

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'B', NEW DELHI**

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER  
AND  
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No.2443 to 2445 /DEL/2016  
Assessment Year: 2006-07 to 2008-09

<b>BG Exploration &amp; Production India Ltd, BG House, Lake Boulevard Road, Hirannandani Business Park, Powai, Mumbai PAN AAACE4569K</b>	<b>Vs</b>	<b>ITO (TDS) International Taxation, Dehradun</b>
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

Appellant by	Sh.Himanshu Shekhar Sinha, Advocate Sh. Bhuwan Dhoopar, Advocate
Respondent by	Ms. Ashima Neb, Sr. DR

Date of hearing:	09/01/2019
Date of Pronouncement:	11/01/2019

**ORDER**

**PER N. K. BILLAIYA, AM:**

ITANo.2443/Del/2016, 2444/Del/2016 and 2445/Del/2016 are appeals by the assessee preferred against the three separate

orders of the CIT(A)-2, Noida09.3.2016 pertaining to A.Y.2006-07, 2007-08 and 2008-09.

2. Since common issues are involved in all these appeals they were heard together and are disposed of by this common order for the sake of convenience.

3. The first common grievance is that the proceedings are barred by limitation. Ground No. 2 is not pressed and the same is dismissed as not pressed. The third common grievance is that the CIT(A) erred in holding that the payments made by the assessee are in the nature of fees for technical services u/s 9 (1) (vii) of the Act and fees for included services under Article 12 of the DTAA between India and the United States of America.

4. With ground No.1 the assessee claims that the proceedings are barred by limitation.

5. Representatives of both the sides were heard at length. Case records carefully perused and the judicial decisions relied upon carefully considered.

6. Facts on record show that in all the three years the order framed u/s 201 (1) / 201 (1A) are dated 28.03.2013. The counsel vehemently stated that the orders so framed are barred by limitation. Before proceeding further let us consider the provisions of the Act as under :-

*Consequences of failure to deduct or pay.—*

201. —*[(1) Where any person, including the principal officer of a company,—*

*(a) who is required to deduct any sum in accordance with the provisions of this Act; or*

*(b) referred to in sub-section (1A) of section 192 , being an employer,*

*does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:*

*Provided that no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.]*

*<sup>94-99</sup> [(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest,— (i) at one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and*

*(ii) at one and one-half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid, and such interest shall be paid before furnishing the statement in accordance with the provisions of subsection (3) of section 200. ]*

*(2) Where the tax has not been paid as aforesaid after it is deducted, - [the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1 A)] shall be a charge upon all the assets of the person, or the company, as the case may be, referred to in sub-section (1).*

*2(3) No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of—*

*(i) two years from the end of the financial year in which the statement is filed in a case where the statement referred to in section 200 has been filed;*

*(ii) four years from the end of the financial year in which payment is made or credit is given, in any other case :*

*Provided that such order for a financial year commencing on or before the 1st day of April, 2007 may be passed at any time on or before the 31st day of March, 2011.*

*(4) The provisions of sub-clause (ii) of sub-section (3) of section 153 and*

*o/Explanation 1 to section 153 shall, so far as may, apply to the time limit prescribed in sub-section (3).}*

7. The relevant provision and the amendment has been considered by the Hon'ble High Court of Delhi in the case of *Bharti Airtel Limited* 76 taxmann.com 256. The relevant findings on the Hon'ble High Court read as under :-

*It is proposed to make these amendments effective from 1st April, 2010. Accordingly it will apply to such orders passed on or after the 1st April, 2010."*

12. *When NHK Japan (supra) and Hutchinson (supra) were decided, the amendment was not brought about and therefore the issue of existence of a period of limitation, did not arise. The court therefore, considered, on the basis of available authority, that a four year period was "reasonable period" as the outer limit for issuance of notice under Section 201. However, in the present case, Parliament consciously amended the Act. In doing so, it prescribed a limitation only for residents. Instead of actively barring the applicability of the provision on non-residents, did the Parliament choose to passively do so by remaining silent on non-residents and only amending the provision, for residents. The question is, whether the petitioner is right in contending that if the Act does not specify a time period, then a reasonable time period should be read into the Act. This contention is based on judgements which were delivered when the Legislature had not made a distinction between residents and non-residents. The question is when such a distinction exists, can one read a "reasonable time period" into the Act.*

13. *The amendment ipso facto is undoubtedly silent about the application of periods of limitation to amounts deducted and payments made to non residents. It is quite possible to argue that the demarcation and distinction between payments made to residents and non-residents through the amendment, can mean that where no period of limitation for Sections 200 and 201 has been prescribed, one cannot be read into the Act. However, the legislative history here becomes instructive; in that context extrinsic material, in the form of statements of objects and reasons, become relevant. At all material times, payments made to residents and non-residents were treated alike. The revenue does not state what necessitated the distinction, made through the amendment for the first time. The only clue to be found to this silence is in that part of the circular quoted above, which states that limitation period for non resident's payment is unfeasible "as it may not be administratively possible to recover the tax from the non- resident." However, that is not the reasoning given in the statement of objects and reasons.*

14. *It was argued that the basis and/or reasoning of not applying*

*the limitation in respect of deduction from non-residents on grounds of administrative convenience is arbitrary, discriminatory and violative of Article 14 and 265 of the Constitution. They have submitted that the basis of 'administrative convenience' in respect of TDS provisions had already been rejected by the Supreme Court in the case of GE India Technology Centre v. CIT 2010 (10) SCC 29. Taking their argument forward, the Petitioner submitted that the provision lacked any intelligible differentia, with no basis in law to provide for period of limitation in the case of payments made to residents and for not providing a similar period of limitation in the case of payments made to non-residents. The revenue's contention is that when Parliament consciously provided no period of limitation, even whilst doing so for domestic taxpayers, this court should not in effect, legislate a period of limitation.*

15. *This court is of opinion that the latest judgment, in Vodafone Essar Mobiles Ltd. (supra) provides a complete answer to the revenue's contentions. The Court had then ruled as follows:*

*"9. More recently in CIT v. Calcutta Knitweaves [2014] 362 ITR 673, the Supreme Court had the occasion to deal with the correct position in law as to the initiation of Income-tax proceedings. Although, the context of the dispute was in respect of recording of a satisfaction note as to the initiation of proceedings against third parties under the erst while section 158BD of the Act which did not prescribe the period of limitation and left it to the discretion of the Assessing Officer to decide on being satisfied that such proceedings were required to be initiated, the court limited such discretion in the following terms (page 691 of 362 ITR):*

*44. In the result, we hold that for the purpose of section 1 58BD of the Act a satisfaction note is sine qua non and must be prepared by the Assessing Officer before he transmits the records to the otrm Assessing Officer who has jurisdiction over such other person. The satisfaction note could prepared at either of the following stages : (a) at the time of or along with the initiation proceedings against the searched person under section 158BC of the Act ; (b) along with to. assessment proceedings under section 158BC of the Act ; and (c) immediately after the assessment proceedings are completed under section 158BC of the Act of the searched person.'*

*10. An added reason why the submission of the Revenue is unacceptable is that had Parliament indeed intended to overrule or set aside the reasoning in NHK Japan {supra}, it would have, like other instances and more specifically in the case of section 201(1 A), brought in a retrospective amendment, nullifying the precedent itself. That it chose to bring section 201(3) in the first instance in 2010 and later in 2014 fortifies the reasoning of the court. Accordingly, the issue is answered against the Revenue."*

17. *It appears to the court that the above decision settles the question whether to declare an assessee to be an assessee in default*

under section 201 of the Act could be initiated for a period earlier than four years prior to March 31, 2011.

18. Mr. M. S. Syali, the learned senior advocate for the petitioners states that although the challenge in these petitions is also to the vires of the proviso to section 201(3) of the Act as inserted by the Finance (No. 2) Act, 2009, the petitioners would be satisfied if the interpretation sought to be advanced by them on the scope and ambit of proviso to sub-section (3) of section 201 of the Act is accepted by the court. In other words what has been canvassed on behalf of the petitioners is that the proviso to section 201(3) of the Act has to be read consistent with the law explained by the court in *CIT v. NHK Japan Broadcasting Corporation* (supra) and should be held not to permit the Department to initiate proceedings for declaring the assesseees to be assesseees in default for a period more than four years prior to March 31, 2011.

19. Mr. Dileep Shivpuri, the learned senior standing counsel for the Revenue, however, seeks to advance a different line of argument. According to him the action taken by the Department was pursuant to a decision in *CIT v. Idea Cellular Ltd.* [2010] 325 ITR 148 (Delhi) where the amounts paid to the channel partners for the pre-paid cards and other products was held to be "commission" by the court within the meaning of section 194H of the Act. It is stated that it is consequent upon the said decision that the Department issued the impugned notices to these petitioners and that this was permissible in terms of section 153(3)(ii) of the Act.

20. The above submission of Mr. Shivpuri cannot be accepted if section 153 is perused carefully. It reads as under:

'153. Time limit for completion of assessments and reassessments.— . . .

(3) The provisions of sub-sections (1), (1 A), (IB) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, subject to the provisions of sub-section (2A), be completed at any time— . . .

(ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act."

21. In the first place, what the said provision does is to not apply the time limit of two years completing the assessment from the end of the financial year "where the assessment, reassessment: or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order .... Or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act." This can apply only to the assessee in whose case such an order is made by a court. For instance, if the above decision was qua *Idea Cellular Ltd.* then it certainly cannot form the basis for initiating proceeding qua other assessee.

22. Secondly there has to be a finding or directions as regards the

issue in question, viz., the non-deduction of tax at source resulting in an assessee having to be declared an assessee in default under section 201 of the Act. In *Rajinder Nath v. CIT* [1979] 120 ITR 14 (SC), it was held that the existence of an order disposing of a case qua an assessee containing specific directions of the court was a *sine qua non* for invoking the powers under section 153(3)(ii) of the Act. Even in the case relied upon by Mr. Shivpuri, i.e., *CIT v. Idea Cellular Ltd.* (supra), there is no such finding or direction to the Department by the court requiring it to initiate proceedings for declaring the assessee to be an assessee in default. The court is, therefore, of the view that the reliance by the Department on section 153(3)(ii) of the Act and the decision in *CIT v. Idea Cellular Ltd.* (supra) to justify initiation of the proceedings in the present case against the petitioner is misconceived."

6. The court was conscious of the absence of any limitation period in respect of payments to non-residents, for the purpose of Section 195 read with Section 201. Yet, it was held that proceedings could be initiated within reasonable time. The circular relied on by the revenue, furnishing a rationale for not providing limitation: "as it may not be administratively possible to recover the tax from the non-resident", was decisively rejected in *G.E. Technologies* (supra), where the Supreme Court observed as follows:

"9. One more aspect needs to be highlighted. Section 195 falls in Chapter XVII which deals with collection and recovery. Chapter XVII-B deals with deduction at source by the payer. On analysis of various provisions of Chapter XVII one finds use of different expressions, however, the expression "sum chargeable under the provisions of the Act" is used only in section 195. For example, section 194C casts an obligation to deduct TAS in respect of "any sum paid to any resident". Similarly, sections 194EE and 194F, inter alia, provide for deduction of tax in respect of "any amount" referred to in the specified provisions. In none of the provisions we find the expression "sum chargeable under the provisions of the Act", which as stated above, is an expression used only in section 195(1). Therefore, this court is required to give meaning and effect to the said expression. It follows, therefore, that the obligation to deduct TAS arises only when there is a sum chargeable under the Act. Section 195(2) is not merely a provision to provide information to the Income-tax Officer (TDS). It is a provision requiring tax to be deducted at source to be paid to the Revenue by the payer who makes payment to a non-resident. Therefore, section 195 has to be read in conformity with the charging provisions, i.e., sections 4, 5 and 9. This reasoning flows from the words "sum chargeable under the provisions of the Act" in section 195(1). The fact that the Revenue has not obtained any information *per se* cannot be a ground to construe section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression "sum chargeable under the provisions of the Act" from section 195(1). While interpreting a section one has to give weightage to every word

used in that section. While interpreting the provisions of the Income-tax Act one cannot read the charging sections of that Act de hors the machinery sections. The Act is to be read as an integrated code. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in the case of CIT v. Eli Lilly and Co. (India) (P.) Ltd. [2009] 312 ITR 225 the provisions for deduction of TAS which are in Chapter XVII dealing with collection of taxes and the charging provisions of the Income-tax Act form one single integral, inseparable code and, therefore, the provisions relating to TDS apply only to those sums which are "chargeable to tax" under the Income-tax Act. It is true that the judgment in Eli Lilly [2009] 312 ITR 225 was confined to section 192 of the Income-tax Act. However, there is some similarity between the two. If one looks at section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head salaries". Similarly, section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum "chargeable under the provisions of the Act", which expression, as stated above, do not find place in other sections of Chapter XVII. It is in this sense that we hold that the Income-tax Act constitutes one single integral inseparable code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the Income- tax Act. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the moneys deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the Income-tax Act by which a payer can obtain refund. Section 237 read with section 199 implies that only the recipient of the sum, i.e.the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all payments, the payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum chargeable under the Act. The interpretation of the Department, therefore, not only requires the words "chargeable under the provisions of the Act" to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax. In our view, section 195(2) provides a remedy by which a person may seek a determination of the "appropriate proportion of such sum so chargeable" where a proportion of the sum so chargeable is liable to tax. The entire basis of the Department's contention is based on administrative convenience in support of its interpretation. According to the Department, huge seepage of revenue can take place if persons making payments to non residents are free to deduct TAS or not to deduct TAS. It is the case of the Department that section 195(2), as interpreted by the High Court, would plug the loophole as the said interpretation requires the payer to make a declaration before the Income- tax Officer (TDS) of payments made to non residents. In other words, according to the Department, section 195(2) is a provision by which the payer is required to inform the Department of the remittances he makes to non-residents b\*\* which the Department is able to keep track of the remittances being made to non-residents outside India. We

*find no merit in these contentions. As stated hereinabove, section 195(1) uses the expression "sum chargeable under the provisions of the Act." We need to give weightage to those words. Further, section 195 uses the word "payer" and not the word "assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfil the statutory obligation under section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default. The abovementioned contention of the Department is based on an apprehension which is ill-founded. The payer is also an assessee under the ordinary provisions of the Income-tax Act. When the payer remits an amount to a non-resident out of India he claims deduction or allowances under the Income-tax Act for the said sum as an "expenditure". Under section 40(a)(i), inserted, vide Finance Act, 1988, with effect from April 1, 1989, payment in respect of royalty, fees for technical services or other sums chargeable under the Income-tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the Income-tax Act. This provision ensures effective compliance with section 195 of the Income-tax Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the Income-tax Act. In a given case where the payer is an assessee he will definitely claim deduction under the Income-tax Act for such remittance and on inquiry if the Assessing Officer finds that the sums remitted outside India come within the definition of royalty or fees for technical service or other sums chargeable under the Income-tax Act then it would be open to the Assessing Officer to disallow such claim for deduction. Similarly, vide the Finance Act, 2008, with effect from April 1, 2008, sub-section (6) has been inserted in section 195 which requires the payer to furnish information relating to payment of any sum in such form and manner as may be prescribed by the Board. This provision is brought into force only from April 1, 2008. It will not apply for the period with which we are concerned in these cases before us. Therefore, in our view, there are adequate safeguards in the Act which would prevent revenue leakage."*

16. *In this court's view, therefore, since Vodafone Essar {supra} considered the entire issue and noted that even recently a reasonable period was read into the Act, in relation to exercise of powers (although in a different context) accepting the petitioner's contention in the present case is based on precedent. Furthermore, the only reason cited by the respondent, i.e. administrative convenience, cannot outweigh the harsh nature of the consequence, which would expose resident payers to the onerous responsibility of 'maintaining books and documents for an uncertain period of time. Given these considerations, the 'Impugned notices are quashed. The writ petition is allowed in these terms; no costs.*

8. Facts of the case in hand are in parity with the facts of Bharti Airtel, respectfully following the findings of the Hon'ble

Jurisdictional High Court (supra) we hold that the order dated 28.03.2013 for A. Y. 2006-07, 2007-08 and 2008-09 are barred by limitation.

9. For the sake of the completeness of the adjudication we will now consider whether the payments made by the assessee to GX Technology of America is in the nature of fees for technical services u/s 9 (1) (vii) of the Act and fees for included services under Article 12 of the DTAA between India and America.

10. We are considering the facts of A. Y. 2006-07 and the facts show that during the year the assessee has made payments to NRC i.e. GXT. The Assessing Officer noticed that the payments have been made without deduction or tax at source as per TDS provision vide chapter XVII B of the IT Act accordingly a show cause notice issued to the assessee to clarify the issue regarding non deduction of TDS on payments made to GXT.

11. In its reply the assessee stated that GXT is a tax resident of United States of America and is eligible for relief / benefits under the Indo-US DTAA. It was explained that the outright sale of geophysical and geological data cannot be held to be covered under the ambit of royalties or fees for included services.

12. The reply of the assessee did not find any favour with the Assessing Officer who was of the opinion that the payments made are in the nature of royalty and, therefore, taxable as per the

provisions of section 115 A (AA) of the Act and accordingly treated the assessee as the assessee in default and computed the tax liability and levied interest u/s 201 (1A) of the Act.

13. Aggrieved, the assessee carried the matter before the CIT(A) and reiterated its claim that it is not liable to deduct tax at source. After considering the facts and the submissions though the CIT(A) was convinced that the payment was not in the nature of royalty but at the same time treated the payment as fees for included services. The relevant findings of the CIT(A) read as under :-

*5.32 It is noted that as per the agreement, the NR was to provide a copy of the Data, an analysis and final report at the conclusion of the project. The copy of the data so supplied may be used for the Exploration Licensing rounds in future. Memorandum of Understanding concerning Fees for Included services appended to the India-USA DTAA, inter-alia, provides that typical categories of services that generally involve either the development and transfer of technical plans or technical designs or making technology available [as described in paragraph 4 (b)] include engineering services, architectural services and computer software development. Further, memorandum also states that technical and consultancy services could make technology available in a variety of settings, activities and industries. Memorandum has considered geological surveys, exploration or exploitation of mineral oil or natural gas as examples of some services where it can be said that technology can be made available. It is noted that in the case of ABC , In re (234 ITR 371AAR) a UK company rendered consultancy to an Indian oil company under various agreements wherein it only surveyed the*

*area earmarked by Indian company and gave the technical designs and knowhow to enable the Indian company to perform the mining job itself. The payment was considered as fee for technical services, In this case, the data after conducting surveys is to be used for exploration licensing rounds by the participants.*

5.33 *In view of foregoing, it is held that the receipts of the Appellant were taxable as fee for technical services under 9(l)(vii) and also under Article 12 of India-USA DTAA. Once the receipts of the NR become taxable in India, the AO was right in holding that while making payments to the NR, the Appellant should have deducted tax at source. Since the tax was not deducted at source while making payments to the NR, the AO was correct in his conclusion that the Appellant was assessee in default. Accordingly, the provisions of section 201(1)/201 (1A) of the Act, were rightly invoked.*

14. On perusal of the 'Master Geophysical Data-Use License' between M/s. GX Technology Corporation (Licensor) and the assessee (Licensee) show that GXT has agreed to grant to the assessee to use certain data from time to time. And data means geophysical and geological the information, derivatives. It is specifically mentioned that the ownership lies with a licensor relevant extract of the agreement as under :-

*2.1, Ownership/Confidentiality Licensor owns (and in particular is the owner of any and all intellectual and/or industrial property rights) or otherwise has the right to license to Licensee (and any Related Entity, any Acquirer, any Partner) and any other Third Party the right to use the Data. Licensor represents, and Licensee acknowledges, that the Data and Derivatives, regardless of the form or medium on which they are displayed or stored, constitute a valuable and highly confidential trade secret that are not generally and publicly available and are the sole property and proprietary information of*

*Licensor (and/or those on behalf of which possibly Licensor acts). Title to the Data shall remain in Licensor (and/or those on behalf of which possibly Licensor acts) and Licensee shall acquire, under the terms and conditions of this License, only the non-exclusive right to utilize such Data on the terms and conditions provided in this License. Licensee shall In no event disclose or transfer the Data or Derivatives thereof or transfer the license to any Third Party whatsoever, except as may specifically be provided in this License. Licensor shall have the right at any time to license any part of the Data to Third Parties at such prices and on such terms and conditions as are determined by Licensor.*

*Except as expressly permitted by this License, Licensee agrees (a) to keep strictly confidential, and shall ensure that its employees and agents keep strictly confidential, the Data and Derivatives and (b) not to Disclose, allow the use of, or display the Data or Derivatives to any Third Party.*

*2.2 Original Data-Retention/Licensing/Right to Destroy It is the intent of Licensor to retain the original Data (such as field tapes and other related information obtained during acquisition); however, Licensee acknowledges that original media containing the original Data may erode, become damaged, and/or contain Data not relevant to the geological area covered by the Data and in such situations, Licensor may be unable to provide Licensee copies of the portion of the original Data thereby affected. Licensor shall have the sole right to delete or discard the original Data upon making reasonable efforts to notify Licensee of its intention to do so. Provided however, the Licensee shall be entitled to a refund of license fee applicable in proportion to the data so deleted or discarded by the Licensor, with the exception of instances where the original data becomes irretrievable due to circumstances that were unanticipated, unavoidable or beyond the control of . . . the Licensor.*

*Licensee may be granted by Licensor a non-exclusive license to use such original Data, not covered under the terms of this License, upon payment of an additional license fee.*

*2.3 Notice of Restricted Use: Licensee may make copies of any Data and Derivatives for the sole purpose of using such copies pursuant to the rights granted in this License; provided that all such copies shall have the following notice printed thereon or attached to it or its*

medium:

NOTICE

*"This Data is proprietary to and a trade secret of GX Technology Corporation ("Licensor"). The use of Unis Data and Derivatives is restricted to companies holding a valid use license from Licensor and is subject to the confidentiality terms of that license.\**

*This notice shall not be removed, obliterated, concealed or otherwise obscured by Licensee or those to whom the Data or Derivatives is disclosed, displayed or transferred by Licensee, as may be permitted in this License.*

*3. Disclosure of Data & Derivatives Licensee shall have the non-exclusive right to use the Data and Derivatives for its internal purposes only but subject to the terms and conditions of Licensee under this License. Licensee shall not Disclose, transfer or otherwise dispose of or allow access to, or use of any or all, of the Data or Derivatives except as specifically provided for in this Article 3 and the Article 5 below. Copies of any Confidentiality Agreements between Licensee and Third Parties as required by the terms and conditions of this License shall be provided to Licensor upon formal written request.*

*3.1 Related Entities Related Entities shall have the same right of usage of the Data and Derivatives as has Licensee, provided that such Related Entity shall be bound by a Confidentiality Agreement entered into with Licensee and containing provisions not less stringent than the terms and conditions of this License to the same extent as is Licensee. In the event that any such Related Entity should cease to exist or no longer meet the definition of a Related Entity, all rights of usage by such company or other legal entity in the Data and Derivatives shall immediately cease and any copies of the Data, Derivatives, then in the possession of such company or other legal entity shall immediately be returned to Licensee.*

*3.2 Government Agencies*

3.2.1 *Notwithstanding the foregoing, the Data and Derivatives may be disclosed by Licensee to the extent such disclosure is specifically required by law, governmental or court decree, order rule or regulation, or by any similar legal process. In the event Licensee is **required by** law, governmental or court decree, order, rule or regulation, **or** by any similar legal process to disclose any Data or Derivatives, Licensee shall give Licensor prompt notice of such process so that Licensor may seek an appropriate protective order (or other appropriate remedy) with respect to maintaining the confidentiality of the affected Data and Derivatives before disclosure thereof by Licensee. If, in the absence of a protective order, Licensee is nevertheless compelled to disclose Data or Derivatives, Licensee may disclose only that portion of the Data or Derivatives that Licensee is advised to be disclosed in compliance with the relevant process. In the event of such disclosure, Licensee shall give Licensor written notice of the Data or Derivatives to be disclosed as far in advance of its disclosure as practicable, and upon Licensor's formal written request, Licensee shall use reasonable efforts to obtain assurances that the disclosed Data or Derivatives will be accorded confidential treatment*

### 3.3 *Outside Service Providers*

3.3.1 *Consultants The Data and Derivatives may be made available to any Licensee's Consultant for the sole use and benefit of Licensee, but subject to the rights of Licensee under this License, provided that the Consultant prior signs with Licensee a Confidentiality Agreement for the restricted use of the Data or Derivatives. The Data and Derivatives shall remain on the premises of Licensee and all analyses or interpretations thereof by Consultant shall be done on such premises and shall not be removed therefrom without the prior written consent of Licensor. Upon completion of the service for which Consultant has been entrusted by Licensee, the Consultant shall not retain any copies of the Data, Derivatives, or analyses or interpretations of the Data or Derivatives.*

3.3.2 *Processors* The Data may be made available to any Licensee's Processor for the purpose of creating Derivatives provided that the Processor prior signs with Licensee a Confidentiality Agreement for the restricted use of the Data and immediately returns the Data and created Derivatives to Licensee upon the completion of the service for which the Processor has been entrusted by Licensee. All created Derivatives shall be marked as provided in Article 2.3 above to identify it as containing Data proprietary to Licensor.

3.3.3 *Storage Contractors* The Data and Derivatives may be delivered to the custody of any Licensee's Storage Contractor provided that the Storage Contractor (i) signs with Licensee a Confidentiality Agreement prior to the delivery of any Data and Derivative; (ii) makes such Data and Derivatives available only to Licensee or Licensee's Related Entities (and any Acquirer, any Partner) as authorized by Licensee as provided in this License; and (iii) immediately returns all copies of the Data and Derivatives to Licensee upon completion of the service for which the Storage Contractor has been entrusted by Licensee.

3.4 *Prospective Acquirers/Prospective Co-venturers* Licensee may Disclose the Data or Derivatives to any Prospective Acquirer or Prospective Co-venturers provided that the respective Third Party prior signs with Licensee a Confidentiality Agreement for the disclosure of the Data or Derivatives and, in case of disclosure to any Prospective Co-venturer, the Data or Derivatives Disclosed are limited to such portions of the Data or Derivatives covering the prospect(s) and/or the particular geographical area(s) under negotiation for a Third Party Business Transaction.

3.5 *Co-venturers:* Licensee shall not Disclose or give copies of the Data or Derivatives to any Co-venturer without the prior written consent of Licensor which shall not be unreasonably withheld or delayed.

3.6 *Internet Disclosures:* Licensee shall not Disclose Data or Derivatives to any Third Party via the Internet, E-Commerce sites, virtual data rooms, asset divestiture web sites, or any other similar means of virtual access outside of Licensee's premises without the express written consent of Licensor which

*shall not be unreasonably withheld or delayed;*

*Taxes:*

*Any sales, gross receipts, value added, use or similar tax is levied or assessed against Licensor as a consequence of the licensing of Data to Licensee under this License and in particular any Supplement, such taxes shall be paid by the Party liable to pay such tax under the relevant statute.*

*Transfer of License:*

*Licensee shall nor sell, sublicense, assign, or transfer this License to a Third Party, in whole or in part, or transfer its rights or obligations hereunder, except as expressly authorized in this License.*

- 5.1 *Acquisitions/Mergers This License shall automatically terminate at such time a Third Party becomes an Acquirer of Licensee unless Licensor receives payment from either Licensee or the Acquirer in the amount of a transfer fee equal to 50% of Licensor's then published market rate license fee wife respect to the Data and the Acquirer signs directly with Licensor the Licensor's then standard license agreement. Should this License terminate the provisions of Article 8 regarding the return of Data and Derivatives shall apply.*
- 5.2 *The provisions of this Article 5 shall not apply to situations where the voting securities of Licensee(or any of its parents) are publicly traded **and** fee Ownership of such voting securities changes over time in the normal course of business unless, however, Ownership or Control of Licensee (or any of its parents) becomes, after the date hereof, concentrated in one unrelated Third Party or more than one such Third Parties acting together.*

15. As can be seen from the above clauses what is provided by the licensor is the data relating to the geophysical and geological information about the coast of India and is not responsible for the accuracy or usefulness of such data. Thus it is clear that licensor have only made available the data acquired by them and available

with them but are not making available technology available for use of such data by the assessee.

16. It has to be understood that 3D seismic is an exploration technique use in the search for oil and gas underground structure. This technique is analogues to ultrasound technology used in the medical field. The maps / designs are nothing but a way to interpret the data and cannot be equated to development and transfer of technical maps and designs as contemplated by the Assessing Officer / CIT (A).

17. A similar issue was considered by the Tribunal Ahmedabad Bench Adani Welspun Exploration Ltd. V. ITO 48 ITR (T) 533. The relevant facts read as under :-

*“The assessee has made a remittance of Rs. 1,09,61,353/- during tire year under consideration to RPS Energy Ltd., UK. The said remittances had been made for providing 3D Seismic Data interpretation Services. The assessee has availed these sendees for conducting exploration work in Mumbai Shallow Offshore Block MB- OSN-2005/2, which is located in Tapti-Daman Sector of Mumbai Offshore Basin along with west coast of India which covers an area of 1191 sq. knr. A perusal of the related documentary evidences shows that the objective of the project was to carry out a 3D Seismic interpretation which included the basin modeling, culminating in prospect generation along with GRV calculations, play fairway mapping and risking of prospects for exploratory drilling.”*

18. And the relevant findings of the coordinate bench read as under :-

*20. On identical set of facts, the Hon'ble High Court of Karnataka in the case of **De Beers India Minerals (P.) Ltd. (supra)** had the occasion to interpret the relevant Articles of India-Netherlands DTAA. In this case, the Hon'ble Karnataka High Court held as under:—*

*"The test is whether tire recipient of the service is equipped to carry on his business without reference to the service provider, if he is able to*

*carry on his business in future without the technical service of tire service provider in respect of services rendered then, it would be said that technical knowledge is made available."*

*The facts of the case and observations made by the Hon'ble Karnataka HC are as under:*

*(Para 18)*

*In terms of the contract entered into with Fugro, they have given the data, photographs and maps. But they have not made available technical expertise, skill or know ledge in respect of such collection or processing of data to the assesseees. which the assessee can apply independently and without assistance and undertake such survey independently excluding Fugro in future. The Fugro has not made available the aforesaid technology with the aid of which they were able to collect the data, which was passed on to the assesseees as a technical service. In other words, Fugro has rendered technical service to the assesseees. They have not made available the technical knowledge with which they rendered technical service. There is no transmission of technical knowledge, expertise, skill, etc., from Fngro along with technical services rendered by them. The assesseees are completely kept in dark about the process and the technologies which the Fugro adopted in arriving at the information/data which is passed on to the assesseees as technical service. The assessee is unable to make use of the said technical knowledge by itself in its business or for its own benefit without recourse to Fugro. In fact, the question whether along with rendering technical services, whether the technical knowledge with which that services was rendered was also made available to the assesseees/customers is purely a question of fact which is to be gathered from the terms of the contract, the nature of services undertaken and what is transmitted in the end after rendering technical services, if along with technical services rendered, if the service provider also makes available the technology which they used in rendering services, then it falls with the definition of fee for technical services as contained in DTAA. However if the technology is not made available along with the technical services and what is rendered is only technical services and the technical knowledge is with-held, then, such a technical service would not fall within the definition of technical services m DTAA and not liable to tax.*

*(Para 26)*

*In the background of the aforesaid principles and facts of this case, it is clear that assesseees acknowledge the services of Fugro for conducting aerial survey, taking*

*photographs and providing data information and maps. That is the technical services which the Fugro has rendered to the assesseees. The technology adopted by Fugro in rendering that technical services is not made available to the assesseees. The survey report is very clear. Unless that technology is also made available, the assesseees are unable to undertake the very same survey independently excluding Fugro in future. Therefore that technical services which is rendered by Fugro is not of enduring in nature.*

*It is a case specific. That information pertains to 8 blocks. The assesseees can make use of the data supplied by way of technical services and put its experience in identifying the locations where the diamonds are found and carrying on its business. But the technical services which is provided by Fugro will not enable the assesseees to independently undertake any survey either in the very same area Fugro conducted the survey or in any other area. They did not get any enduring benefit from the aforesaid survey. In that view of the matter, though Fugro rendered technical services as defined under Section 9(l)(vii) Explanation 2, it does not satisfy the requirement of technical services as contained in DTAA. Therefore the liability to tax is not attracted. Accordingly the first substantial question of law is answered in favour of the assesseees and against the Revenue.*

*Para 27)*

*Therefore the assesseees not being possessed with the technical know how to conduct this prospecting- operations and reconnaissance operations, engaged die services of Fugro which is expert in the field. By way of technical services Fugro delivered to the assesseees dre data and information after such operations. The said data is certainly made use of by die assesseees. Not only die said data and information was furnished in the digital form, it is also provided to the assesseees in the form of maps and photographs. These maps and photographs which were made available to the assesseees cannot be construed as Technology made available. Fugro has not devised any technical plan or technical design. Therefore the question of Fugro transferring any technical plan or technical design did not arise in the facts of these cases. The maps which are delivered are not of kind of any developmental activity. As such, earlier the information which is furnished to the assesseees by way of technical services in the digital form is also given in the form of maps. Therefore the case on hand does not fall in the second part of the aforesaid clause dealing with development and transfer of plans and designs Therefore the second substantial question of law is also answered in favour of the assesseees and against the Revenue.*

*Conclusion*

*Though Fugro rendered technical services as defined under Section 9(l)(vn) Explanation 2, it does not satisfy the requirement of technical sendees as contained in India Netherlands DTAA'*

21. *In the case of Perfetti Van Melle Holding B. V. In re [2011] 16 taxmann.com 207/T2012I 204 Taxman 166/342 ITR 200 (AAR) held as under:—*

*"The expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilise the knowledge or know-how in future on his own. "By making available the technical ski/Is or know how, the recipient of the same will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider. So when the expertise in running the industry run by the group is provided to the Indian entity in the group to be applied in running the business, the employees of the Indian entity get equipped, to carry on that business model or service mode! on their own without reference to the service provider, when the service agreement comes to and end. It is not as if for making available, the recipient must also be conveyed specifically the right to continue the practice put into effect and adopted under the service agreement on its expiry."*

22. *An analysis of the aforementioned rulings lead to one conclusion-*

*"if the fruits of the services remained with the service provider then out of the ambits of the term 'make available' but after the fruits of the service rendered remained with the service recipient and the service recipient is able to perform similar activity, for which the services were sought, without the help or recourse of the service rendered then the technology can be said to be transferred or made available to the recipient."*

23. *For the sake of completeness, there are significant distinction between the definition as prescribed u/s. 9 of the Act of "fees for technical services" as compared with the definition prescribed in Article 13of Indo-UK treaty. But the settled law is that the provisions of DTAA overrides the provisions of IT Act in the matter of ascertainment of taxability under the Income Tax Act. At this juncture, it is worth to mention the decision of the Hon'ble Supreme Court in the case of GE India Technology Centre (P.) Ltd. v. CIT [2010] 7 taxmann.com 18/193 Taxman 234/327 ITR 456 wherein the Hon'ble Apex Court has decided that there was no obligation for withholding tax on any person making payment to a non-resident, if the payment made to non-resident is not chargeable under the provisions of the I.T. Act.*

24. *After considering the totality of the facts of the case in hand, in our*

*considered opinion, the revenue could not prove that there was transfer of Technology by M/s. RPS Energy Ltd to the assessee nor it has been proved that the impugned transactions have made available technical expertise skill or knowledge by processing the data provided by the assessee. Nor it has been proved that the assessee can apply independently and without assistance and undertake such survey independently excluding RPS Energy Ltd. in future.*

25. *Assuming that M/s. RPS Energy Ltd., rendered services as defined u/s. 9(l)(vii) Explanation 2 of the Act, yet it does not satisfy the requirement of technical services as contained in India-UK DTAA. We set aside the findings of the Id. CIT(A) and direct the A.O to delete the impugned addition.'*

26. *Appeal filed by the assessee is accordingly allowed.*

19. As no distinguishing decision has been brought to our notice, respectfully following the findings of the coordinate bench (supra) we set aside the findings of the CIT(A) and allow the appeal of the assessee.

20. In the result, all the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 11.01.2019.

**Sd/-**  
**(SUCHITRA KAMBLE)**  
**JUDICIAL MEMBER**

\*NEHA\*

Date:- 11.01.2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**Sd/-**  
**(N. K. BILLAIYA)**  
**ACCOUNTANT MEMBER**

ASSISTANT REGISTRAR  
ITAT NEW DELHI

Date of dictation	10.01.2019
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	11.01.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	