review and tracking of execution plans of the assessee and also obtained procedures from a foreign company which also undertook project budget and client satisfaction, the foreign company had made available its technical knowledge, expertise and know-how in execution of the contract with the assessee in India and hence the assessee was liable to deduct tax under section 195 of the Act on the said payment.
Forster Wheeler France SA v DDIT (IT) - (2016) 67 taxmann.com 120 (Chennai- Trib)

46. The Tribunal held that the assessee was not liable to deduct tax under section 195 of the Act on payments made towards security surveillance services paid to a non-resident since the payment was towards maintenance of common security platform applicable to all Group companies which did not make available any technical knowledge, experience, skill and therefore did not fall under the definition of fees for included services under the India -China DTAA.
DCIT v Dominion Diamond (India) Pvt Ltd - TS-42-ITAT-2016 (Mum) [India - China DTAA]

47. The Tribunal held that export commission payments to foreign brokers for rendering services abroad was not a sum chargeable to tax in hands of foreign brokers as contemplated under section 195 and

was not a fee for technical / managerial service as defined in Explanation 2 to section 9(1) (vii) to bring it to tax under fiction created by deeming provisions of section 9.
ACIT v Pahilarai Jaikishin - [2016] 66 taxmann.com 30 (Mumbai-Trib)

48. The Court held that where an arranger of bank engaged in mobilizing deposits in India for Deposits Scheme, appointed non-resident sub-arrangers for mobilizing fund outside India, services rendered by non-resident sub- arrangers would not fall within category of managerial, technical or consultancy services; and therefore payments made by the assessee to such non-residents would not be liable to TDS and accordingly, the disallowance under section 40(a)(i) of the Act was deleted.
DIT (IT) vs. Credit Lyonnais - [2016] 67 taxmann.com 199(Bombay)

49. The Apex Court dismissed the assessee's SLP against the judgement of the Calcutta High Court wherein it was held that payment of consultancy fees paid to Singaporean company for forex derivative transaction services was taxable as 'Fees for technical services '('FTS') for AY 2008-09 considering the fact that the Singaporean company provided expert guidance and consultancy services.
CIT vs. Andaman Sea Food (P) Ltd - [TS-30-SC-2016] [India - Singapore DTAA]

50. The Tribunal held that fee for included services (FIS) would not include amounts which are inextricably and essentially linked to start up services and sale of property.
Raytheon Ebasco Overseas Ltd v DCIT - [2016] 68 taxmann.com 133 (Mumbai-Tribunal) [India - US DTAA]

51. Where the assessee company was developing and exporting gas circuit breaker and vaccum circuit breaker for which design tests were conducted as per IEC Standards, and the assessee company had paid testing charges without TDS to foreign companies, the Tribunal held that the said payment was FTS liable for TDS and that though the products were sent out of India, source of income was created once export orders were concluded in India. It further held that in order to fall within second exception provided in section 9(1)(vii)(b), source of income, and not receipt should be situated outside India.
DCI - Large Taxpayer Unit v Alstom T & D India Ltd - [2016] 68 taxmann.com 336 (Chennai-Tribunal.)

52. The Tribunal held that sum received by the assessee, a UK based Company, for allowing Indian telecom operators to use its Virtual Voice Network (VVN), i.e., a facility used to connect the call to the end operators could not be treated as royalty or FTSin terms of Article 13 of India-UK DTAA since the payment was made to the assessee for using its services and not for the use of any scientific equipment or technology. Also payment for service could not be brought to tax as 'FTS' under Article 13 of India-UK DTAA as no technology was made available to the service recipient, since it was not able to apply that technology without recourse to the service provider.
Interroute Communications Ltd v DDIT - [2016] 68 taxmann.com 160 (Mumbai -Tribunal) [India - UK DTAA]

53. The Tribunal held that review of design does not amount to transfer of design and hence fees for the same cannot be taxed as FTS / FIS under the India US treaty. It also held that where the service of installation was inextricably connected to sale of goods, the same could not be treated as FIS or FTS.
Gujarat Pipavav Port Ltd v ITO - (2016) 67 taxmann.com 370 (Mumbai - Tribunal) [India - US DTAA, India - China DTAA]

54. The Tribunal held that the payment of professional fees made by the assessee to non-residents in the UK, USA, France and China did not constitute fees for technical services since it did not make

available to the assessee, any technology by virtue of which it would be able to apply such technology without recourse to the service provider. Further, in dealing with the alternate contention of the assessee that the payments, being made to individuals, would be governed by Article 15 viz. Independent Personal Services and not FTS, the Tribunal agreed with the same and held that since none of the individuals were present in India for a period of 90 days or more the same would not be taxable under Article 15 of the respective DTAAs. Further, it held that the retrospective amendment to Section 9(1)(vii) inserted vide Finance Act, 2010, doing away with the requirement of services being rendered in India, would not be applicable to the assessee, since at the time of deduction of tax, the same was not applicable and therefore it deleted the disallowance made under section 40(a)(i) of the Act.

KPMG v ACIT - (2016) 46 CCH 0339 (Mumbai - Trib) [DTAA between India and US / UK / France /China]

55. The Tribunal held that where assessee rendered composite service of managerial and technical nature to is Indian subsidiary and the CIT (A) taxed half of receipts therefrom without analyzing bills to segregate them, action of CIT(A) was not justified and restored the matter to the file of CIT (A).
ADIT v Lloyds Register UK - [2016] 68 taxmann.com 309 (Mumbai- Tribunal) [India - UK DTAA]

56. The Tribunal held that the payment made by the assessee to a Korean non-resident company for testing and certification services was taxable as fees for technical services and therefore liable to withholding tax, by relying on the decision of the Court in the case of M/s Havells (India) Ltd wherein it was held that fees for testing and certification services was taxable in the hands of the non-resident company since the assessee (making the payment) in that case could not prove that the testing services availed were utilized in a business outside India as a result of which the source was to be considered to be in India.
Megawin Switchgear Pvt Ltd v ACIT - (2016) 47 CCH 0039 (Chen Trib)

57. The Tribunal held that payments made by the assessee for 3D Seismic Data Interpretation services were not FTS under Article 13 of India- UK DTAA as services did not "make available" technical expertise, skill or knowledge and hence not liable for withholding tax under section 195 of the Act. It observed that the assessee had provided the initial data and the non-resident was only required to provide the interpretation report of such data and therefore held that the AO erred in treating maps/designs given by the non-resident to the assessee as technical plan or design since the said maps/designs were nothing but a way to interpret the data and could not be equated to development and transfer of technical maps and designs as contemplated by the AO. Further, it held that the payment was made for providing analysis of data and the conclusion provided by the non-resident did not enable the assessee to apply such knowledge or undertake survey independently without any assistance.
Adani Welspun Exploration Ltd v ITO - TS-249-ITAT-2016 (Ahd) [India - UK DTAA]

58. The Tribunal held that where in course of business carried on by assessee-company as a stock broker, foreign subsidiaries rendered services which were in nature of simple marketing services of introducing foreign institutional investors to invest in capital markets in India, but no technical service was being made available, payments made to subsidiaries would not fall within definition of 'fees for technical services' taxable in India.
Batlivala & Karani Securities (India) (P) Ltd v. DCIT - (2016) 71 taxmann.com 142 (Kolkata - Trib) - IT APPEAL NOS. 1234 AND 1235 (KOL.) OF 2013 [India - UK DTAA]

59. The Tribunal held that payment made by the assessee to an Israel based company under an annual maintenance contract was not taxable in India and accordingly there was no liability to deduct tax under section 195 of the Act since the payment towards AMC was in the nature of routine repairs and maintenance and not in the nature of fees for technical services absent managerial, technical

or consultancy services provided to the assessee. Further, it rejected the contention of the Revenue that the services were rendered in India since as per the warranty agreement the equipment was sent outside India for repairs and re-imported in India and therefore it was incorrect to conclude that the entire services were rendered in India.
ACIT v HCL Comnet Ltd - TS-456-ITAT-2016 (Del) - ITA No 321/ Del/2012, 5651/Del/2012, 6142/Del/2012 [India - Israel DTAA]

60. The Tribunal held that service tax did not have any element of income i.e. it was not in the nature of fee for technical services and therefore did not partake the character of income hence was not includible in the gross receipts offered for taxation.
DDIT v Egis Bceom Intl SA - (2016) 46 CCH 0098 (Del Trib) [India - France DTAA]

61. The Court reversed the decision of the AAR and held that the Most Favoured Nation clause contained in Article 7 of the Protocol between India and France was applicable to Fees for technical services under the India-France DTAA and therefore where the Protocol provided that where any convention / agreement / protocol was signed between India and a OECD member state which limits India's taxation at source on FTS to a lower rate or on the basis of a restricted meaning the benefit under the Protocol could not be denied. Accordingly, it held that the definition appearing in the India-UK DTAA was to be read as forming part of the India-France DTAA as well and therefore since the management fee paid by the assessee to a French company was not covered under the FTS clause of the India-UK DTAA, the same would not be taxable under the India-France DTAA.
Steria India Ltd - TS-416-HC-2016 (Del) - W.P.(C) 4793/2014 & CM APPL. 9551/2014 [India - France DTAA]

62. The AAR held that program fees received by the Applicant, Regents of the University of California from its Indian counterpart for holding management programs for training senior executives was not taxable under the India-US DTAA since the applicant's activity was in the nature of educational activities and could not come within the ambit of fees for includes services or royalty under Article 12(5) of the India-US DTAA which excludes amount paid for teaching in or by educational institutions.
The Regents of University of California - TS- 490-AAR-2016 - A.A.R. No 1656 of 2014 [India - US DTAA]

63. The AAR held that the service fee payable by the Applicant to its Russian subsidiary for providing product promotion services was not FTS under the Act or under Article 12 of the India-Russia DTAA since the services rendered could not be considered as consultancy services as they merely entailed preparation of reports by the Russian subsidiary which were statistical in nature. Further, it dismissed the alternate contention of the Revenue that the same could be taxed as managerial services since the job of the medical representatives of the Russian subsidiary was to merely meet doctors and pharmacies which could not said to be managing the affairs of the Applicant.
Dr Reddy's Laboratories Ltd - TS-487-AAR-2016 - A.A.R. No 1572 of 2014 [India - Russia DTAA]

64. The AAR held that administrative support services provided by a third party service provider to the Applicant in connection with the Applicant's contract with Indian Oil Corporation were not taxable as fees for technical services since it was in the nature of managerial services which did not make available any technical skill information or knowledge to the Applicant.
Foster Wheeler GB Ltd - TS-491-AAR-2016 - A.A.R. No 1003 of 2010 [India - UK DTAA]

65. The Tribunal held that payment of legal fees by the assessee to UK firm for educating its officials regarding various legal/regulatory requirements for setting up of a bank branch outside India falls within the exceptions under section 9(1)(vi)/(vii) as the payment was made to carry on business outside India and create a new source of income outside India and hence, not taxable as royalty/fees for technical service under the Act. It further held that under India-UK DTAA, as per Article 15

(Independent Professional Services) being more specific than Article 13 (Royalty/ Fees for Technical Service) the fees were not taxable, since no employee of the UK firm was present in India for more than 90 days.
Kotak Mahindra Bank Limited - TS-528-ITAT-2016 (Mumbai Trib)- ITA No. 3901/Mum/2013 [India - UK DTAA]

66. The Tribunal held that revenue earned by assessee, a resident of Finland from management support and other services rendered to its Indian group concern were not taxable as fees for technical services under the provisions of Article 13 of India-Finland DTAA on the ground that such services did not make available technology or technical knowhow to the recipient to function on its own without the dependence of the assessee.
Outotec Oyj [TS-569-ITAT-2016 (Kol)] (I.T.A Nos. 558/Kol/2014 & I.T.A Nos. 462/Kol/2015) [India - Finland DTAA]

67. The Tribunal held that amount received by assessee of Rs. 23.77 cr (out of total receipts of Rs. 33 crore), a UK based event management company pursuant to contract with BCCI for providing assistance in organizing Indian Premier League (IPL) cricket tournament was taxable as fees for technical services under Article 13 of India-UK DTAA on the ground that assessee had made available the procedures, agreements for organizing IPL by virtue of which BCCI would be able to carry on the IPL events subsequently.
International Management Group (UK) Ltd. [TS-545-ITAT-2016 (Del)] (ITA No.1613/Del/2015) [India - UK DTAA]

68. The Tribunal held that payment made by assessee to its Malaysian subsidiary for carrying out clinical trial and R&D pursuant to Product Development agreement with Cipla constituted fees for technical service under Article 13 of India-Malaysia DTAA and TDS was required to be deducted under section 195 since the services provided by the Malaysian subsidiary were of technical nature and the DTAA between India and Malaysia did not contain the make available clause.
Stempeutics Research Pvt. Ltd. [TS-560-ITAT-2016(Bang)] (I.T.(I.T) A. No.1450/Bang/2013 & 1196/Bang/2014) [India - Malaysia DTAA]

69. The Tribunal reversed the order of the DRP and held that the fees for technical services ('FTS') received by assessee (company incorporated in UAE) from its Indian counterpart was not chargeable to tax in India absent FTS article in India – UAE DTAA. It held that since the income derived by the assessee from providing services was its regular business activity, it could only be taxed as business income under Article 7 of the DTAA and in the absence of PE in India, the assessee was not chargeable to tax in India. It rejected the Revenue's plea that FTS income was taxable u/s 9(1)(vii) and held that once the income chargeable to tax as per the DTAA was categorized by excluding the Fees for Technical Services then the scope of taxing the said income cannot be expanded by importing the said provision from the Income Tax Act when it is excluded under the DTAA.
ABB FZ LLC [TS-589-ITAT-2016(Bang)] (I.T.(I.T) A. No.188/Bang/2016) (India-UAE DTAA)

70. The Tribunal held that payment made to UK parent for provision of management services in relation to advise and guidance on key management decisions to explore the possibilities of acquisition of businesses was not taxable as fees for technical service under Article 13 of India-UK DTAA as the make available test contained in the DTAA was not satisfied.
Xansa India Ltd. [TS-597-ITAT-2016(DEL)] (India-UK DTAA)

71. The Tribunal held that technical/consultancy service payments made by the assessee to a Switzerland based company, constituted fees for technical services under India-Swiss DTAA and it rejected the assessee's contention that by virtue of Protocol to the India-Swiss DTAA, the restrictive

FTS provision in a subsequent DTAA between India and other OECD country should be read into the Indo-Swiss treaty and therefore the make available clause, though not present in Swiss treaty, but contained in India-Portuguese DTAA could be invoked as no technical knowhow was made available. It clarified that the Protocol only provided for re-negotiation of the clauses in India-Switzerland Treaty in case of more liberal subsequent agreements with other OECD countries, and thus, until it was actually re- negotiated and approved, the 'make available' limitation in India-Portugal DTAA treaty could not apply to Swiss remittances.

Torrent Pharmaceuticals Ltd. [TS-609-ITAT-2016(Ahd)] (ITA No.451/Ahd/2012) (India – Swiss DTAA)

c. Capital Gains

72. The Tribunal held that where the assessee transferred shares under a scheme of arrangement approved by the High Court, the scheme would not fall under the category of re-organization under Article 13(5) of the India - Netherlands DTAA, since the object of the scheme was not financial re-structuring but to enable the assessee to transfer its shareholding and pursuant to the scheme there was only a reduction in the share capital but the security holders continued to enjoy the same rights and interests, thereby not satisfying the definition of reorganization. Accordingly, it held that the gain received by the assessee was taxable in India.

Accordis Beheer BV v DIT - TS-10-ITAT-2016 (Mum) [India - Netherlands DTAA]

73. The AAR held that settlement amount received for surrender of right to sue was not taxable since it was a capital receipt and could not be charged to capital gains as its cost of acquisition was not determinable. Further, the AAR held that the settlement amount was received as a result of surrender of claim against another company and its auditors and not in substitution of any business income and therefore the said amount could not be taxable in accordance with the principle of surrogatum, since it did not replace any business income.

Aberdeen Claims Administration Inc - (2016) 65 taxmann.com 246 (AAR- Del)
Lead Counsel of Qualified Settlement Fund - (2016) 65 taxmann.com 197 (AAR- Del)

74. The AAR held that where a Mauritius based company proposed to transfer shares held by it in an Indian company in favour of a company proposed to be incorporated in Singapore pursuant to a group reorganization initiated 20 years back, it could not be said to be a tax avoidance scheme merely because treaty benefits were available. It further observed that the Mauritius company had been operating for a period of 10 years and therefore could not be considered as a shell company. It held that the applicant was not liable to capital gains tax as per Article 13 of the DTAA, since Article 13(1) and 13(3) were not applicable and in the absence of a permanent establishment Article 13(2) of the DTAA was also not applicable.

In the absence of a PE in India, the MAT provisions did not apply to the applicant and neither did the transfer Pricing provisions apply as there was no income arising out of the said international transaction.

Dow Agro Sciences Agricultural Products Ltd In re - [2015] 65 taxmann.com 245 (AAR- New Delhi) [India -Mauritius DTAA]

75. The Tribunal held that gains from alienation of shares of capital stock of the company the property of which consists directly or indirectly principally of immovable property situated in a contracting state may be taxed in that State and therefore, the assessee a resident of India, transferring shares of a Sri-Lankan company would be taxable in Sri Lanka itself. It held that the contention of the CIT in invoking 263 of the Act on the basis that the AO failed to examine the issue adequately and that the AO failed to compute long term capital gains and short term capital gains separately, was not consequential since the capital gains would be taxable only in Sri Lanka in any case.

Jay Agriculture & Horticulture Pvt Ltd v Pr CIT - (2016) 46 CCH 0118 (Ahd Trib) [India - Sri Lanka DTAA]

76. The Tribunal held that advance given by assessee, a non-resident company, to its wholly owned subsidiary is a property in the sense that it is an interest which a person can hold and enjoy, and since it is a property and is not covered by exclusion clauses set out in section 2(14), it is required to be treated as a 'capital asset' and if any loss arises on sale of the said asset, it would be treated as short term capital loss in the facts of the given case.
Siemens Nixdorf Informationssysteme GmbH v DDIT - [2016] 68 taxmann.com 113 (Mumbai - Tribunal)

77. The Tribunal held that where the assessee was resident of both India and Sri Lanka, as per Article 13 of the India-Sri Lanka DTAA, capital gains arising from the transfer of immovable property situated in Sri Lanka would be taxable only in Sri Lanka. However, it held that the same was also income chargeable to tax in India under the provisions of the Act and therefore to avoid double taxation relief i.e. credit for tax paid in Sri Lanka would be granted to the asssessee in accordance with Notification No 91 of 2008 read with the DTAA.
Shalini Seekond v ITO - (2016) 47 CCH 0398 (Mum - Trib)- I.T.A. No. 3877/Mum/2012 [India - Sri Lanka DTAA]

78. The Court held that the situs of an intangible asset was the situs of the owner of such asset and that an intangible asset does not have any physical form at any particular location and therefore could not presumed to be situated in India when its owner was outside India. It held that the legislature could have, through a deeming fiction, provided for the location of an intangible capital asset but it had not done so insofar India in concerned. Citing the deeming fiction introduced for the situs of shares in an indirect transfer, it held that since there was no like provision for intangible assets, the well accepted principle of 'mobilia sequuntur personam', which provides that the situs of the owner of an intangible asset would be the closest approximation of the situs of an intangible asset, was to be followed. Accordingly, since the assessee / owner of the intangible asset was not in India at the time of transfer of intellectual property rights to another company viz. SAB Miller, no income accrued to the Petitioner in India.
CUB Pty Ltd v UOI - TS-401-HC-2016 (Del) - WP(C) 6902/2008

79. The AAR held that the capital gains arising to the Applicant, a Mauritian company and wholly owned subsidiary of a Japanese Bank, on transfer of shares of an Indian asset management and trustee companies was not taxable under Article 13 of the India-Mauritius DTAA. It noted that the Applicant held more than 75 percent of the paid up capital of the asset management and trustee companies and held a valid TRC and therefore the Revenue were incorrect in contending that the Applicant was merely a 'permitted transferee' just to claim the benefit of the India-Mauritius DTAA and that the Japanese parent company was in effective control of the transaction. Noting that the Applicant had a valid TRC, the AAR held that the beneficial provisions of the DTAA could not be denied to the Applicant.
Shinsei Investment Ltd - TS-473-AAR-2016 - A.A.R. No 1017 of 2010 [India - Mauritius DTAA]

80. The AAR, invoking the non-discrimination clause under Article 25(1) of the India-Italy DTAA, held that capital gains arising on amalgamation of a non- resident company having an Indian branch with its group company(an Italian based bank) was not taxable in light of the exemption provided in Section 47(vi) which is otherwise available only to Indian companies. It dismissed the contention of the Revenue that the applicants case fell under the exception carved out under Article 25(3) and clarified that the said exception only applied to personal allowances etc and would be in context of individuals and not companies. It further held that even if the amalgamation was considered as a transfer, since the shareholders of the applicant and not the applicant received consideration by virtue of shares of the amalgamated company, there would be no capital gains tax in the hands of the applicant since it did not receive any consideration. Further, the AAR also held that that the

consideration received by the shareholders of the applicant was not chargeable to tax as capital gains in view of Article 14(5) of the India-Italy DTAA which provided that capital gains shall be taxable only in Italy.
Banca Sella SPA - TS-468-AAR-2016 - AAR No 1130 of 2011 [India - Italy DTAA]

81. The AAR held that as per Article 13(4) of the India-Mauritius DTAA, the assessee, Mahindra-BT, Mauritius, was not liable to tax in India in respect of the transfer of shares in Tech Mahindra Ltd ('TML') to AT&T International USA ('AT&T'). It rejected the Revenue's contention that the applicant was incorporated without any economic substance and that its sole purpose was to hold shares to facilitate a tax neutral share transfer noting that there was a commercial option agreement between TML and AT&T, whereby AT&T was to be offered an opportunity to hold shares in TML only once AT&T had provided TNML was a certain level of business and that there was nothing wrong if the Applicant held the shares in TML and transferred them to AT&T subsequent to the fulfillment of conditions prescribed in the Options Agreement. It further rejected the stand of the Revenue that the control and management of the Applicant was situated in India under section 6(3) of the Act since the condition of control and management being wholly situated in India was not satisfied as various important decisions on financial matters were taken by the Applicant's Board of Directors in Mauritius.
Mahindra-BT Investment - TS-479-AAR-2016 - A.A.R. No 991of2010 [India -Mauritius DTAA]

d. Dividend Income

82. The Tribunal held that for AY 2004-05, dividend received by the assessee from a Malaysian Bank would be governed by the old DTAA between India and Malaysia and therefore would not be liable to tax in India. Post AY 2004-05, the dividend income would be taxable in both states and subject to tax credit under section 91 of the Act.
DCIT v UCO Bank - (2016) 46 CCH 0313 (Kol Trib) [India – Malaysia DTAA]

83. The Tribunal held that where the assessee, a resident of India, received dividend from a company incorporated in Brazil, then as per Article 10 read as well as Article 23 of the India-Brazil DTAA, the dividend could have been taxed at a rate not exceeding 15 percent in Brazil as per the DTAA. However, since the Brazilian law declared the dividend income to be exempt from income-tax, as the assessee was a resident of India within the meaning of paragraph 3 of Article 23 of the DTAA (which provides that where a company which is a resident of a Contracting state derivces dividends which, in accordance with the provisions of paragraph 2 of Article 10 may be taxed in the other Contracting state, the first mentioned State shall exempt such dividends from tax), such dividends were exempt from tax in India.
ITO v Besco Engineering & Services Pvt Ltd - (2016) 47 CCH 0028 (Kol) [India - Brazil DTAA]

84. The Tribunal held that where the assessee society received dividend income from an Omani company, which was offered to tax in India, it would be liable to credit of tax paid under the India - Oman DTAA, in spite of the fact that the Omani tax laws exempts tax on such income, as the term 'tax payable' in Article 25(4) of the DTAA includes tax which would have been payable but not paid due to certain tax incentives under laws of the contracting State.
Krishak Bharati Cooperative Ltd v ACIT - (2016) 67 taxmann.com 138 (Del - Trib) [India - Oman DTAA]

e. Article 8 / Section 44BB / Section 44D

85. The Tribunal quashed reassessment proceedings initiated by the Revenue seeking to tax technical and ground handling services rendered as fees for technical services under the Act as they were allegedly effectively connected with the assessee's PE in India, following the order of the

Tribunal in the assessee's own case for previous assessment years wherein it was held that ground handling and technical services performed by the assessee should be considered as a part of operation of aircraft in international traffic under Article 8 of the India-Netherlands DTAA, and therefore could not be treated as fees for technical services under the Act.
DCIT v KLM Royal Dutch Airlines - TS-25-ITAT-2016 (Del) [India - Netherlands DTAA]

86. The Court held that the freight income earned by the assessee, a Singapore based company engaged in the shipping business, from the operation of ships was not taxable in India under Article 8 of the India- Singapore DTAA, despite the fact that the receipts were remitted to London and not Singapore, since the Inland Revenue Authority of Singapore issued a certificate stating that the entire freight income derived by the assessee would be assessable in Singapore on accrual basis without making any reference to the amount of income remitted or received in Singapore. The contention of the Revenue that the assessee was not entitled to the benefit of Article 8 by virtue of Article 24(1) (which provided that reliefs provided by the DTAA would only apply to income remitted to Singapore) was rejected by the Court on the ground that the said clause did not provide that Article 8 would not apply to every case of non-remittance and moreover the income in the instant case was taxable in Singapore on the basis of accrual.
M.T. Maersk Mikage [TS-474-HC-2016(GUJ)] SPECIAL CIVIL APPLICATION NO. 9150 of 2014 [India - Singapore DTAA]

87. The Tribunal allowed the assessee's (resident of Indonesia) appeal challenging assessment under section 172 of the Act (which deals taxation of non-resident shipping companies) and held that income earned from slot chartering in certain vessels sailing from Port of Mundra was not taxable in India as per Article 8 of India-Indonesia DTAA. It held that the Revenue was incorrect in denying exemption under Article 8 of India-Indonesia DTAA on the ground that vessels in which the containers were transported were not owned/ chartered by the assessee, since as per Article 8(1) source jurisdiction (India in this case) had no right to tax income from operations of ships in international traffic or even any activity directly connected with such operations, whether carried on by the assessee on his own/ in collaboration with others and that there was no reference to ownership and charter of vessels in Article 8 of the DTAA. It relied on Bombay HC ruling in Balaji Shipping UK Ltd wherein it was held that "slot hire facility is an integral part of the contract of carriage of goods by sea" and thus is eligible for treaty protection against source taxation of such income.
K Cargo Global Agencies v ITO - TS-235-ITAT-2016(Ahd) [India - Indonesia DTAA]

88. The AAR held that consideration received for on-board fabrication and installation of Floating Production Storage and Offloading facility under Change order was taxable in India under section 44BB of the Act despite working performed outside India as the change order was a mere extension of the Original Contract and therefore warranted similar tax treatment. Entire consideration received was taxable under section 44BB without splitting the same on the basis of travel of FPSO outside or in India as section 44BB did not provide for such splitting up.
Aker Contracting FP ASA - TS-773-AAR-2015

89. The Tribunal held that where profits and gains of the business carried on by the assessee were to be computed at 10 percent of gross receipts as per section 44BB of the Act, deeming the gross receipts to be the income of the assessee, it could not claim a deduction of fuel cost incurred in respect of construction of offshore facilities, even though the same would be allowable under the normal provisions of the Act, since its taxability was governed by the provisions of Section 44BB which do not provide for deduction of expenses incurred.
Fugro Rovtech Ltd v ADIT(IT) - (2016) 66 taxmann.com 19 (Mum)

90. The Tribunal held that where the assessee and a Russian company entered into an agreement for the construction of Nuclear power plant in India, whereby the Russian company was to assist in

setting up the Nuclear Power Station, the payment made to the Russian company was taxable under section 44BBB of the Act and not taxable as fees for technical services since the Russian company not only provided necessary assistance but also was actively involved in the process of setting up the Power Station by providing end to end services and deputing personnel for the purpose of carrying on construction.

DDIT(IT) v Nuclear Power Corporation of India Ltd - (2016) 46 CCH 0111 (Mum Trib)

91. The Tribunal held that income received by a non-resident under a time charter agreement accrues and arises in India even when the vessel and crew are outside the territorial waters of India since the payments were intricately linked to the services/works rendered by the assessee and arose due to the execution of contract in India. Further, it held that if a non-resident is engaged in the business of providing services or facilities in connection with the prospecting for extraction or production of mineral oil, then 10% of the aggregate of the amounts received/accrued will be deemed to be the profits and gains of such business chargeable to tax in terms of provisions of section 44BB of the Act even if it was in the nature of Royalty / FTS since specific services were contemplated only under section 44BB of the Act and, therefore that being special provision, the same will prevail over all other provisions dealing with royalty/FTS.

Siem Offshore Crewing v ADIT - (2016) 46 CCH 0277 (Del Trib)

92. The Court held that both section 44B and 172 of the Act open with a non-obstante clause and that section 44B provides for the computation and section 172 provides for the recovery and collection of taxes. The provisions of section 172 of the Act clearly provide the mechanism for levy, assessment and recovery and therefore there is no warrant in applying the provision of section 195 to the assessee and accordingly there is no obligation to deduct tax at source on the resident / Indian company making payments to non-resident covered under section 172 of the Act. Thus, no disallowance can be made under section 40(a)(i) of the Act in such a case.

CIT v VS Dempo & Co Pvt Ltd - (2016) 66 taxmann.com 93 (Bom)

93. The Court held that consideration received by foreign company for services rendered to Indian entities for activity of 2D/3D seismic survey carried on in connection with exploration of oil could not be construed as "fees for technical services" in terms of Explanation 2 to section 9(1)(vii) and the same was liable to tax in India under section 44BB only if non-resident had a PE in India in relevant assessment year.

PGS Exploration (Norway)AS v ADIT - [2016] 68 taxmann.com 143 (Delhi)

94. The AAR held that where the applicant provided coring service (which generally include the removal of sample formation material from a wellbore for further analysis of the said samples) sample analysis service to examine presence of petroleum in block for exploration, consideration received by applicant would be taxable under section 44BB and the provisions of sections 9(1) (vii), 44D and 44DA of the Act would not be applicable in view of the judgment of the Apex Court in Oil & Natural Gas Corpn. Ltd v CIT.

Corpro Systems Ltd., In re - [2016] 68 taxmann.com 330 (AAR-New DELHI).

95. The Tribunal held that the assessee, a Singapore Company and wholly owned subsidiary of an Indian company, engaged in the business of operating ships in international traffic across Asia and the Middle East could not be considered to have effective management and control in India merely because it had opened a bank account in India, having one of its directors in India or holding of only one meeting during the year in India. Also, it held that the location of the parent company in India would not decide the residential status of the assessee. It dismissed the contention of the Revenue that the assessee was taxable under section 44B since the assessee did not own or charter or lease any vessel or ship for the year under consideration and therefore held that its income was to be taxed as business income and in the absence of PE in India no income was taxable in India.

Forbes Container Line Pte Ltd v ADIT - TS-126-ITAT-2016 (Mum)

f. Independent Personal Services

96. The Tribunal held that the amount received by the assessee, a US individual, for rendering software development services to an Indian entity was not taxable in view of Article 15 of India-US DTAA and rejected the AO's contention that the impugned services not being covered under Article 15 were taxable under Article 12 of the DTAA. It held that once a receipt was of a nature covered under Article 15, it would stand excluded from Article 12 by applying sub-clause 5 of Article 12. It further observed that software development services essentially required intellectual skill and was dependent on individual characteristics as a result of which it fell within the ambit of 'professional services under Article 15(2) and also noted that while dealing with the scope of services covered under Article 15, there could be overlapping effect of the scope of services covered under other Articles but as long as the services were rendered by an individual or a group of individuals, the rendition of services was covered by Article 15.
ITO v SusantoPurnamo - TS-438-ITAT-2016 (Ahd) - I.T.A. No. 254/ Ahd/2015 [India - US DTAA]

g. Withholding tax

97. The Tribunal held that the assessee, a branch of a foreign bank was not liable to deduct tax at source on payment of interest to its head office since the payment was made by the non-resident to himself and accordingly deleted the disallowance made under section 40(a)(i) of the Act.
DBS Bank Ltd v DDIT (IT) - (2016) 66 taxmann.com 173 (Mum)

98. The Tribunal held that the assessee, an independent insurance broker was not required to deduct tax at source on payments made to non-resident re- insurers since it was an independent broker and not an agent and did not carry out any activity on behalf of anyone in India and did not have the authority to conclude contracts in India. It observed that neither did the non-resident reinsurers nor any independent insurance company have any control over the assessee and that section 9(1)(i) specifically excluded independent brokers from its ambit. Accordingly, it held that the assessee could not be treated as an assessee in default under section 201 / 201(1)(A) of the Act.
ADIT v AON Global Insurance Service Ltd - TS-756-ITAT-2015 (Mum)

99. The Tribunal held that the question of applying a rate of 20 percent and making consequent adjustment on payments made by the assessee to a non- resident, ignoring the provisions of the DTAA was a legal question which was beyond the scope of intimation under section 200A of the Act which provided for adjustments on account of arithmetical errors and therefore, the said intimation and adjustment was not justified.
Wipro Ltd v ITO - (2016) 46 CCH 0187 (Bang - Trib)

100. The Tribunal held that the second proviso to section 40(a)(ia) of the Act was retrospective in nature, being declaratory and curative in nature, seeking to eliminate unjust enrichment on part of the Government.
Dilip Kumar Roy v ITO - (2016) 68 taxmann.com 129 (Kolkata - Trib)

101. The Tribunal deleted Sec 40(a)(i) disallowance and held that the assessee was not liable to deduct TDS u/s 195 on payments made to non- resident during AY 2010-11 for training conducted outside India and dismissed the contention of the Revenue that the assessee was liable to deduct TDS applying explanation to Sec 9(1) inserted retrospectively by Finance Act 2010 which provides that even where the non-resident has not rendered services in India, FTS shall be deemed to accrue or arise in India. It held that an assessee who has to make the payment cannot visualize or

apprehend that in future a retrospective amendment would be brought whereby it would require withholding of tax and that that law cannot compel a person to do something which is impossible to perform (i.e lex non cogit ad impossiblia).
Holcim Services South Asia Ltd v DCIT - TS-80-ITAT-2016(Mum)

102. The Tribunal held that assessing Officer's order under section 195(2) determining the amount of TDS to be deducted from payment to non-resident is not an appealable order u/s 246 / 246A and CIT(Appeals) cannot entertain appeals against it and any order passed by CIT(A) by entertaining such appeal will be unsustainable for want of jurisdiction - Consequently, the Tribunal also cannot entertain any appeal against CIT(A)'s order on the matter
Bangalore International Airport Ltd v ITO - [2016] 68 taxmann.com 228 (Bangalore - tribunal)

103. The Court held that for AY 2001-02, prior to the insertion of section 40(a)(ia) of the Act, disallowance of payments to non-residents on account of non-deduction of tax at source was discriminatory, since payments to residents were not subject to such disallowance arising out of non-deduction of tax at source and consequently assessees would be eligible to benefit of Article 26(3) of the India-US DTAA i.e. Non-discrimination, and therefore it held that the administrative fee paid by the assessee to its US based holding company was allowable in spite of non-deduction of tax at source.
CIT v Herbalife International India Pvt Ltd - (2016) 96 CCH 0007 (Del) [India - US DTAA]

104. The Tribunal held that where the assessee made payments in consideration for services rendered by non-residents, in view of the fact that no finding had been brought on record by the Revenue that non-residents had business connection in India, it could be concluded that no services were rendered by non-residents in India. Further, since no finding was made vis-à- vis the nature of the payments and no evidence was brought on record to show that the payments were in the nature of fees for technical services, the provisions of section 40(a)(i) of the Act would not be applicable since the receipts were not in the nature of income deemed to accrue or arise in India in the hands of the non-residents.
IDS Infotech Ltd v DCIT - (2016) 69 taxmann.com 393 (Chandigarh)

105. The Tribunal deleted Sec 40(a)(i) disallowance for non-deduction of Sec 195 TDS on payment of technical know-how fees to AVL Austria, since under old DTAA provision of 1963 between India and Austria which existed till September, 2001, payment made by Indian entity to Austrian resident for rendering services in Austria was not taxable in India.
LML Ltd - TS 392 ITAT 2016 (MUM) ITA No. : 3668/Mum/2004 [India - Austria DTAA]

106. The Tribunal held that the amount remitted by the assessee to its 100 percent Mauritian holding company under a share buy-back scheme was not taxable in India during the relevant assessment year viz AY 2011-12 (prior to the insertion of section 115QA of the Act) since the shareholders were liable to capital gains tax under section 46A and there being no capital gains tax in Mauritius, no tax was payable. Accordingly it held that Section 195 was not applicable to the said transaction. It further dismissed the contention of the Revenue that the buyback scheme was a colourable device to avoid payment of DDT under section 115O and held that the buyback was legitimate and in accordance with section 77A of the Companies Act.
Korn Ferry International Pvt Ltd - TS-439-ITAT-2016 (Mum) I.T.A. No. 7367/Mum/2014, I.T.A. No. 7139/Mum/2014

107. The Tribunal held that the remittance of sales commission to non- resident agents was not taxable in India absent operations carried out in India and therefore it deleted the disallowance made under section 40(a)(i) of the Act. It held that even though Section 9(1)(i) of the Act was triggered in the instant case, it had no impact on the taxability in the hands of the commission agent because admittedly no business operations were carried out in India and by virtue of Explanation 1 to Section

9(1)(i) of the Act, the entire commission income was outside the ambit of income deemed to accrue or arise in India.
ITO v Excel Chemicals India Ltd - TS-417-ITAT-2016 (Ahd) - I.T.A. No.5/Ahd/16

108. The Tribunal held that the assessee was not liable to withhold tax under section 195 of the Act on payment towards ground rent, advertisement and exhibition expenses to non-resident entities not having PE in India, since the payments were in the nature of business receipts which would be taxable only if the payee had a PE in India.
ITO v Brahmos Aerospace Pvt Ltd - TS-524-ITAT-2016 (Del) - ITA No. 966/Del/2015

109. The Tribunal upheld CIT(A)'s order deleting disallowance made by the AO under section 40(a)(ia) of the Act on account of non-deduction of tax on selling expenses paid to non-residents since the payments made to the said non-resident parties were for the purpose of marketing and consultancy services rendered outside India and the said payments were not exigible to tax deduction at source u/s 195 of the Act as there was no income accruing or arising in India in the hands of the said non-resident parties in view of Section 9(1)(vii) of the Act read with Section 90(2) and the treaty provisions as per the India-USA DTAA..
ITO vs. Annik Technology Systems P. Ltd. (2016) 48 CCH 0132 (Delhi Trib.) (ITA No. 4763/DEL/2012) [India - US DTAA]

110. The Tribunal held that provisions of section 195 of the Act do not apply to transaction between one non-resident to another non-resident. Further, it held that if the non-resident assessee is not liable to pay advance tax then there is no question to levy interest under sections 234B and 234C of the Act.
Star Limited [TS-773-ITAT-2016 (Mum) - TP]

111. Where the assessee had duly deducted tax at source during the relevant year on the payments for which disallowance under section 40(a)(i) was made on account of non-deduction of tax in the prior year, the Tribunal allowed assessee's claim of reversal of disallowance made in light of proviso to Section 40(a)(i) of the Act.
Star Limited [TS-773-ITAT-2016 (Mum)- TP]

112. The Tribunal held that appeal filed by the assessee- deductee against a 195(2) order passed upon application made by the payer / deductor was not maintainable since as per section 246A an order under section 195(2) was not appealable before the CIT(A). It further held that the only remedy against a section 195(2) order was appeal under section 248 which was required to be filed by the deductor and not the deductee. It held that the order appealed against must be an order against an assessee determining its liability to be assessed under the Act and since, in the present case, the order under section 195(2) was against the deductor in whose case the assessment was concluded and not the assessee, the only course open to the assessee was to deny its liability to be assessed under the Act and claim a refund.
DCIT v Abu Dhabi Ship Building PJSC - TS-328-ITAT-2016 (Mum)

h. Miscellaneous

Assessment

113. The Court held that when there was no failure on part of the assessee to disclose all material facts relating to income in question at the time of assessment and the AO concluded that the amount received by the assessee from its subsidiary under the software duplication and distribution license agreement was taxable as royalty, he could not subsequently initiate reassessment proceedings

merely on the basis of change of opinion that the amount in question was to be taxed as business income.
Oracle Systems Corpn v DIT(IT) - (2016) 66 taxmann.com 286 (Del)

AAR - Maintainability of Application

114. The Court held that a notice issued under section 143(2) of the Act in a pre-printed format would not be a bar to the AAR application even if it was issued prior to the filing of the AAR application. Further, it held that the words 'already pending' in section 245R(2) of the Act covered situations wherein on the date of filing of the application before the AAR, the question raised therein was already subject matter of proceedings before the income tax authority and since the question before the AAR was not subject matter of the notice under section 143(2) of the Act, the AAR application could not be dismissed.
Hyosung Corporation v AAR - TS-77-HC-2016 (Del)

115. The Court held that the words 'already pending' in section 245R(2) of the Act relates to the date of filing of application before the AAR and therefore notices issued under section 143(2) of the Act subsequent to filing the AAR application would not bar the AAR proceedings. It held that only if the question raised in the AAR application was already subject matter of proceedings before the income-tax authorities, could the AAR refuse to entertain the said application. Where the notice issued by the AO was in a standard format and not covering the specific issue which was subject matter of application before the AAR, there would be no bar on adjudicating such issues under section 245R of the Act.
LS Cable & System Ltd v CIT - (2016) 96 CCH 0011 (Del) Hyosung Corporation v AAR - TS-274-HC-2016 (Del)

116. The Court allowed the Petitioner's writ and quashed the AAR order rejecting the Petitioner's application for advance ruling under Section 245R on the ground that since a notice under section 143(2) was issued in case of the Petitioner the matter was pending adjudication before AO thereby attracting bar on approaching the AAR, since the notice under section 143(2) was issued in general terms and it did not address itself to any specific question.
Sage Publications Ltd v DCIT - TS- 480-HC-2016 (Del) - W.P.(C) 5870/2016

Individuals

117. The Tribunal held that since the assessee, an employee of a US based company, was a non-resident providing services in the US and subject to tax in the USA he was exempt from tax in India as per Article 16 of the India-USA DTAA and merely because he was paid salary by the US company's Indian counterpart, which was later reimbursed by the US company, tax could not be levied on him in India.
Neeraj Badaya v ADIT(IT) - (2016) 46 CCH 0541 (Jaipur)

118. The Tribunal held that the salary received by the assessee, a non- resident individual, working as a marine engineer in foreign waters, was taxable in India since it was received in the assessee's NRE account in India. It rejected the contention of the assessee that the income was not taxable in India since it was received in foreign currency and held that Section 5(2)(a) provides for taxability of any income received or deemed to be received in India irrespective of the residential status of the recipient.
Tapas Kr Bandopadhyay - TS-310-ITAT-2016

Others

119. The Court dismissed the petition filed by the petitioner challenging validity of section 94A(1) of the Act, (incorporating special measures in respect of transactions with persons located in notified jurisdictional areas) Notification No 86 and press release dated November 1, 2013. It held that Section 94A of the Act, empowering the Central Government to declare any country or territory outside India as a notified jurisdiction was constitutionally valid. It held that the Indian Constitution followed the dualistic doctrine with respect to international law and that international treaties do not automatically form part of the international law unless incorporated into the legal system by a legislation made by parliament. The Court held that the challenge to the constitutional validity of section 94A(1) of the Act was meritless and in dealing with the contention of the Petitioner that section 90(1)(c) of the Act could not be diluted by section 94A(1) of the Act, it held that in the case of lack of effective exchange of information, section 90(1)(c) of the Act gets diluted by the contracting parties and not by section 94A(1) of the Act. It observed that there was sufficient justification for the insertion of Section 94A of the Act which sought to take action against non- cooperative jurisdictions. With regards to the validity of Notification No 86, which declared Cyprus as a notified jurisdiction under section 94A of the Act, it held that the contention of the tax payer that countries with whom agreements were entered into under section 90(1) could not be considered as notified jurisdictional areas was incorrect as the language used in section 94A was 'any country or territory' and therefore the Central government could notify any country irrespective of the existence of a treaty with the said country. Further, the Court held that the impugned Press release, which speaks about the liability to withhold tax at 30 percent to payments made to non-residents in Cyprus using the words 'any sum', 'income' and 'amount', was not a legal document and therefore the language used therein could not be tested on the strength of law lexicons as they were meant for the benefit of the common man and therefore dismissed the contention of the petitioner pointing out the discrepancies in the terms used therein and those used in section 94A.
T Rajkumar v Union of India - (2016) 68 taxmann.com 182 (Mad)

120. The Apex Court dismissed the Revenue's SLP filed against the decision of the Delhi High Court in the case of Hyosung Corporation wherein the Court had allowed the assessee's writ petition against the AAR ruling rejecting application on the ground that issues were pending adjudication before AO since section 143(2) notices were already issued. The High Court had accepted assessee's contention that mere issuance of notice u/s 143(2) would not make the question raised in the AAR application 'pending' before IT authorities. Accordingly, the Apex Court dismissed the SLP as it held that there was no legal and valid ground for interference with the order of the High Court.
CIT v Hyosung Corporation & ANR – TS-668-SC-2016

121. Where the assessee, who executed projects in Saudi Arabia, income on which tax was levied in Saudi Arabia claimed benefit under section 91 of the Act including on the sums which were allowed as deduction under 80HHB and 35B, the Court upheld the decision of the Tribunal and held that since amounts claimed as deduction under section 80HHB and section 35B admittedly did not bear any tax in India, no relief could be granted under section 91 as there was no double taxation on such amounts.
Reliance Infrastructure Ltd. v. CIT, Mumbai [2016] 76 taxmann.com 257 (Bombay)