

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "D" : DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA.No.3377, 3378, 3379, 3380, 3381, 3382 &
3383/Del./2018
Assessment Years 2011-12 to 2017-18

M/s. Sharda Educational Trust, Plot No.32-34, Sharda University, Knowledge Park-III, Greater Noida. Uttar Pradesh. PAN AAATS5294C	vs.	The Income Tax Officer, (TDS), International Taxation, Noida.
(Appellant)		(Respondent)

For Assessee :	Shri Gaurav Gupta, AR
For Revenue :	Smt. Anupma Anand, CIT-DR

Date of Hearing :	22.03.2022
Date of Pronouncement :	05.05.2022

ORDER

PER R.K. PANDA, A.M.

The above batch of 07 appeals filed by the assessee are directed against the common order dated 28.02.2018 of the Ld. CIT(A)-2, Greater Noida, relating to the A.Ys. 2011-12 to 2017-18 respectively. Since identical issues are involved in all these appeals, therefore, these

were heard together and are being disposed of by this common order.

1.1. Both the parties agreed that the decision taken for the A.Y. 2011-12 in ITA.No.3377/Del./2018 may be followed for other assessment years. We, therefore, take-up the facts in ITA.No.3377/Del./2018 for the A.Y. 2011-12 as the lead case.

2. Facts of the case, in brief, are that the assessee is a Trust registered under section 12A of the I.T. Act, 1961 and is running a University under the name and style of M/s. Sharda University which is engaged in the business of providing Medical Education, Hospital Services and other Educational Courses at Greater Noida. A TDS survey under section 133A of the Income Tax Act, 1961 was conducted on 29.03.2017 at the educational premises of the deductor.

2.1. During the course of such TDS survey, it was found that the assessee had remitted abroad amounts under various heads viz. Consultancy Fees on Student Recruitment, Commission on Student Recruitment, Participation Fee for Education Tour, Advertisement/

Marketing Promotional Activities, Educational Tours, Ph.D Thesis Evaluation, Education Fair Charges etc. However, the assessee has not made TDS on these foreign remittances. The statement of Shri Ram Phal Gupta, Advisor Finance, Sharda University was recorded on 29.03.2017 to ascertain the remittances which had been made abroad and to ascertain the nature of these payments. Subsequently, a letter dated 08.05.2017 was issued to the assessee requiring it to furnish information regarding TDS on foreign remittances from 01.04.2009 to 31.03.2013. The assessee produced details of outward foreign remittances regarding Consultancy Fees on Student Recruitment, Commission on Student Recruitment, Participation Fee for Education Tours, Advertisement/Marketing Promotional Activities, Educational Tours, Ph. D Thesis Evaluation, Education Fair Charges etc..

2.2. The AO observed that the assessee had not made TDS on various foreign remittances which it was obliged to do. He, therefore, the A.O. issued notices under section 201(1)/201(1A) dated 17.05.2017 and 29.05.2017 to the

assessee asking him to explain as to why TDS has not been made from the above payments.

2.3. The assessee explained that the sums paid under various heads were not chargeable to tax as per the provisions of the I.T. Act, 1961 and the assessee was not required to make TDS as per the provisions of Section 195 of the I.T. Act, 1961. It was argued that all the payments have been made to non-resident outside India having no PE in India.

2.4. However, the A.O. was not satisfied with the explanation offered by the assessee. He perused a sample agreement which reproduced in the assessment and which is as under:-

“MEMORANDUM OF UNDERSTANDING
FOR INTERNATIONAL STUDENTS”

THIS AGREEMENT Dated 30/07/2015 is between Sharda University, India (www.sharda.ac.in) having its registered office at 32,34 Knowledge Park-3, Greater Noida, U.P. NCR, Delhi 201306, India hereinafter referred to as Party A (which expression shall include its permitted assigns) of the one part,

AND

MBS Admissions, Textile Labour House Bos, 17709, Kaduna, Nigeria

Hereinafter referred to as the Consultant or Party B (which expression will include its permitted assigns) of the other part.

Party Bor consultant desired to be appointed by Party A as an authorized consultants to aid and advise applicants seeking admission to different programs offered at Party A, subject to the Terms and Conditions mentioned below:

Terms & Conditions

1. *This agreement shall at all times be governed by Indian law but nothing contained in this agreement shall prevent Party A from enforcing the Agreement outside India if necessary.*

2. *Both Parties acknowledge that the ethical performance of both parties is of paramount importance.*

3. *Party A appoints Party B to action its behalf for the sole purpose of pre-admission and counselling of International students for Party A's courses and Party B accepts this non exclusive appointment as an authorized consultant.*

4. *This agreement shall be effective for one year from 30/07/2015 to 30/07/2016 and based on satisfactory performance and targets achieved, will be renewed for a similar period of time.*

5. *Exclusively you will work only with Sharda University in India.*

6. *Either Party may terminate this Agreement giving a thirty (30) days notice in writing.*

7. *The consultants can book candidates for Provisional consideration of admission upon payment of the Admission Fees (as specified in the Program Prospectus & Website) th tough and Demand Draft in favour of Sharda University payable at New Delhi, India or to Sharda University Bank Account as mentioned on the website.*

8. *Complete candidate files, fully attested by Party B, shall be scanned and emailed to Sharda University (global@sharda.ac.in) prior to admission. These documents must be verified and attested by the consultant before*

emailing/sending to Party A. The original documents should be brought by the student himself. The admission office of Sharda University shall complete authenticity checks on the documentation once the originals are received.

9. *The right of admission is solely and purely based at the discretion of Party A's Central Admission Cell, Greater Noida. This is governed by the Rules and Regulations of the Academic Council of Party A.*

10. *In case of cancellation of admission, the refund of fee will be as per the refund policies of the University.*

11. *In case of refund the consultant is not entitled to any commission.*

12. *Consultancy fee.*

All consultancy charge will be paid 30 days after the student pays the 1st year Tuition fee's. The following charges have been agreed to between Part A and Party B, which shall remain in force for the duration of this agreement

For All Courses except MBBS, BDS

Total No. of Students	Commission per student
0-10 students	600 USD per Student
11-20 students	700 USD per student
21-40 students	800 USD per student
40 above	1000 USD per student
For BDS	1500 USD per student
For MBBS	3000 USD per student

13. *Advertising & Promotional Material/ Registration Information*

a) *The consultant shall not issue any advertisement containing the Sharda University I logo, or text directly or indirectly without obtaining prior written approval from Party A be it on a local or international level. Party B must seek written approval of the contents form and medium of the proposed advertisement from Party A*

b) Party B must comply with the policies, procedures and instructions as stipulated by Party A (As on the website)

14. Party B contact information to be used with regard to any queries and communications is as indicated below:

Contact Person: Mr. Anderson Andy Ngelale
Postal Address: Testile Labour House Box 17709,
Kaduna, Nigeria
Ph/pical Address: Jangpura B 156
Telephone No.: 08130817386
Email: mbsadmission@gmail.com

15. Confidentiality and Integrity

a) Party B undertakes to keep confidential and not to deal with any of the information, documents, materials and details acquired under this Agreement for other than (he sole purpose of Party B's performance of his/her obligations under this agreement and towards the interests and benefit of Party A

b) Should Party B be found exploiting candidates for services that they either cannot provide or have no right to provide, shall immediately be struck off from the University's list of consultants.

Signed & Stamped & Dated

Signed & Stamped & Dated

Mr. Andy Ngelate

For & On behalf of Party A

For & On Behalf of party B

(Sharda University)

MBS ADMISSION

Witnessed By:

Witnessed By:

1.

1.Singto Barisuka

2.

2. Sonia Obanu”

2.5. He analysed the provisions of DTAA with the respective countries and the MoU between the assessee and

the consultants and noted that the assessee has engaged them on behalf of it for recruitment of international students to assessee's various courses offered in India. Rejecting the various explanation given by the assessee, the AO held the commission paid by the assessee to the consultants as Fee for Technical Services (FTS) under section 9(1)(vii) in the nature of consultancy and managerial services on account of the following reasons :

- a) The consultancy fees on student recruitment is admittedly paid to the agents appointed by Sharda University to visit various school at local area and to collect the data of prospective students.
- b) These agents approach to interested students through email/phone. They introduce Sharda University by giving the details of the colleges, providing admission brochures, describe the fee structure of the particular courses and pursue with the students and their families to get them ready for taking admission in Sharda University.

- c) The agreement terms the agents as consultants on page no.1 of the agreement. The consultants desired to be appointed as authorized consultants to aid and advice the applicants seeking admission to different programs offered by Party A.
- d) The consultant can book candidate for professional consideration of admission upon payment of the admission fees through a demand draft in favour of Sharda University.
- e) As per MOU, the Part B (Agent / Consultant) was to advice the applicants seeking admission to take admission in different programs of Sharda University only.
- f) It is a binding condition and pre condition that the consultant will work exclusively for Sharda University only.
- g) Nature of services were in the nature of Technical services as clause 3 provides that Party A appoints Party B to act on its behalf for the sole purpose of pre-

admission and counselling of international students for Party A's courses and Party B accepts this non-exclusive appointment as an Authorised Consultant.

- h) The consultant also had the duty to verify and attest the records of the candidates before scanning and mailing it along with the complete files of the candidates to Sharda University.
- i) AO referred to the confidentiality clause in the MOU account to which the Party B would work towards the interest and benefits of the Sharda University.
- j) The agreement could be renewed only on the basis of satisfactory performances and targets achieved.

3. In view of the above, the AO held that services provided by the foreign firm to the assessee in respect of student recruitment/admission falls under the category of Fees for Technical Services u/s 9(1)(vii) of the Act.

3.1. So far as payment in respect of Ph.D Thesis Evaluation is concerned, the AO held that Ph.D Thesis Evaluation involves expertise of the evaluator to examine

the thesis of the student and clearly falls under the head Fee for Technical Services u/s 9(1)(vii) of the Act.

3.2. So far as the payments for Faculty Development charge is concerned, the AO noted that faculty development program is a technical service because it is not merely in the nature of a discussion or advice but specific programs not only to increase the technical knowhow but also other skills of any faculty. The AO similarly held the assessee as defaulter for not deducting tax in respect of professional expenses.

3.3. Since, the assessee has not deducted any tax from the payments made to the foreign firms and non-residents, the AO rejecting the various explanations given by the assessee held the assessee to be an assessee deemed to be in default under section 201(1) of the I.T. Act, 1961 read with section 195(1) of the I.T. Act, 1961. Since the assessee was deemed to be an assessee in default of tax, therefore, the A.O. charged simple interest at an amount of Rs.20,21,730/- as interest under section 201(1A) of the I.T. Act, 1961 for the A.Ys. 2010-11 to 2017-18 and also

initiated penalty proceedings under section 271C separately against the assessee for failure to deduct tax at source for the A.Ys. 2010-11 to 2017-18.

4. In appeal, the Ld. CIT(A) upheld the action of the A.O. by observing as under :

“4.13. I have considered the submission of the appellant, perused the assessment order, remand report and rejoinder of the appellant. The assessing officer has held the appellant as “assessee in default u/s 201 of the Act for non-deduction of tax u/s 195 of the Act for various remittances abroad. The appellant had taken the different issues for which the assessee was considered to be in default under different ground of appeal. In following paragraphs, discussion is made on each issue separately.

A. Failure to deduct TDS on remittances paid to Authorized Consultants.

4.14. The appellant had made remittances to various Authorized Consultants in various countries over a period of time, the details of which are as below:

S. No.	F.Y.	Amount
1.	2009-10	0
2.	2010-11	0
3.	2011-12	Rs. 5,97,466/-
4.	2012-13	Rs. 12,20,595/-
5.	2013-14	Rs. 24,45,250/-

6.	2014-15	Rs. 1,61,42,203/-
7.	2015-16	Rs. 19,99,843/-
8.	2016-17	Rs. 12,31,750/-
	Total	Rs. 2,36,37,107/-

4.15. During the course of the survey, various documents were found which showed flat the assessee had made remittances to consultants abroad without deducting tiny THIS. The appellant had made almost identical Memorandums of Understanding with its consultants for which remittances were made outside India. The significant features of such MoUs are briefly reproduced below:

“Party B or consultant desires to be appointed by Party A as an Authorised Consultant to aid and advise applicants seeking admission to different programs offered at Party A, subject to the Terms and Conditions mentioned below:

“3. Party A appoints Party B to act on its behalf for the sole purpose of pre-admission and counseling of international students for Pccrtu A’s courses, and, Party B accepts this non-exclusive appointment as an Authorized Consultant.

4. This agreement shall be effective for one year from 30/07/2015 to 30/07/2016 and based on satisfactory performances and targets achieved will be renewed for a similar period of time.

5. Exclusively you will work only with Sharda University in India.

6. Either Party may terminate this Agreement by giving a third party (30) days notice to writing.

7. The consultant can book candidate for Professional Consideration of admission upon payment of the Admission Fees (as specified in the Program Prospectus & website) through a Demand Draft in favour of Sharda University payable at New Delhi, India or to Sharda University Bank account as mentioned on the website.

8. Complete candidate file, fully attested by party B, are to be scanned and emailed to Sharda University (global@sharda.ac.in) prior to admission. It has been stipulated that these documents must be verified and attested by the consultant before emailing/ sending to the assessee.

15. Confidentiality & Integrity

a) Party B undertakes to keep confidential and not to deal with any of the information, documents, material and details acquired under this Agreement for other than the sole purpose of Party B's performance of his/ her obligations under this Agreement and towards the interests and benefits of the Party A.

b) Should Party B found exploiting candidates for services that they either cannot provide or have no right to provide, shall immediately be struck off from the University's list of consultants."

4.16. On perusal of the agreement following facts emerge :

1. Sharda University has hired the parties to which remittances have been made (referred to as Party B or the consultant in the Memorandums of Understanding) as Authorized Consultants. They are required, by virtue of this MoU, to advise the applicants seeking admission to take admission in different

- programmes of Sharda University only. This is a binding condition on the Authorized Consultants as the Clause 5 of the MoU lays a pre-condition that the consultant will work exclusively for Sharda University only.*
- 2. The consultant also had the duty to verify and attest the records of the candidates before scanning and mailing it along with the complete files of the candidates to Sharda University.*
 - 3. Moreover, a confidentiality Clause has been incorporated in the MoU wherein Party B (Consultant) was required to give an undertaking to Sharda University that he would work towards the interest and benefits of Sharda University. Clause 4 further provided that the agreement could be renewed only on the basis of satisfactory performances and targets achieved.*
 - 4. Thus, it is clear explicitly from the MoUs found during the course of the survey, that the various parties to whom remittances were being made outside India were Authorized Consultants. This is not only written clearly in the agreement itself but also is apparent from the contents of the MoU. Further, the fact that not only the consultants were required to aid and advise (Counseling) the students to seek admission in the courses of Sharda University only, it was also stipulated in the MoU that the consultants were required to meet the targets and make satisfactory performances.*

4.17. The submission of the appellant on this issue is at Page 7-14 above:

4.18. It is undisputed that the deduction of tax u/s 195 of the Act in case of payment to nonresidents, not having any permanent establishment in India, arises only when the services rendered by the non-

resident fall under the purview of section 9(l)(vii) of the Act.

4.19 The provisions of Section 9(l)(vii) is reproduced below:

“Income deemed to accrue or arise in India.

9.(1) The following incomes shall be deemed to accrue or arise in India:—

29(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

(vii) income by way of fees for technical services payable by—

.....(c) a person who is a non-resident, where the fees are payable in respect of services utilized in a business or profession carried on by such person in India or for the purposes of making or earning tiny income from any source in India :

..... Explanation 2.—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this Section, income of a non-resident shall be deemed to accrue or arise in India under Clause (v) or Clause (vi) or Clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,—

- (i) the non-resident has a residence or place of business or business connection in India; or*
- ii) the non-resident has rendered services in India.”*

4.20. So, in the present case it has to be examined only whether the services provided by the foreign firm to the appellant falls under the category of “fees for technical services” U/s 9 (1)(vii) of the Act.

4.21. A consultant is a professional who provides expert advice in a particular area such as management, education, accountancy, law, human sources, marketing, public relations, finance, engineering, science or any of many other specialized fields. A consultant is usually an expert or an experienced professional in a specific field and has a wide knowledge of the subject matter.

4.22. They may be Internal consultant who operates within an organization but is available to be consulted on areas of their specialization by other departments or individuals (acting as clients); or External consultant, someone who is employed externally to the client (either by a consulting firm or some other agency) whose expertise is provided on a temporary basis, usually for a fee.

4.23. By hiring a consultant, clients have access to deeper levels of expertise than would be financially feasible for them to retain in-house on a long-term basis. Moreover, clients can control their expenditures on consulting services by only purchasing as much services from the outside consultant as desired.

4.24. A consulting or consultancy firm is a business of one or more experts (consultants) that provides professional advice to an individual or an organization for a fee. The deliverable of a consultant is usually advice or a recipe to follow to achieve a company objective, leading to a company project. Consultancy Services lend valuable assistance to

specialized business. There major focus is to improve the quality of the company in all sense.

4.25. In the present case the consultancy was taken from the non residents consultants for the purpose of referral of students. These consultants provide counselling to foreign students and perform all other associated job for the appellant as client which culminated into admission of students to the educational university run by the appellant. These technical and professional advice to the students were given by the consultant having technical expertise in the field. The appellant cannot just appoint any entity for this special job which is resulting into more business to the appellant. It is also certain such managerial and consultancy services are not available at hand internally to the appellant otherwise it could have sent its own personnel for this purpose to different countries and could have saved money also.

4.26. In the circumstances when the appellant is appointing a foreign consultant for the special job by signing a memorandum of understanding to various consultants in different countries, it is evident that without such expert advice from these foreign consultant the appellant could not have got the business in the form of admission of foreign students. In lieu of such services the appellant is making payment of fee based on the number of students taking admission in the institutions run by the appellant university. In view of all such facts, I am of the opinion that the services provided by all the firms/company are in the nature of managerial and consultancy services which clearly falls within the ambit of "Fee for Technical Services" under Section 9(l)(vii) of the Act. In view of this the appellant was very much liable to deduct tax over such payments to non residents consultants u/s 195 of the Act. Hence, for failure to deduct TDS on remittances of Rs.2,31,81,507/ paid to Authorized Consultants, the action of the assessing officer to treat the appellant as assessee in default u/s 201 of tins Act is correct.

Charging interest of Rs.18,83,199/u/s 201 (1 A) of the Act is also found to be correct.

B. Failure to deduct TDS on remittances made for Ph.d Thesis Evaluation, Faculty Development Expenses and Professional Fees.

4.27. During the period, remittances have been made for Ph. D Thesis Evaluation, Faculty Development Expenses and Professional Fees. The remittances have been made for the Evaluation of Ph. D Thesis submitted to the experts of the respective subjects. The evaluation services have been rendered by highly professionally qualified persons who enjoy technical experience and expertise in that particular field. These services are not in the nature of mere discussion or advice of routine nature.

4.28. The assessee has submitted vide its reply dated 08.01.2018 as below:

“That amount has been paid for online faculty training/development of staff from the non-resident persons as Faculty Development Expenses. The said payment is not for any managerial and technical services. The amount is paid to train and educate the staff in the field of education and not for any technical field. The payment is like a coaching fee and independent individual services. Thus the said payment cannot be said to be any income that can be said to have been accrue or arise in India or deemed to accrue or arise in India nor can be said to be any payment in the nature of Section 9(1)(vii) of the I. T. Act.. ”

4.29. The contention of the assessee that the income does not accrue or arise in India and docs not fall within the purview of Section 9(1)(vii) is not correct as any advice or technical evaluation of special task like evaluation of Ph.D thesis conducted by an expert of that field will be a work in the nature of technical services

only. The submission that the amount is paid to train and educate the staff in the field of education and not for any technical field has no basis. Thus, these services are clearly technical in nature and fall under the purview of "Fees for technical services" u/s 9(1)(vii) of the Act

4.30. Similarly, the services for Faculty Development and Professional Services are also technical in nature. It is indisputable that the training of faculties/staff who are already experts in their fields can be rendered only by professionally and technically more qualified persons than them. The faculty development program is a technical service because it is not merely in the nature of a discussion or advice but specific programs to not only increase the technical knowledge but also other skills of any faculty. The contention of the assessee that the income does not accrue or arise in India and does not fall within the purview of Section 9(1)(vii) is not correct as any service for Faculty Development and Professional Services can be given by an expert of that field and will be in the nature of technical services only.

4.31. In view of all such facts, I am of the opinion that the services provided for Ph. D Thesis Evaluation, Faculty Development Expenses and Professional Fees are in the nature of technical services which clearly falls within the ambit of Fee for Technical Services under Section 9(1)(vii) of the Act. and therefore the appellant was very much liable to deduct tax over such payments abroad u/s 195 of the Act. Hence, for failure to deduct TDS on remittances paid on these three accounts, the action of the assessing officer to treat the appellant as assessee in default u/s 201 of the Act is correct.

4.32. Hence, for failure to deduct TDS on remittances of Rs.81,110/ paid for Ph.D Thesis Evaluation, the action of the assessing officer to treat the appellant as assessee in default u/s 201 of the Act

is correct. Charging interest of Rs. 2,820/ u/s 201(1 A) of the Act is also found to be correct.

4.33. Similarly, for failure to deduct TDS on remittances of Rs.1,88,820/paid for Faculty Development Expenses and Rs.30,008/ for Professional services, the action of the assessing officer to treat the appellant as assessee in default u/s 201 of the Act is correct. Charging interest of Rs.32,761/ and Rs.5,221/ under these two heads u/s 201(1 A) of the Act is also found to be correct.

C. Failure to deduct TDS on Membership and Subscription Fees

4.34. During the post-survey proceedings, the assessee was asked to show cause as to why TDS was not deducted on remittances made to Foreign Universities/Council in respect of Affiliation/Membership. The assessee submitted vide its reply dated 02.06.2017 that the amount was paid to Foreign Universities/Council in respect of Affiliation/Membership. According to the assessee, the said payment could not be said to be any income that could be said to have been accrued or arisen in India or deemed to accrue or arise in India nor could be said to be any payment in the nature of Section 9(l)(vii) of the I. T. Act.

4.35 Since assessee has not furnished any agreement / documentary evidence in support of his claim regarding the affiliation with the foreign universities and what benefits it has received through such affiliations, it was held by the AO that the assessee should have deducted TDS before making remittance to such foreign remittances as this remittance is taxable as Royalty as per the provisions of Section 9(l)(vi) of the Income Tax Act, 1961 and DTAA for use of Trademark/ Logo/ Goodwill of the Foreign Educational Institutions.

4.36 During the present proceedings on 10.01.2018, the appellant filed certain additional evidences in regard to the details of membership/affiliation fee, documents for membership/affiliation fee and details of advertisement for

faculty position vide page number 57 to 71 of the submission. These additional evidences were sent to the assessing officer for a remand report on admissibility and merit of the same. A remand report dated 30.01.2018 was received. It is observed by the assessing officer that the assessee had been granted adequate opportunity for presenting his case, hence the additional evidences may not be accepted at this stage as per the provisions of rule 46A of Income Tax Rules. Further, on merit the AO has reported as below :

“Without prejudice to the above, reporting in respect of additional evidence submitted by the assessee is as under:

The main contention of the assessee is that the AO has erred in calculating TDS liability on payments i.e (i) Expenses and Commission on the student recruitment/admission, (ii) PhD thesis evaluation, (iii) faculty development expenses,(iv) professional services, and (v) membership/affiliation fees made to non-resident parties is baseless. The above payments must be made after deducting TDS as the sums paid under different heads were taxable in India as per the provisions of income tax Act and relevant DTAAAs.

The mere submission of the copy of payment made for professional services and the copy of membership/affiliation fee letter from the International Education Bodies does not support the claim of the assessee. Moreover, the assessee did not provide the supporting document during the assessment proceedings and additional evidence may not be accepted at this stage as per the provisions of rule 46A of Income Tax Rules, 1962.

In view of the details submitted by the assessee, the claim of the assessee appears to be false and the deserves to be rejected. ”

4.37 I have verified the content of the details of membership/affiliation fee, documents for membership/

affiliation fee furnished as additional evidences. The document appearing at page 59 of the submission is in regard to payment of Sri Lankan Rs.50,000/ for the purpose of recognition of medical school. From the very nature of the document it is evident that the payment has been made in regard to recognition of the medical school run by the appellant. On bare perusal of the document it can be easily concluded that such payments are not with respect to any fees for royalty or technical services.

4.38. The document at Page No. 61 is in regard to payment to International Accreditation Organisation and the payment is for the purpose of acquiring the Candidacy Status with certifications. The payment of USD 2000, as appearing at page number 62, is the approval given to the institution for the official visit to International Accreditation Organisation. Such payment is in regard to the official visit only. The documents do not suggest that the payments are in the nature of royalty.

4.39. Similarly, Page No. 64 and 65 are invoices for USD 1000, issued by University of Massachusetts, Lowell (UMASS) for accommodating the "Sharda University" as a member of the IUCEE consortium. Here also such payments cannot be considered in the nature of Royalty.

4.40. Page No. 66 and 68 are in regard to the payment of £1765 for annual ACU membership subscription for 2013-2014 of the Association of Commonwealth Universities. As discussed above in the case of membership fee for other organisation, such payments also cannot be taken as payment in the nature of royalty.

4.41. In view of the above facts, the submission of the appellant that such remittances were in regard to getting membership a prestigious international educational bodies for global recognition of the university and the courses of International Students are acceptable. Documents do not suggest that such membership fees are in regard to use of any trademark/logo/Goodwill of any foreign educational

institutions and therefore cannot be equated with nature of royalty as per the provisions of section 9(1 (vi) of the Act. Hence, for failure to deduct TDS on payment of Rs. 7,60,267 for A.Y 2011-12 to 2013-14 on account of Membership and Subscription Fees, the action of the assessing officer to treat the appellant as assessee in default u/s 201 of the Act is incorrect. Charging interest of Rs.97,729/ u/s 201(1 A) of the Act is also found to be incorrect.

D. Claim for Lower Rate of TDS @ 10% under the provisions of Section 206AA of the Income Tax Act, 1961

4.42. *The assessing officer has elaborately dealt with the issue on page33-35 of the assessment order. All the aspects of the issue have been covered by the assessing officer in detail.*

4.43. *The assessee has stated that the proposed imposition of higher rate @ 20% is without considering the amendment made by the Notification No. SO 2196 (E) dated 24th June 2016, whereby Rule 37BC has been inserted in the Income Tax Rules, 1962 providing relaxation from deduction of tax at higher rate u/s 206AA on providing certain information / documents in case of non-residents not having PAN.*

4.44. *I agree with the observation of the AO that the Notification No. 53 of 2016 has come into force only from 24th June, 2016 and therefore it is not applicable for all the relevant assessment years. In the case of the assessee, the remittances have been made from the A.Y. 2010-11 onwards. Therefore, the provisions of the above notification are not applicable for the remittances made by the assessee during the A.Ys. 2009-10 to 2015-16 and till 24.06.2016 in the F.Y. 2016-17.*

4.45. *Further, the provisions of Rule 37BC are not applicable in the present case as the deductee is a foreign company. Since, majority of the deductees are foreign*

companies, the assessee cannot claim shelter under the provisions of Rule 37BC for all the deductees.

4.46. As per Rule 37BC, it is mandatory that the deductee provide and furnish the details like (i) name, e-mail id, contact number;(ii) address in the country or specified territory outside India of which the deductee is a resident;(iii) a certificate of his being resident in any country or specified territory outside India from the Government of that country or specified territory if the law of that country or specified territory provides for issuance of such certificate; (iv) Tax Identification Number of the deductee in the country or specified territory of his residence and in case no such number is available, then a unique number on the basis of which the deductee is identified by the Government of that country or the specified territory of which he claims to be a resident.

4.47. It was noted by the AO that the assessee at no stage of the post survey proceedings has filed any of these details which were required to be filed with him by the deductee. Further, the assessee was required to file a quarterly return in Form No. 27Q as has been provided in the newly inserted Rule 37B. It is evident that the assessee has not filed any TDS returns in Form No. 27Q and neither is it in possession of this information which was required to be filed by it.

4.48. In view of the above facts, it is evident that the assessee has no explanations for its failure to deduct TDS on the various foreign remittances made and its reliance on the provisions of Rule 37BC is without any basis. Therefore, the action of the assessing officer to charge the rate of deduction @ 20 % is correct.

E. Applicability of the provisions of DTAA

4.49. On the issue of applicability of the provisions of DTAA, the assessing officer has elaborately dealt with the issue on page 44-46 of the assessment order. All the aspects

of the issue have been covered by the assessing officer in detail.

4.50. The remittances made to the Authorized Consultants are in various countries. From a perusal of the MoUs submitted by the assessee, it has been found that remittances have been made largely to consultants off those countries with which there is no DTAA. In these cases, it implies, that the provisions of Section 9(1)(vii) of tint Income Tax Act, 1961 will be fully applicable. It has already earlier been held that Consultancy Services are taxable in India as per the provisions of Section 9(l)(vii). The assessee was therefore required to deduct TDS as per the provisions of Section 195 on such foreign remittances.

4.51. Further, DTAAs exist in the cases of Countries-Kenya, Korea, Mauritius and Tanzania. The FTS clauses are present in these DTAAs in which Managerial, Technical and Consultancy Services are taxable in the source state.

4.52. The AO has been very judicious in discussing the case of remittance of \$ 6700 made to M/s Global Education Link Ltd., Dar es Salam, Tanzania as Consultancy Fees. A perusal of the MoU with this consultant shows that this agreement is effective from 1st May, 2015 to 31st April, 2016. Further, perusal of DTAA between India and Tanzania reveals that there is no FTS Clause. However, Article 14 and 15 of the DTAA provides that income of the individuals will be taxable in the other contracting state (India in this case) for providing Technical Services. M/s Global Education Link Ltd. is a company and not an individual. Therefore, services provided are not covered by the India- Tanzania DTAA. This beneficial provision of the DTAA is available to M/s Global Education Link Ltd. to the effect that its receipts from M/s Sharda University by way of providing Consultancy Services are held not to be taxable in India. Therefore, it is held that the assessee is not required to deduct TDS on payment made to M/s Global Education Link Ltd. in respect of Consultancy Services amounting to Rs.4,55,600/-.

4.53. *In view of such discussion on this issue, it is held that the AO has properly applied the provisions of section 9(l)(vii) of the Act w.r.t the applicability of provisions of DTAA.*

4.54. *In view of the above discussion between para 4.10 to 4.53, only Ground of appeal 4 to 8 are dismissed.*

4.55. *In this ground the appellant has requested to stay to the demand till the pendency of appeal. Since with this order the appeal proceeding is not pending now, the ground of appeal becomes infructuous. For statistical purposes, the ground of appeal No. 9 is dismissed.*

4.56. *Ground No. 10 is general in nature and do not require any adjudication.*

5. *In the result, the appeal is partly allowed.*

5. Aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds [ITA.No.3377/Del./2018 A.Y. 2011-12]:

1. *“Because the Ld. CIT (Appeals) has legally erred in rejecting the appellant ground and submission that the impugned order u/s 201(1)/201(1A) has been passed as a result of survey proceedings u/s 133A carried out at the premises of the appellant educational trust (Charitable trust) whereas survey proceedings as per the provisions of section 133A cannot be carried out at the charitable trust. Thus the very basis of initiating the proceedings u/s 201(1) being itself wrong and bad in law, the impugned order passed u/s201(1)/201(1A) is also wrong and bad in law and deserves to be cancelled.*

2. *Because the Ld. CIT(Appeals) has erred both in law and on facts in not adjudicating the specific ground that proper and reasonable opportunity of representing the case before the Assessing Officer and of being heard has not been allowed by the Assessing Officer.*
3. *Because the Ld. CIT(Appeals) has erred both in law and on facts in rejecting the appellant ground and the submission that the appellant trust is not liable deduct tax at source on payments made to non-resident parties.*
4. *Because the Ld. CIT(Appeals) has erred both in law and on facts in rejecting the appellants ground and the submission and in confirming the order passed u/s 201(1)/201(1A) vide which the Assessing Officer has calculated the TDS liability on the appellant trust on following payments to non-resident parties :-*
 - i. *Faculty Development expenses.*
 - ii. *Professional Services.*
5. *Because the Assessing Officer in the order passed u/s 201(1)/201(1A) has wrongly, illegally, and arbitrarily held that the payments to non-resident parties are covered under the definition of fees for technical services and the receipts are taxable in India in the hands of respective recipients as per the provisions of section 9(1)(vii) of the I.T Act. The Ld. CIT(Appeals) has erred both in law and on facts in confirming the observations of the Assessing Officer and in rejecting the appellants ground and the submission on the issue.*
6. *Because the Ld. CIT (Appeals) has erred both in law and on facts in confirming the action of the Assessing Officer who treated the payments made to certain non residents as their income deemed to*

accrue or arise in India. Further the Ld. CIT (Appeals) has also legally erred in evaluating the provisions of DTAA.

7. *Because the Ld. CIT (Appeals) has legally erred in confirming the action of the Assessing Officer who calculated the TDS liability at the rate of 20% of the amount paid to non residents.*
8. *Because the Ld. CIT(Appeals) has legally erred in confirming the action of the Assessing Officer who charged interest treating the assessee to be in default in not deducting tax at source on the payment to non-resident party.*
9. *Because considering the facts of the case and the legal position the appellant trust is not liable to deduct tax at source on the payments made to non residents. The TDS liability calculated by the Assessing Officer and confirmed by Ld. CIT(Appeals) being wrong, bad in law, arbitrary and unwarranted, the order passed u/s.201(1)/201(1A) is also wrong and bad in law and hence deserves to be cancelled and the consequent interest charged deserves to be deleted.*
10. *That the appellant craves to add amend alter modify or delete any or all of the grounds of appeal before or at the time of hearing.”*

6. The Learned Counsel for the Assessee did not press Ground of appeal Numbers.1, 2 and 6 for which the ld. DR has no objection. Accordingly, these grounds are dismissed as not pressed.

7. So far as Grounds of appeal Numbers.3 to 5, are concerned these relate to the order of ld. CIT(A) in

confirming the action of the AO that the tax was required to be deducted at source u/s 195 on the following payments for which demand was raised: -

- (i) Commission on Student Recruitment/ Admission
- (ii) Phd. D Thesis Evaluation
- (iii) Faculty Development Expenses
- (iv) Professional services on which tax was deducted.

7.1. The ld. counsel for the assessee drew the attention of the Bench to the following table and drew the attention of the Bench to the various amounts paid on which the AO has treated the assessee as an assessee in default.

Financial Year	Commission on Student Recruitment/admission		Ph. D Thesis Evaluation		Professional Services (Advertisement expenses wrongly mentioned as professional services)		Faculty Development Expenses	
	Amount (Rs.)	TDS @ 20% Amount (Rs.)	Amount (Rs.)	TDS @ 20% Amount (Rs.)	Amount (Rs.)	TDS @ 20% Amount (Rs.)	Amount (Rs.)	TDS @ 20% Amount (Rs.)
2010-11					30,000/-	6,002/-	1,88,28	37,656/-
2011-12	5,97,466/-	1,19,493/-						
2012-13	12,20,595/-	2,44,119/-						
2013-14	24,45,250/-	4,89,050/-						
2014-15	1,61,42,203/-	32,28,441/-						
2015-16	19,99,843/-	3,99,969/-	16,110/-	3,222/-				
2016-17	7,76,150/-	1,55,230/-	65,000/-	13,000/-				
	2,31,81,507/-	46,36,302/-	81,110/-	16,222/-	30,000/-	6,002/-	1,88,28	37,656/-
							Total TDS	46,96,182/-
							Interest	19,24,001/-
							Grand Total	66,20,183/-

7.2. So far as Commission on Student Recruitment/ Admission is concerned, the Learned Counsel for the

Assessee submitted that the MOU entered into with the various parties in different countries contains standard terms and conditions which has been reproduced by the assessing officer. So far as the contention of the revenue that the agents have rendered technical services as defined u/s 9(l)(vii) read with explanation 2 is concerned, he submitted that the same is incorrect. He submitted that the agents have rendered marketing services and have been paid for that computed on basis of per-admission of the students in Sharda University referred and introduced by them. He submitted that marketing services are outside the purview of Section 9(l)(vii) and therefore amount received by the agents as per the MoU is not the income deemed to accrue or arise in India. He submitted that all the agents with whom assessee has entered MoU are Non-residents and have rendered services outside India. Payment has been received by them outside India. Since the income is not deemed to have accrued in their respective hands in India, therefore, in view of the provision of section 5(2) of the Income Tax Act, the amount so received by them is not

chargeable to tax in India and therefore, assessee is not liable to deduct tax u/s 195 of the Income Tax Act, 1961.

7.3. So far as the contention of the AO that these agents have held consultancy services and therefore consideration paid to them by the assessee is 'Fees for Technical Services' as defined under explanation 2 to section 9(l)(vii), and the same is deemed to have accrued in India and therefore, the assessee is liable to deduct tax u/s 195 is concerned, he submitted that if the substance of all the clauses of the MOU are looked into, the agents named as consultants in the agreement were required to market assessee's educational institutions for the sole purpose of admission and counseling of international students for Sharda University courses which is just motivating and convincing these students for taking admission in Sharda university.

7.4. He submitted that A.O. emphasized the word consultant used in the MOU to form an opinion that the agent rendered consultancy services without appreciating

the obligation and duties to be discharged by them and going through the MOU terms and conditions in toto. He submitted that the concept of substance over form has been ignored both by the AO as well as CIT (A). He submitted that nomenclature does not decide the real nature of the transaction entered into between the two parties. For the above proposition, he relied on the following decisions:-

- i. Super Poly Fabriks Ltd. Vs. Commissioner of Central Excise (24.04.2008) (SC)
- ii. Bhopal Sugar Industries Vs. STO (1977) 3 SCC 147.
- iii. Moped India Ltd Vs. Asst. Collector Central Excise 1985 (SC)
- iv. State of Andhra Pradesh Vs. Kone Elevators India Ltd (2005) 181 ELT 156 (SC)
- v. Sundaram Finance Ltd Vs. State of Kerala AIR 1966 SC 1178 (SC).
- vi. Mc Dowell & Co. Ltd Vs. Commercial Tax Officer, 1985 TMI 40038 (SC).
- vii. Bharat Sanchar Nigam Ltd Vs. Union of India

2006 TMI 309 (SC).

7.5. The Id. Counsel for the assessee submitted that the agents entered into an MOU with the assessee exclusively for admission of the students in Sharda University. The payment to such persons are also dependent on the number of students enrolled through them in Sharda University. He submitted that as per Explanation 2 to section 9(1)(vii), the “Fee for Technical Services” means consideration for rendering of any managerial, technical or consultancy services. He submitted that except motivating and convincing the international students for taking admission in Sharda University, these agents do not have any role in the admission of the students. Referring to clause 8 of the MOU he submitted that “the right of admission is solely and purely based at the discretion of Appellant’s Central Administration Cell, Greater Noida, India”.

7.6. The Id. counsel for the assessee submitted that the agents were not managing Sharda University. Sharda

University did not ask for any technical services from them for which the person must be technically qualified. No consultancy was provided by them to the appellant. It may be a consultancy to the prospective students so that they get admission in Sharda University but not to the assessee.

7.7. The ld. counsel for the assessee submitted that the work of a commission agent is to market the product /services of the seller/service provider to the prospective buyers/service receivers. For the said purposes, the commission agent is required to pitch and inform the buyer/service receivers for the various products/services of the seller/service provider or get him introduced with the seller. This cannot be termed as consultancy to the assessee.

7.8. He submitted that if the agent is advising the students and introducing or referring them to Sharda University so that they may get admission in assessee-university, it cannot be said that he has rendered consultancy services to the assessee. Referring to the

decision of the Hon'ble Jurisdictional Delhi High Court in the case of Director of Income tax (Int. Tax) Vs. Panalfa Autoelectrik Ltd ITA No. 292/2014 he drew the attention of the Bench to the same wherein the meaning of -managerial, technical and consultancy services were explained at length.

7.9. He accordingly submitted that it cannot be said that the agents have rendered managerial, technical or consultancy services to the assessee university. The services rendered by the agents are marketing services as per MOU and are not covered in any of the services as provided in section 9(1)(vii) of the Act.

7.10. The ld. Counsel for the assessee referring to the following decisions submitted that when the commission/fee is paid to the non-resident agents for sales/services outside India for the services rendered outside India and the non-resident is not having any permanent establishment (PE) in India, tax is not required to be deducted at source u/s 195 of the Act.

a) Marketing is not considered as Fee for Technical Services:

- i. Le Passage to India Tours Vs. DCIT ITA No. 210/Del/2012 [19.12.2014]
- ii. Endemol South Africa (Proprietary) Ltd. Vs. DCIT [2018] 98 taxmann.com 227 (Mum.)
- iii. On process Technology India Pvt Ltd. Vs. DCIT ITA No.1047/Kol/2016.
- iv. Evolv Clothing Company Pvt Ltd Vs. Asst. CIT ITA No. 572/2013 (Mad.).
- v. Batlivala & Karani Securities (India) Pvt Ltd Vs. DCIT ITA No.1234 and 1235/Kol/ 2013.

b) Commission to Non-Resident on marketing services is not taxable in India:

- i. CIT Vs. Eon Technology P Ltd (2012) 246 CTR 40 (Delhi HC).
- ii. DCIT vs., Taj International Pvt Ltd [2018] 96 taxmann.com 222 (Delhi Trib.).
- iii. Southern Borewells Vs. CIT [2014] 43 taxmann.com 378 (HC Kerala).

iv. ITO Vs. Trident Exports [2014] 44 taxmann.com 297 (Chennai).

v. Allied Nippon Ltd Vs. DCIT [2013] 37 taxmann.com 135 (Delhi Trib).

vi. Armavesh Global Vs. ACIT [2012] 21 taxmann.com 130 (Mum. Trib).

7.11. So far as Ph. D Thesis Evaluation is concerned, the Learned Counsel for the Assessee submitted that the payment was made by the assessee to non-resident for evaluation of the thesis. The expenses were incurred under the head related to education which cannot be considered as fee for technical services as it is neither a technical services for applied or industrial sciences nor consultancy for technical services and nor the managerial services.

7.12. So far as of Faculty Development Charges are concerned, the Learned Counsel for the Assessee submitted that the amount is paid to train and educate the staff in the field of education and not for any technical field. The payment is like a coaching fee and independent individual services. Thus, the said payment cannot be said to be any

income that can be said to have accrued or arisen in India or deemed to have accrued or arisen in India nor can be said to be any payment in the nature of Section 9(l)(vii) of the I.T. Act. The payment was made to the service provider at Singapore. He submitted that payments for educating are not covered under 'Fee for Technical Services' in DTAA between India and Singapore. Hence, the assessee is not required to deduct tax at source.

7.13. So far as Professional Expenses are concerned, the Learned Counsel for the Assessee submitted that these are wrongly grouped as professional expenses since the expenses were relating to advertisement expenses. He submitted that the assessee had already deducted tax at source on such expenses incurred towards advertisement expenses wrongly considered under the head professional expenses. Referring to the details of the tax paid given at Page no. 40 of the PB, he submitted that there was no default by the assessee in deducting tax, therefore the assessee should not be considered as an assessee in default for the same u/s 201 of the Income tax Act. He also referred

to the copy of ledger account of the vendor enclosed at page 156 of the PB.

7.14. He submitted that in AY 2012-13, 2013-14 and 2014-15 in the grounds of appeal, a ground is taken in respect of TDS applicability on Membership Affiliation Fees paid by the assessee. However, the Id. CIT(A) has already allowed relief and therefore grounds on this issue may be treated as not maintainable.

8. The Ld. D.R. on the other hand heavily relied on the orders of A.O. and the Ld. CIT(A). He submitted that a perusal of the assessment order shows that the assessing officer has analyzed the provision of Double Taxation Avoidance Agreements (DTAA) in para 4 of his order. The AO has observed that in majority of cases where remittances have been made, there is no DTAA with the respective country and hence the provisions of section 9(l)(vii) would be applicable in such cases. In respect of countries where DTAA is in existence, the AO has applied the FTS clause in such DTAA's as per which managerial, technical and consultancy services are to be taxed in the source state (Page 45 of AO). The CIT (A) in para E on page 33 of his

order has also referred to the provisions of DTAA and provisions of FTS clause while confirming the finding of the AO. He drew the attention of the Bench to provisions of section 9(l)(vii) of the Act and submitted that failure to deduct TDS on remittances to authorized consultants attract the provisions of section 201(1)/201(1A) of the Act.

8.1. The Id. DR referring to the MOU submitted that a perusal of the MOU made with the consultants (reproduced on Pages 39 - 42 of the assessment order) shows that the assessee had engaged them on its behalf for recruitment of international students to the assessee's courses in India. It is seen that the MOU stipulated that the agreement would be renewed further on the basis of achievement of targets by the foreign parties. The foreign parties would work exclusively with the assessee i.e. Sharda University. It is evident from the above that the consultants were providing expert advice and inputs to the students on behalf of the assessee. The assessee is a large university offering courses in various disciplines. Giving information about these courses requires technical information and knowledge about

them by the foreign consultants. The payment received by these consultants also depends on the target achieved by them. Therefore, these services are very clearly in the nature of managerial and consultancy services and would fall squarely within the ambit of fee for technical services (FTS) u/s 9(1)(vii) of the Act.

8.2. So far as failure to deduct to TDS on remittance made for Ph.D thesis evaluation, faculty development expenses and professional fees are concerned, he submitted that in respect of these expenses it is clear, as noted by the CIT(A) on pages 28 & 29 of his order, and is also a well accepted fact, that evaluation of PhD theses is done by experts and highly qualified professionals in the respective fields and therefore any technical evaluation made by such experts would be in the nature of technical services.

8.3. He submitted that in respect of remittances for faculty development expenses, the nature of training that is given is to increase the technical knowledge and skills of the faculty and is undoubtedly imparted by highly trained experts and professionals. Thus they would clearly fall within the ambit of FTS and Section 9(1)(vii).

8.4. The ld. DR submitted that a perusal of the copy of MOU (Nigeria) which has been scanned by the AO and is a part of his order from pages 39 to 42, shows that the same does not bear the signature of any witness on behalf of the assessee. Secondly, it is interesting to note that the person who has signed the MOU also has an address in India as evident from para 14 of the MOU. Therefore if the consultant is present in India and has an Indian address then the income paid to him accrues and arises in India and would therefore be liable to tax in India. Therefore what needs to be seen is whether these agents are recruiting students from their own countries or whether they are present in India and are advising potential students from their diaspora present in India. The MOU is not clear in this respect. She accordingly submitted that it needs to be verified whether all these consultants are actually residing abroad or whether they are residents in India and the payments are being made to them abroad.

8.5. So far as the decision of Hon'ble Delhi High Court in case of DIT vs Panalfa Autoelektrik Ltd. (ITA No. 292/2014 dated 18.09.2014) relied on by the Ld.AR is

concerned, she submitted that on a perusal of the relevant paras 21 & 22 that were relied on by the assessee, it is seen that the facts of the case are entirely different from those in the present case. In the case before the Hon'ble Delhi High Court the issue was in respect of commission paid for arranging exports sales and recovery of payment and it was held that these were not in the nature of consultancy services. However in the present case the issue involved giving expert advice and inputs in various disciplines to foreign students thereby enabling them to take a considered decision leading to admission in the assessee university. Thus, it was clearly a technical service that was being provided and that they were being paid for and the same would fall under the purview of section 9(l)(vii) of the Act. She accordingly submitted that the grounds raised by the assessee should be dismissed.

9. We have considered the rival arguments made by both the sides, perused the orders of the A.O. and the Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us by

both the sides. We find the assessee in the instant case is a Trust registered under section 12A of the I.T. Act, 1961 and is also approved under section 10(23)(vi) of the I.T. Act, 1961. In this case, during the course of TDS survey under section 133A(2A) of the I.T. Act, 1961, it was noticed by the A.O. that the assessee has not deducted tax from payments remitted abroad under various heads i.e., Commission on Student Recruitment, Ph.D Thesis Evaluation, Participation Fee for Education Tour, Advertisement/Marketing Promotional Activities, fee towards outsourced admission process, Educational Tours, and Education Fair Charges etc. Rejecting the various explanations given by the assessee, the A.O. held that as per the terms of the agreement, the agents are consultants who were appointed to aid and advise the applicant seeking admission to different courses offered by the assessee and, therefore, the nature of services are in the nature of Fees for Technical Services as per section 9(1)(vii) of the I.T. Act, 1961. It is his observation that the consultant had the duty to verify and attest the records of the candidates before scanning and mailing it along with the complete files of the candidates to the assessee viz., Sharda

University. It is a binding condition and precondition that the consultant will work exclusively for Sharda University only. Similarly, the assessee has not deducted tax from payments made to experts for Ph. D. Thesis evaluation, professional services, Faculty Development expenses etc. Therefore, by not deducting tax at source the assessee has violated the provisions of Section 195 of the I.T. Act, 1961. He, therefore, held the assessee as an assessee in default and levied interest under section 201(1A) of the I.T. Act, 1961.

10. We find the Ld. CIT(A) confirmed the action of the A.O. by holding that the services provided by the foreign firms to the assessee falls under the category of fees for technical services under section 9(1)(vii) of the I.T. Act, 1961. The observation of the Ld. CIT(A) has already been reproduced in the preceding paragraph. It is the submission of the Learned Counsel for the Assessee that the agent has not rendered any consultancy services to the assessee and he was required to market assessee's educational institution for the sole purpose of admission and counseling of

international students for Sharda University which is nothing but marketing by the agent. It is his submission that as per the terms of the MoU the agent is entitled for commission only after the student is enrolled and the nomenclature does not decide the real nature of the transaction. It is also his submission that the MoUs entered into with the various parties in different countries contain standard terms and conditions. Further it is also his submission that the said marketing services are outside the purview of Section 9(1)(vii) and, therefore, the amount received by the agents as per the MOU is not the income deemed to accrue or arise in India.

10.1. We find force in the above arguments of the Learned Counsel for the Assessee. We find merit in the arguments of the Learned Counsel for the Assessee that the nomenclature given in the agreement as consultants will not conclude that these persons were rendering consultancy services to the assessee. For deciding whether these persons were rendering any technical services as provided under section 9(1)(vii) of the I.T. Act, 1961, one has to look

into the terms and conditions of the agreement. A perusal of the terms and conditions which has been reproduced by the A.O. and which has already been reproduced in the preceding paragraph shows that these are standard terms and conditions.

10.2. We find in the case of M/s. Super Poly Fabrics Ltd., vs., Commissioner of Central Excise vide order dated 24.04.2008 the Hon'ble Supreme Court has held that "*there cannot be any doubt whatsoever at a document has to be read as a whole. The purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor any particular activity undertaken by the parties to the contract would be decisive.*"

10.3. Similarly we find the Hon'ble Supreme Court in the Court of Bhopal Sugar Industries Ltd., vs., STO reported in (1977) 3 SCC 147 (SC) has held that while interpreting the terms of the agreement the Court has to look to the substance rather than form of it. The mere formal description of a person as an agent or buyer is not

conclusive, unless the context shows that parties clearly intended to treat a buyer as a buyer and not an agent. Similar decision has been taken by the Hon'ble Supreme Court in the case of Moped India Ltd., vs., Assistant Collector of Central Excise reported in (1985) SCC 147.

10.4. In view of the above decision and various other decisions relied on by the Learned Counsel for the Assessee, we are of the considered opinion that the intention of the agreement and the nature of the services rendered by these agents have to be looked into rather than just wording of the MOU terming the agents as consultants. A perusal of the terms and conditions shows that these persons have to market the assessee's educational courses. The sole purpose for rendering the services was attracting and motivating the international students for taking admission in assessee's university which is nothing but marketing of the educational courses run by the assessee university among the international students. In our opinion it cannot be regarded as consultancy services provided to the assessee. On a pointed query raised by the Bench, the Learned Counsel for

the Assessee stated and not controverted by the Ld. D.R. that these agents do not have any role ultimately in admitting the students. The admission of a student entirely depends on the discretion of the management of the assessee university and foreign agents are not authorized to give admission to any person they want. We find as per Clause-9 of the MOU, it is apparent that the right of admission of the students in assessee's university is surely and purely based on the discretion of the assessee's central admission cell. The working of the agent is limited to collect the required documents, attest the same and sent a scanned copy of these documents to the assessee. After receiving these documents from the agents, the university admission cell checks the documents and evaluate the same for the eligibility of the admission of the applicants. Once the non-resident student takes admission in the university and pay full fee, the agent who referred that particular applicant is entitled for commission. Similarly as per clauses 10 and 11 of the MOU the agent is entitled to commission only after the student is enrolled. In case of refund the agent is not entitled to any commission. The agent has no role to direct

the assessee how they should admit the students. The work of the agent, in our opinion, is only relating to the marketing of the assessee's educational courses. It is also not disputed that these persons are not having any permanent establishment in India. Even the remittance was made outside India. Therefore, the question that arises as to whether the services rendered by these persons (Agents) can be regarded to be technical services so that the income earned for such services are deemed to accrue or arise in India ? and Whether the assessee has made any default for not deducting the tax at source while remitting the amount to these persons ?

10.5. We find the provisions of Section 9(1)(vii) of the I.T. Act, 1961 read as under :

“(1) The following incomes shall be deemed to accrue or arise in India

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

...

...

...

(vii) income by way of fees for technical services payable by-

(a) the Government; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non- resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976 , and approved by the Central Government.]

Explanation 1 - For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976 , shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.]

Explanation 2 - For the purposes of this clause," fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the

recipient or consideration which would be income of the recipient chargeable under the head "Salaries".]

10.6. We find the provisions of Section 195 of the I.T. Act, 1961 reads as under :

"195. Other sums

(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest on securities) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income- tax thereon at the rates in force:

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode.]

Explanation - For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called " Interest Payable Account" or " Suspense Account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.]

(2) Where the person responsible for paying any such sum chargeable under this Act (other than] interest on securities, and salary) to a non- resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing] Officer to determine, by general or special order], the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub- section (1) only on that proportion of the sum which is so chargeable:

Omitted by the Finance (No. 2) Act, 1991 , w. e. f. 1- 10- 1991]

(3) Subject to rules made under sub- section (5), any person entitled to receive any interest or other sum on which income- tax has to be deducted under sub- section (1) may make an application in the prescribed form to the Assessing] Officer for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that subsection, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub- section (1).

(4) A certificate granted under sub- section (3) shall remain in force till the expiry of the period specified therein or, if it is cancelled by the Assessing] Officer before the expiry of such period, till such cancellation.

(5) The Board may, having regard to the convenience of assesseees and the interests of revenue, by notification

in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an (3) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.”

10.7. A perusal of the provisions of Section 195 of the I.T. Act, 1961 shows that under this Section a person shall be liable to deduct tax at source out of the payment or remittance made to a non-resident if such sum is chargeable to tax. We find the Hon'ble Supreme Court in the case of GE Technology Centre Pvt. Ltd., vs., CIT 327 ITR 456 (SC) has held that “tax has to be deducted at source if the income is chargeable to tax in the hands of the non-resident in India.”

10.8. Now the question arises as to whether the remittances made by the assessee to these agents as per the terms and conditions of the MoU are chargeable to tax in the case of the non-resident. Provisions of section 5(2) of the Act determine the scope of total income chargeable to tax in case of non-resident. Provisions of Section 5 (2) of the I.T. Act, 1961 reads as under :

“Section 5 (2) Subject to the provisions of this Act, the total income of any previous year of a person who is a

non- resident includes all income from whatever source derived which-

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year. Explanation 1-Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India. Explanation 2.- For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.”

10.9. We find there is no dispute to the fact that these agents have not received the consideration in respect of their services in India or deemed to be received in India on their behalf as they do not have any PE or agent in India. The amount has been remitted directly to them outside India by the assessee. Therefore, provisions of section 5(a) is not applicable.

10.10. So far as the applicability of sub-clause (b) of Section 5(2) is concerned, it is also not disputed that these agents have not rendered any services in India. Since the

services have been rendered by them outside India, therefore, it cannot be held that the income for the services rendered by them accrues or arise in India in the case of the non-resident.

10.11. So far as the applicability of provisions of Section 9(1)(vii) of the I.T. Act, 1961 is concerned, we are of the considered opinion that the same is also not applicable. The contention of the Revenue that these agents have been paid fees for technical services rendered by them which is deemed to arise or accrue in India are not correct especially when these agents have not rendered any technical services and the payment made by the assessee to them in our opinion are not fee for technical services.

10.12. Explanation-2 of Section 9(1)(vii) of the I.T. Act, 1961 defines Fees for Technical Services which means any consideration including any consideration for rendering any managerial, technical or consultancy [including the provision of services of technical or other personnel] but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient

or consideration which would be income of the recipient chargeable under the head salary.

10.13. We find the coordinate bench of the Tribunal in the case of *Le Passage to India Tours & Travels vs., DCIT (supra)* has observed as under :

"12. We have heard rival contentions and have perused the submissions made by the parties in detail. The main issue for consideration in assessee's appeals are as to whether the consideration paid by assessee to overseas nonresident agents can be categorized as FTS u/s 9(i)(vii) of the Act and accordingly be taxed under the provisions of the Act. Explanation (2) to Section 9(i)(vii) defines FTS as under:

"For the purpose of this clause, FTS means any consideration including any consideration for rendering any managerial, technical or consultancy services (including the provisions of services of technical or other personnel) but does not include consideration for any construction assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "salaries"."

13. It is evident that for a particular item of income to be categorized as FTS, it is necessary that some sort of managerial, technical or consultancy services should have been rendered by payees. The terms managerial, technical and consultancy do not find mention in the I. T. Act, 1961 and it is a settled law that

they need to be interpreted based on their understanding in common parlance. Hon'ble Delhi High Court, in *J.K. (Bom.) Limited Vs CBDT and Another* 118 ITR 312 (Del.) referred an article on Management Services wherein it is stated that the Management action includes at least the following: (a) Discovering, developing, defining and evaluating the I.T.A.Nos. 1989,1778/Del/2013 goals of the organization and the alternative policies that will lead towards the goals; (b) Getting the organization to adopt the policies; (c) Scrutinizing the effectiveness of the policies that are adopted and (d) Initiating steps to change policies when they are judged to be less effective than they ought to be. Management thus pervades all organizations. Technical: In the case of *Skycell Communications Ltd. Vs DCIT*, the Hon'ble High Court had held that the popular meaning associated with the word 'technical' is involving or concerning applied and industrial science. Consultancy: is generally understood to mean an advisory service. Further, it may be fair to state that not all kinds of advisory could qualify as technical services. For any consultancy to be treated as technical services, it would be necessary that a technical element is involved in such advisory. Thus, the consultancy should be rendered by someone who has special skills and expertise in rendering such advisory. Let us examine the contract entered into by assessee with a few overseas nonresident agents. The agreements demonstrate that assessee was to pay commission and retention charges for advancement of business of the assessee. The primary services to be provided to assessee by the overseas agent Mr. Ashok Sultan as placed in paper book pages 98-101 is reproduced below:

"6. Responsibilities of LPTI:

To comment of Mr. Sultan's suggestions & reports without undue delay.

To communicate marketing and sales leads to Mr. Sultan for follow up and execution,

To keep Mr. Sultan properly and promptly informed on policies, rates and status. A Bi-weekly booking forecast to be supplied to Mr. Sultan.

To keep and confirm booking as and made by Mr. Sultan based on the availability.

I.T.A.Nos.1989, 1778/Del/20i3 To supply ,Mr. Sultan with sales aids, tariffs & brochures free of charge, custom charge paid.

To include Mr. Sultan's name, address, telephone & fax number in its advertising in the areas covered by LPTI.

-To provide complimentary services for travel agents, tour operators as recommended by Mr. Sultan based on availability,

7. SPECIAL ARR.ANGEMENTS. \WHICH CAN BE UNDERTAKEN ON COST BASIS ON PRIOR SANCTION FROM UTI HQS TN NEW DELHI Special mailing on request.

Cost of promotional functions .

Advertising, media planning & media placing.

Construction & staffing of exhibition booths., Assistance at travel trade shows & full time-dedicated participation by Mr Sultan-Assistance with legal affairs Execution of dedicated sales blitzes on behalf of-the client. Printing of material.

Marketing &. Managerial time.

Personal sales calls as mentioned, travel expenses within the area other than transport by air/train to distant places & to Canada, Mexico & Caribbean,

8. **CHARGES:**

Mr. Sultan will be paid a monthly retainer ship of USD 3000/- (US\$ THREE THOUSAND) per month, payable, always in the middle of each month, In addition to this amount he would be paid monthly up to USD 700/D(USD SEVEN HUNDRED) towards Communications telephone answering service, office telephone, cellphone, charges for internet. Normal office material (excluding printing), Postal charges, electricity, reasonable entertainment etc. on an actual basis. Local bus transport etc on actual basis Bus / train and car rental expenses on actual basis for making sales calls within the tri state area (New York. New Jersey & Connecticut)."

I.T.A.Nos.1989, 1778/Del/2013

14. *Similarly, the area of activities to be performed by another agent Mr. Naresh Sarvaria as placed in paper book pages 119-122 are reproduced below:*

"Functions of Mr. Naresh Sarvaria:

Mr. Naresh Sarvaria will conduct regular direct e-mailing campaigns to key clients tour operators and incentive houses in JK, Scotland and Ireland markets for Le Passage to India Tours and Travels Pvt. Ltd. Mr. Naresh Sarvaria will conduct regular direct e-mailing campaigns to key clients tour operators and incentive houses in JK, Scotland and Ireland market as and make sales calls on them as required. Mr. Naresh Sarvaria will follow up his sales calls as result of the e-mailing

comparing and will pass on to the Le Passage to India Tours and Travels Pvt. Ltd. the full e-mail correspondence file for canvassing the sales leads into firm bookings. Mr. Naresh Sarvaria will respond to buyers for information and literature and also assist Le Passage to India Tours & Travels Pvt. Ltd. With distribution of their brochures in the tour operations and MIC (Meetings Incentives, Congresses) market place. Cost of mailing will be billed separately.

Mr. Naresh Sarvaria will represent Le Passage to India Tours and Travels Pvt. Ltd. during specified UK Scotland and Ireland Travel Trade Fairs as agreed mutually, cost and out of pocket and travel expenses will be billed by him separately.

Mr. Naresh Sarvaria will promote Le Passage to India Tours & Travels Pvt. Ltd. through the media and will assist Le Passage to India Tours and Travels Pvt. Ltd. with press releases, editorials, interviews etc. Mr. Naresh Sarvaria will keep Le Passage to India Tours and Travels Pvt. Ltd. informed about the key industry trends, opportunities and developments in the UK, Scotland & Ireland markets, tour operators, and MIC Planners meetings, incentives, congresses. Mr. Naresh Savaria wil be at the disposal of Le Passage to India Tours and Travels Pvt. Ltd. Mr. Naresh Sarvaria will track and justify all costs, including pre approved out of pocket expenses and communication costs directly linked to the marketing of Le Passage to India Tours and Travels Pvt. Ltd.

I.T.A.Nos.1989, 1778/Del/2013 Mr. Naresh Sarvaia will if requested by Le Passage to India

Tours and Travel Pvt. Ltd. conduct an educational tour form the UK, Scotland and Ireland markets to India at the time and convenience of Le Passage to India Tours and Travels Pvt. Ltd. Out of pocket and travel expenses are to be billed by him separately. Mr. Naresh Sarvaria will support Le Passage to India Tours and Travels Pvt. Ltd.'s work and assists requests and answers whenever needed.

Mr. Naraesh Sarvaria will not represent any other Destination Management Company form India. In the same manner Le Passage to India Tours and Travels Pvt. Ltd. will not appoint any other representative in the same country.

Mr. Naresh Sarvaria will report on a monthly basis his actions towards Le Passage to India Tours and Travels Pvt. Ltd.,"

15. *From the nature of services to be performed by the overseas agents, we are of the view that services rendered by the agents in this case are purely in the nature of advancement of business of the assessee company and cannot be categorized as managerial/technical/consultancy services. Accordingly, the consideration paid by the assessee cannot be classified as fee for technical services (FTS).*

16. *We further find that Hon'ble Delhi High Court in the case of Panalfa Autoelektrik Ltd. while explaining meaning of the word managerial, technical or consultancy services falling under the scope of FTS u/s 9(i)(vii) of the Act held that sales and marketing services made by an overseas commission agent do not fall within the meaning of aforesaid words and, therefore, the payment of commission made to such agent will not be deemed to accrue or arise in India and consequently,*

would not be liable to tax in India. Similarly, in a number of case laws relied upon by Ld. A.R. as noted in his synopsis page 5, we find that various courts have held that sales and marketing services rendered outside India do not fall within the meaning of FTS u/s 9(i)(vii) of the Act. Therefore, keeping in view the facts and circumstances of the present case and on the basis of various case laws relied upon by the assessee, we hold that the amount of retainer-ship charges and commission paid by the assessee to an overseas nonresident agent is not in the nature of FTS and, therefore, was not liable to be taxed in India and in consequence, assessee was not required to deduct tax therefrom. Ld. CIT(A) himself in Assessment Year 2007-08 has allowed relief to the assessee on account of non-deduction of TDS on commission payments as noted by us at page 6 of our order. Therefore, keeping in view all facts and circumstances and keeping in view the case laws relied upon by Ld. A.R. we hold that representation charges and commission paid by assessee were not liable to be taxed in India and consequently no tax was required to be deducted and therefore disallowance u/s 40(a)(i) was not warranted. Since, we have decided the issue in favour of the assessee based upon the first limb of the arguments advanced by the Senior Counsel we do not deem it necessary to deal with other two limbs of arguments advanced by the senior counsel. In view of above, appeals filed by the assessee are allowed.

17. Now, coming to the appeals filed by the revenue, we find that as regards payment of tour expenses and other expenses paid without deduction of TDS, Ld. CIT(A) has passed a very elaborate and speaking order and Ld. D.R. was unable to controvert any of his findings, therefore, we do not find any infirmity in the

same. Similarly, Ld. CIT(A) has allowed depreciation on computer peripherals based upon various decisions of the courts wherein we do not find any infirmity.

18. In view of above, the appeals filed by the Revenue are dismissed.”

10.14. We find the Hon’ble Delhi High Court in the case of DIT (Intl.) vs., Panalfa Autoelekrik Ltd. vide order dated 18/09/2014 has observed as under :

“12. In the present case, clause (b) to Section 9(i)(vii) would be applicable as the respondent-assessee, the payer was a resident of India. The exceptions carved out under clause (b) are not applicable as it is not the case of the respondent-assessee that the fee paid was in respect of services to be utilised in business or profession carried out by the payer outside India, or for the purpose of making or earning of any income from any source outside India. The respondent-assessee’s manufacturing unit was in India and it would be proper to hold that the source of income would be the manufacturing unit of the respondent-assessee in India, even if the sale proceeds were on account of exports.

13. The main question and issue, which would arise is whether the payment made to the non-resident would be covered under the expression, "fee for technical services" as defined in Explanation 2 quoted above. There are three categories of technical services as per Explanation 2; managerial services, technical services and consultancy services, and it includes provisions for services of technical and other personnel albeit there are specific exclusions, but we are not concerned with the same in the present appeal.

14. The expressions "managerial, technical and consultancy services" have not been defined either under the Act or under the General Clauses Act, 1897. The said terms have to be read together with the word services to understand and appreciate their purport and meaning. We have to examine the general or common usage of these words or expressions, how they are interpreted and understood by the persons engaged in business and by the common man who is aware and understands the said terms. The expression "management services" was elucidated upon by this Court in *J.K. (Bombay) Limited versus CBDT and Another*, [1979] 118 ITR 312 in the following terms :-

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

(b) getting the organization to adopt the policies,

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

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

Management thus pervades all organisations. Traditionally administration was distinguished from management, but it is now recognised that management has a role even in civil services. According to the *Fontana Dictionary of Modern Thought*, page 366, management was traditionally

identified with the running of business. Therefore, management as a process is practised throughout every organization from top management through middle management to operational management."

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

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

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

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

"First, about the connotation of the term "managerial". The adjective "managerial" relates to manager or management. Manager is a person who manages an industry or business or who deals with administration or a person who organizes other peoples activity [New Shorter Oxford Dictionary]. As pointed out by the Supreme Court in R. Dalmia v. CIT [1977] 106 ITR 895,

"management" includes the act of managing by direction, or regulation or superintendence. Thus, managerial service essentially involves controlling, directing or administering the business."

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

"2. Appointment

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

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

XXXXX

4. Commission

(a) PAL agrees and AGENTA accepts that the amount of commission payable to it shall be the difference between consideration which PAL receives in terms of the purchase contract/order form the purchaser(s) and the pre determined guaranteed consideration settled and agreed between the parties, as described in Annexure 1 annexed hereto;

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

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

the agreement and the consideration that the respondent-assessee received in terms of the purchase contract or order, in addition to a pre-determined guarantee consideration. Again, an indication contra to the contention that the non-resident was providing management service to the respondent-assessee.

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

18. *It would be incongruous to hold that the non-resident was providing technical services. To quote from Skycell Communications Ltd. and Anr. Vs. Deputy Commissioner of Income Tax and Ors. (2001) 251 ITR 53 (Mad), the word technical has been interpreted in the following manner :-*

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

strict application or interpretation of the law or the rules: the arrest was a technical violation of the treaty.

Having regard to the fact that the term is required to be understood in the context in which it is used, "fee for technical services" could only be meant to cover such things technical as are capable of being provided by way of service for a fee. The popular meaning associated with "technical" is "involving or concerning applied and industrial science".

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

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

"14. Similarly, the word "consultancy" has been defined in the said Dictionary as "the work or position of a consultant; a department of consultants." "Consultant" itself has been defined, inter alia, as "a person who gives professional advice or services in a specialized field." It is obvious that the word "consultant" is a derivative of the word "consult" which entails

deliberations, consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the said Dictionary as "ask advice for, seek counsel or a professional opinion from; refer to (a source of information); seek permission or approval from for a proposed action". It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant."

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

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

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

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

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25. Thus, the technical services consists of services of technical nature, when special skills or knowledge relating to technical field are required for their provision, managerial services are rendered for performing management functions and consultancy services relate to provision of advice by someone having special qualification that allow him to do so. In the present case,

the aforesaid requisites and required necessities are not satisfied. Indeed, technical, managerial and consultancy services may overlap and it would not be proper to view them in water tight compartments, but in the present case this issue or differentiation is again not relevant.”

10.15. Respectfully following the above decision, we are of the considered opinion that the services rendered by these agents cannot be regarded to be the managerial, technical or consultancy services. These agents are not managing the affairs of the assessee university. They are not giving any technical advise to the assessee. They are also not having any technical or special skill in this regard and no such material was brought to our notice to substantiate the same that these agents are either managing the affairs of the assessee or are giving any technical advise to the assessee. Further they are also not having any technical special skill in this regard. The services rendered by them are also not the consultancy services as they are not giving any consultancy to the assessee. For a consultancy services, the services must be rendered in the form of an advise or consultation given by the non-resident to the Indian resident. However, in the instant case, these agents are only

marketing the educational course of the assessee among the intended non-resident students for which commission was paid for motivating and attracting the students or making them aware of about the utility of the various educational courses run y the assessee university. Such type of services, in our opinion, cannot be called as consultancy services. The nature of services rendered by these foreign agents is simply marketing the services, introducing the foreign students to take admission in the assessee university and therefore, we are of the opinion that no technical services was rendered by these agents. Under these circumstances, we are of the considered opinion that the remittances made by the assessee outside India to these agents as per the terms and conditions of the MOU cannot be deemed to be accrue or arise in India and, therefore, will not be chargeable to tax in India. Since such remittances is not chargeable to tax in India, the assessee was not under an obligation to deduct tax at source. We, therefore, hold that the assessee cannot be treated as an assessee in default in respect of non-deduction of tax under the provisions of Section 201 of the I.T. Act, 1961 in respect of commission on student

recruitment/admission. Accordingly, we set aside the order of the Ld. CIT(A) and direct the A.O. to delete the demand of TDS made under section 201 as well as levy of interest under section 201(1A) of the I.T. Act, 1961.

11. So far as Ph.D Thesis Evaluation is concerned, we find the issue arises in F.Ys. 2015-16 and 2016-17 relating to non-deduction of the TDS for payment for Ph.d thesis evaluation. We find the A.O. while considering the tax required to be deducted on such payments made to the Ph.d thesis evaluation considered that Ph.d thesis evaluation involves expertise of the evaluator to examine the thesis of the students. According to him, these services are utilised in India and clearly fall under the head 'Fee for Technical Services' as per Explanation-2 to Section 9(1)(vii) of the I.T. Act, 1961. We find the Ld. CIT(A) confirmed the order of the A.O, the reasons of which have already been reproduced earlier.

12. It is the submission of Learned Counsel for the Assessee that these persons have not rendered any technical services to the assessee but applied their technical

knowledge or skill in evaluating the thesis papers submitted by the research scholars. The remittance is not for managerial or consultancy services.

13. It is the submission of the Ld. D.R. that the evaluators are technically qualified and they have rendered technical services while evaluating Ph.d thesis submitted to them. Therefore, being technical services, the consideration received by them deemed to have accrued or arisen in India. Therefore, it was chargeable to tax in India in view of provisions of Section 5(2)(b) of the I.T. Act, 1961. Since the assessee has not deducted tax at source, therefore, the assessee should be held as assessee in default.

14. After considering the rival arguments by both the sides, we are of the considered opinion that the issue to be decided in this regard is whether the consideration paid by the assessee for evaluating Ph.d thesis by remitting the same outside India can be regarded to be the income of non-resident deemed to accrue or arise to him in India so that it may be chargeable to tax in India. As per the provisions of Section 195 of the I.T. Act, 1961, payment made to a non-

resident, if chargeable to tax, the assessee is liable to deduct tax at source. In case he fails to deduct tax at source, he will be deemed to be an assessee in default as per provisions of Section 201 of the I.T. Act, 1961 and is also liable for interest under section 201(1A) of the I.T. Act, 1961. As per Explanation-2 to Section 9(1)(vii) defines fee for technical services which is for rendering of any managerial, technical or consultancy services. It is not the case of the Revenue that the Ph.d thesis evaluators have rendered managerial or consultancy services to the assessee. It is their contention that they have rendered technical services to the assessee by evaluating the Ph.d thesis papers. In our opinion, the Ph.d evaluator must have been technically qualified and having technically skilled. However, the question that arises is as to whether these persons by evaluating these papers have rendered the technical services to the assessee? In our opinion, such evaluation of the Ph.d Thesis for which they have received the commission cannot be treated as fees for technical services. By evaluating Ph.d thesis paper, they have not provided to the assessee any technical services but merely applied their skill for evaluating Ph.d Thesis.

Therefore, we are of the considered opinion that no technical services were rendered to the assessee by the Ph.d thesis evaluators and the assessee has also not asked for any technical services. We, therefore, are of the considered opinion that the Ld. CIT(A) was not justified in holding the assessee to be an assessee in default for not deducting the TDS from the remittance made to the Ph.d Thesis evaluators under section 201 of the I.T. Act, 1961 and consequently interest charged under section 201(1A) of the I.T. Act, 1961. Therefore, the ground relating to this issue in both the A.Ys. 2016-17 and 2017-18 are allowed.

15. Now coming to the issue of non-deduction of tax on Faculty Development Expenses is concerned, which arises only in F.Y. 2010-11, we find the assessee has made payment of Rs.1,88,280/- to the non-resident. According to the A.O. the assessee defaulted in not deducting tax at source considering the training of faculty staff who are already experts in their fields and their services to be technical nature covered under section 9(1)(vii) of the I.T. Act, 1961. We find the Ld. CIT(A) upheld the action of the

A.O., the reasons of which have already been reproduced in the preceding paragraph.

16. It is the submission of the Learned Counsel for the Assessee that the amount has been paid to train and educate the staff in the field of education and not for any technical field. The payment is like a coaching fee and independent individual service and, therefore, such payment cannot be said to be any income that can be said to have accrued or arisen in India or deemed to have accrued or arisen in India nor it can be said that it is in the nature of payment under section 9(1)(vii) of the I.T. Act, 1961. It is also his submission that payment for educating are not covered under fee for technical services as defined under DTAA between India and Singapore.

17. It is the submission of the Ld. D.R. that the Faculty Development Provider has rendered technical services by giving training to the staff.

18. We have heard the rival arguments made by both the sides. We find Article 12(5) of DTAA between India and Singapore read as under :

“5. Notwithstanding paragraph 4, "fees for technical services" does not include payments :

a) For services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a) ;

b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic ;

c) for teaching in or by educational institutions ;

d)for services for the personal use of the individual or individuals making the payment;

e)to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 14 ;

f)for services rendered in connection with an installation or structure used for the exploration or exploitation of natural resources referred to in paragraph 2(j) of Article 5 ;

g)for services referred to in paragraphs 4 and 5 of Article 5.”

19. In view of the above Article of the Treaty the services rendered by Singapore party for educating the faculty and staff so that their professional and technical

knowledge be upgraded/updated cannot be regarded to be the fee for technical services. Further as per provisions of Section Article 7 of DTAA which is applicable in the instant case, the amount paid to Singapore party shall be liable to tax in India only if that party has PE in India. As mentioned earlier, it is an undisputed fact that the non-resident does not have any PE in India. Therefore, the income so earned by the non-resident cannot be said to be chargeable to tax in India. We, therefore, are of the considered opinion that the assessee was not liable to deduct tax at source under section 195 of the I.T. Act, 1961. In view of the above, we set aside the order of the Ld. CIT(A) and hold that the assessee has not made any default in not deducting the tax and, therefore, assessee is not an assessee in default under section 201 of the I.T. Act, 1961 and consequently the interest under section 201(1A) of the I.T. Act, 1961. The A.O. is accordingly directed to delete the addition and ground raised by the assessee on this issue is allowed.

20. So far as ground of appeal number-7 is concerned, the same relates to rate of deduction of tax in

case income of the non-resident is chargeable to tax. The A.O. was of the view that tax has to be deducted @ 20% which has been upheld by the Ld. CIT(A).

21. We have heard the rival arguments made by both the sides. While dealing with Grounds of appeal numbers-3 to 5, we have already held that assessee cannot be deemed to be an assessee in default in respect of non-deduction of tax on the remittances made to the non-residents. Therefore, ground of appeal number-7, in our opinion, does not require any adjudication being academic in nature.

22. Ground of appeal numbers-8 and 9 being consequential in nature, needs no adjudication.

23. In the result, ITA.No.3377/Del./2018 of the assessee is partly allowed.

ITA.Nos.3378, 3379, 3380, 3381, 3382 & 3383/Del./2018 –
A.Ys. 2012-13 to 2017-18

24. Since identical grounds have been raised in all these appeals, therefore, respectfully following the reasons

for decision in ITA.No.3377/Del./2018 for the A.Y. 2011-12,
these appeals are also partly allowed.

25. In the result, all the appeals of the Assessee are
partly allowed.

Order pronounced in the open Court 05.05.2022.

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER
Delhi, Dated 05th May, 2022

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

VBP /-  Shekhar

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'D' Bench, Delhi
6.	Guard File.

/ By Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.