IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA
[Before Shri Mahavir Singh, JM & Shri M. Balaganesh, AM]

I.T.A No.1629/Kol/2012
Assessment Year: 2009-10

Deputy Commissioner of Income-tax, Circle-52, Kolkata.	Vs.	Shri Subhotosh Majumder (PAN: AGSPM8745N)
(Appellant)		(Respondent)

&

I.T.A No.366/Kol/2012
Assessment Year: 2008-09

Assistant Commissioner of Income-tax Circle-52, Kolkata.	Vs.	Shri Subhotosh Majumder
(Appellant)		(Respondent)

&

I.T.A No.2058/Kol/2009
Assessment Year: 2006-07

Assistant Commissioner of Income-tax Circle-52, Kolkata.	Vs.	Shri Subhotosh Majumder
(Appellant)		(Respondent)

Date of hearing: 29.09.2015
Date of pronouncement: 27.11.2015

For the Appellant: Shri S. Srivastava, CIT
For the Respondent: Shri J. P. Khaitan, Advocate

ORDER

Per Shri Mahavir Singh, JM:

All these revenues appeals are arising out of separate orders of CIT(A)-XXXIII, Kolkata in appeal nos. 107/CIT(A)-XXXIII/Addl.CIT R-52,Kol/11-12 dated 01.08.2012, 237/CIT(A)-XXXIII/AC Cir-52,Kolkata/10-11 dated 07.12.2011 and 166//CIT(A)-XXXIII/CIR-52,Kol/08-09 dated 31.07.2009. Assessment for AY 2009-10 was framed by Addl.CIT, Range-52, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") vide its order dated 19.12.2011, assessment for AY 2008-09 was framed by ACIT, Circle-52, Kolkata u/s. 143(3) of the Act vide its order dated 31.12.2010 and assessment for AY 2006-07 was framed by Dy. CIT, Circle-52, Kolkata u/s. 143(3) of the Act vide its order dated 29.12.2008.

2. The only common issue in these three appeals of revenue is against the order of CIT(A) in deleting the disallowance made by AO in respect to expenses claimed by the assessee of fee for technical services for non-deduction of TDS u/s. 195 of the Act thereby invoking the provisions of section 40(a)(i) of the Act. For this, revenue has raised common grounds and the grounds as raised in AY 2006-07 read as under:

> *"1. The Ld. CIT(A) has erred in facts and circumstances of case, by considering that the amount Rs. 5,38,36,097/-paid by the assessee to the non-residents patent attorneys is not liable to tax deduction at source u/s 195.*
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> *2. The Ld. CIT(A) has erred in facts and circumstances of case by disregarding the fact that the situs of payee i.e, assessee is in India and hence liable to deduct Tax at source u/s. 195.*
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> *3. The Ld. CIT(A) has erred in facts and circumstances case by disregarding the fact that the foreign attorneys were hired by the assessee who is situated in India and payment was made by the assessee on the invoices raised by the foreign attorneys in the name of assessee in India.*
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> *4. The Ld. CIT(A) has erred in tact and circumstances of case by disregarding the fact that the situs of payee and situs of utilization of service is in India and hence any sum paid to Foreign Attorneys covered u/s 9.*
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> *5.. The Ld. CIT(A) has erred in facts and circumstances of case by treating the income of non-resident attorneys as outside the scope of section 5 and section 9.*
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> *6. The Ld. C1T(A) has erred used in tact and circumstances of case by disregarding the fact that these exists a business connection between the assessee and foreign attorneys both individually and separately with each other in capacity of principal and agent where each of utilizes the others services for work done in their countries and get remunerated thereof and hence foreign attorneys are liable for taxation of their income u/s. 9(1)(i).*
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> *7. The Ld. CIT(A) has erred in law by disregarding tact that there exists a distinction between the situs of service and situs of utilization of services of the foreign attorney by the assessee. In this case while the services of foreign attorneys were utilized by the assessee in India, the services were rendered in the respective countries.*
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> *8. The Ld.CIT(A) has erred in facts and circumstances of case by disregarding the facts that services of expert who were non-resident were used for effective rendering of services in India by the assessee hence any sum paid to them is covered u/s. 9(i)(vii).*
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> *9. The Ld. C1T(A) has erred in facts and circumstances of case by disregarding the fact that payment to a non-resident is liable to tax deduction u/s. 195 pending the filing of return and the regular assessment in India, so that there no loss of revenue to the country."*

The facts and circumstances are exactly identical in all these three years, hence, we will take the facts from AY 2006-07 in ITA No. 2058/Kol/2009 and decide the issue.

3. Briefly stated facts are that the assessee is a patent law practitioner as an advocate specialized in Intellectual Property Laws (IPR) and renders services only in IPR services. The main claim of the assessee is that the services of assessee are utilized by its clients in India and its clients include multinationals, major corporate etc. The assessee also facilitates the filing of Patents in foreign countries for its clients and for the purpose interfaces the Patent filing and granting process and deals and communicates with the foreign lawyers and law firms chosen by its clients. Before us assessee explained the utilization of patent that patents granted in India can be utilized in India alone because patents granted by the Republic of India has effect only in India and in no other country. Likewise, patents granted in other countries can only be utilized in such countries. A patent granted in the US or any other country does not create any legal right in India to claim monopoly or to license or otherwise benefit from the patent in India. It was also explained before us that foreign national is not entitled to practice as a patent attorney in India and also a person cannot claim to be a patent attorney/agent in India unless such person qualifies the prescribed examination and is registered by the Government of India. Therefore, an inventor in India or his employer or assignees in India cannot engage a foreign attorney for the purpose of obtaining a patent in India. Likewise an Indian practitioner cannot practice in another country. In view of this process Ld. Counsel explained the role of the assessee that where clients of assessee express interest in protecting their IPR in foreign territories, assessee acts as a facilitator and entrusts the work to a foreign attorney in respective jurisdictions who renders services to the clients of assessee and acts in their respective countries on behalf of the clients of assessee. All communications are routed through assessee and assessee facilitates the process and charges a nominal fee. The fees of the foreign attorneys are remitted by assessee upon receipt of payments/instructions from its clients and such amounts including the fees of assessee for the facilitation are borne by the clients. The services rendered by the foreign attorneys in their respective jurisdictions lead to grant of patents in their respective countries and the Indian company can utilize such rights in the respective countries in which such patents are granted. The job of assessee is to act as an interface between the client and foreign law firms and does not make any utilization of the services but acts merely as a facilitator. Most of the foreign assignments received by assessee relates to patents in respect of

pharmaceutical products for which patents are obtained in the name of the company/person in whose name such patents are applied for. Therefore, the clients of assessee utilize such patent rights in the respective countries where patents are obtained. If a patent is granted in US to an Indian client of assessee in respect of a pharmaceutical product the job of assessee is to act as a facilitator. Assessee does not have the right or capability or the need to utilize such rights. The services of assessee may be compared with a travel agent in India who makes all travel arrangements for Indian nationals in foreign countries by booking hotels and transportation utilizing services of foreign service providers. The Indian agent gets paid for its services limited to its activities of liaising with a foreign travel agent which would be essentially forwarding such documents that may be required for the travel from India and for its lodging and transportation in say Singapore. The payments are made by the tourists to the local agent who in turn makes payment to the foreign travel agent. For the purpose the local foreign agent makes payment in foreign exchange. In the Singapore the local travel agent renders the services in Singapore by taking care of the guests and also arranging transportation and tours. Such services are availed and utilized wholly in Singapore and not in India, The Indian agent does not avail of the services or utilize such services and mere act of facilitation cannot be said to utilization of services only because the local agent charges his service charges. In the same way assessee has not utilized the services at all and has only merely acted as a liaising entity for a small amount of fees compared to the fees charged by the foreign attorney. In the facts and circumstances of the nature of the involvement of assessee it may be noted that it is not the beneficiary of the services of the foreign attorneys and neither does it make any payment through its own funds but only the funds of the client. The assessee charges a service charge from time to time to communication and forwarding documents.

4. But the AO arrived at the finding that the assessee was deriving professional fee for rendering services in India to Indian principals and for effective rendering of services in India, the assessee has availed professional services of expert who are non-residents. He had also arrived at the finding that though services are performed outside India they were for the benefit of the assessee's profession, which was carried out in India and therefore payments made to non-residents resulted in accrual of income in

India within the meaning of section 9(1)(vii)(b) of the Act and therefore assessee had obligation to deduct TDS u/s. 195 of the Act. According to AO, failure to do so had attracted provisions of section 40(a)(i) of the Act. Accordingly, the payments made to non-residents amounting to Rs.5,38,36,097/- was disallowed.

5. Aggrieved, assessee preferred appeal before CIT(A), who allowed the claim of the assessee by observing in para 10, 11 and 12 as under:

> *"10. The appellant also filed complete list of remittances made to foreign associates, filed copies of some of the invoices raised upon the appellant by such foreign associates as also the order vide number ITO(IT)/Kol/NOC/2009-10/104 dated 16.06.2009 issued by Income Tax Officer, International Taxation 1(1), Kolkata, authorizing the appellant to remit amounts to one of his foreign associates without deduction of tax at source. It was submitted that although the NOC relates to a subsequent period, the departmental interpretation in the matter is clear from the order and the same would squarely apply to the year of assessment in question because the relevant provisions have not changed. It was also submitted that interpretation by International Tax Department of Income Tax authorities cannot be ignored particularly because such NOC has been issued by the Dept. which is specialized in the relevant area of IT laws and which has issued the NOC after making enquiries and applications of mind.*
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> *11. I have considered the contentions of assessing officer as mentioned in the assessment order and the reasons given by him for disallowing the payments under section 40[a][i]. I have also considered the oral and written submissions made by the appellant. In my view, the disallowances under sec. 40[a][i] can be made only if the amounts remitted to non-residents are chargeable to Income Tax in India and the same are remitted without deduction of tax as required under sec 195. As per details furnished and as per copies of the invoices shown, the recipients were not liable to income tax in India as the amounts paid to non-resident foreign attorneys were for the services rendered by them outside India and there was no rendition of services in India. No territorial nexus between the rendition of services and territorial limits of India has been established. As such provisions of sec 195 were not applicable in case of the remittances made by the appellant to his foreign associates. The fundamental question to be answered is whether the recipients of the various amounts in different countries performed any part of the services in India, whether the payments were received in India and whether the recipients had permanent establishment or business in India. These factual aspects are important to determine, whether income was taxable in India and consequently whether liability for deduction or non-deduction of TDS under section 195 existed. I am unable to agree with the findings of the A.O. that simply because remittances have been made without deduction of tax at source provisions of sec 40(a)(i) are attracted.*
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> *12. As per Sec.40(a)(i) any sum paid outside India or in India to a non-resident, on which tax is deductible at source under chapter XVII B and such tax has not been deducted or after deduction not been paid shall not be deducted in computing the income chargeable. Therefore, only those sums can be considered as inadmissible u/s. 40(a)(i) were tax was required to be deducted at source under chapter XVII B but was not done. Under chapter XVII B "any sums" being payable to non-residents is dealt in Sec. 195 which casts an obligation on the person responsible for paying to the non-resident any sum which is chargeable under the provisions of the Act, to deduct tax at the time of credit of such income to the account of the payee. Therefore deduction has to be made from sums which are chargeable under the Act. In case the amount is not chargeable there is no responsibility for deduction of tax. Therefore only those sums*

which are chargeable under the Act, if paid without TDS, can be held as inadmissible u/s. 40(a)(i). If the sum is not chargeable to tax it cannot be held as inadmissible u/s.40(a)(i). Section 5 of the Income Tax Act defines the income which is chargeable under the Act. In the case of non-resident income received or deemed to be received in India or income accruing or arising or deemed to accrue or arise in India from whatever source is chargeable. Since the income is received outside India for services rendered outside India, it cannot be said to be received, accrue or arise in India. Section 9 gives the income which is deemed to accrue or arise in India. The income in the case of the recipient does not arise through or from any property or asset or from transfer of asset in India. The recipient of the sum does not carry out any part of his business or profession in India either directly or through any person in India. All the services are rendered outside India and even the deliverables in the form of patent are specific for territories outside India. Therefore no parts of the business of recipient for which payments are received are carried out in India or have territorial nexus with India. Therefore no parts of recipient for which payments are received are carried out in India. Hence Income of the payee cannot be deemed to arise or accrue in India. Section 9(1)(vii)(b) is not applicable as the patents can be utilized only in the respective territories and therefore the activity would fall within the exception - making or earning any income from any source outside India. The income of the payee was therefore not chargeable under the Act and cannot be held as inadmissible under Section 40(a)(i) for failure to deduct as there was no obligation undr chapter XVIIB for deduction of tax at source.

This conclusion is also supported by the analogy that can be drawn from CBDT Circular No. 786, decision in the case of M/s. Clifford Chance and the certificate issued by the International Taxation Department, Kolkata permitting remittance without deduction of Tax at Source (albeit for another year).

This ground of the assessee is allowed. The A.O. is directed to delete the addition made u/s.40(a)(i) of Rs.5,38,36,097/-·"

Aggrieved, now revenue is in second appeal before tribunal.

6. Before us Ld. CIT-DR Sh. Sachidanand Srivastava argued on behalf of revenue. He first of all stated the facts that in this case the assessee has paid fees for obtaining technical information or consultancy services from foreign consultants in connection with profession carried out in India. He argued that the assessee is deriving fees for rendering services in India to its Indian principals and for rendering services in India, the assessee has availed technical services of experts who are non-residents. Though services are performed outside India they were for the benefit of the assessee's business/profession which was carried out in India and therefore payments made to on-residents resulted in accrual of income in India within the meaning of section 9(l)(vii)(b) of the Act and therefore assessee has obligation to deduct TDS u/s. 195 of the Act. But assessee failed to do so, and accordingly AO invoked the provisions of Section 40(a)(i) of the Act. Sh. Srivastava summarized the findings of AO as under:-

i) the assessee has paid fees for obtaining technical information or consultancy services from foreign consultants in connection with profession carried out in India.

ii) The assessee is deriving fees for rendering services in India to Indian principals.

iii) For effective rendering of services in India the assessee has availed technical services of experts who are non-residents.

iv) Though services are performed outside India they were for the benefit of the assessee's business/profession which was carried out in India.

Sh. Srivastava further argued that fees paid for obtaining technical information or consultancy services from foreign consultants in connection with profession carried out in India by the assessee is directly covered by the explanation 2 of section 9(l)(vii)(b) of the Act and newly substituted explanation to section 9(2) of the Act. He referred to the relevant provision which was substituted by the Finance Act,2010 w.r.e.f. 01.06.1976.

7. On the other hand, Ld. Counsel for the assessee Sh. JP Khaitan, Ld. Senior Advocate argued on behalf of the assessee and stated the facts that all the three appeals involve a common issue, which is as under:-

> *"whether the payments made by the assessee to non-resident patent attorneys without deduction of income tax at source are to be disallowed under section 40(a)(i) of the Income tax Act 1961 ("the Act").*

According to him, first aspect of the case is that the assessee was not required to deduct any tax at source since the amounts paid were not chargeable under the provisions of the Act. He narrated the facts, as summarized by the AO, that the assessee paid fees for obtaining technical information or consultancy services from the non-resident attorneys in connection with his profession carried on in India for effective rendering of services in India to his clients and accordingly, he sought to treat the services provided by the non-resident attorneys as technical services by invoking section 9(1)(vii)(b) of the Act and held that the fees paid to the non-resident attorneys were income deemed to accrue or arise in India since the services were utilized by the assessee in his profession in India. He thus held that the assessee should have deducted tax at source. According to Sh. Khaitan, the finding of the AO that the

assessee obtained technical information or consultancy services from non-resident attorneys which were used by him for effective rendering of services in India to his clients is contrary to the factual position. The invoices of the non-resident attorneys and the assessee's corresponding debit notes on his clients would show that the non-resident attorneys were engaged merely for obtaining registration of patents/trade marks or for continuation/renewal of registration previously obtained. Such services were of procedural nature not having any iota of technical information or consultancy service. Further, such services were provided by the non-resident attorneys directly to the Indian clients, who had also granted them Powers of Attorney. No technical information or consultancy service was provided by the non-resident attorneys to the assessee and there was no question of the assessee using any information or service which he did not obtain. The assessee merely acted as a facilitator between the Indian client and the non-resident attorney and in his invoices sought reimbursement of the amount as per the non-resident attorney's invoice and separately charged his fee for his work as facilitator @ 20% of the non-resident attorney's fee subject, however, to a minimum fee of Rs.2000 and a maximum of Rs.7000/-. Sh. Khaitan has not disputed that the non-resident attorneys provided services outside India but according to him the assessee did not receive or use such services in India. Even from the point of view of assessee's clients, the services could have been utilized by them only outside India in as much as the protection of registration of patent/trade mark is available only in the countries where such registration is obtained. A trade mark or patent registration affords protection on territorial basis only in the country of registration and nowhere else.

8. The second aspect argued by Sh. Khaitan is that the services rendered by the non-resident attorneys were professional services and not any technical service within the meaning of Section 9(1)(vii) of the Act. According to him professional services are different from technical services, which are clearly defined by Act itself separately. Section 194J of the Act applies to fees for professional services, which have been defined in Explanation (a) to the section to mean, inter alia, services rendered by a person in the course of carrying on legal profession. The same section also covers fees for technical services which according to Explanation (b) have the same meaning as in Explanation 2 to Section 9(1)(vii) of the Act. Thus, service rendered in the course of

carrying on legal profession is a professional service and not a technical service. Even otherwise, having regard to the nature of service rendered by the non-resident attorneys, namely that of registration and renewal of patents and trade mark, it cannot be said that such service is a managerial, technical or consultancy service within the meaning of Explanation 2 to Section 9 (1)(vii) of the Act.

9. The third aspect argued by Sh. Khaitan was that the assessee was granted no objection certificate for remittance of non-resident attorneys' fees without deduction of tax at source under section 195 of the Act, both before and after the amendment made by the Finance Act 2010, upon the basis that the amount being remitted is for legal and professional services. The fourth aspect of the case, which is inter connected with the third aspect, as argued by Sh. Khaitan was that the amendment made by the Finance Act 2010 will impose an impossible task to perform because in any event and without prejudice to the aforesaid, no disallowance can be made under section 40(a)(i) where law relating to tax deduction at source is retrospectively amended or circular in that behalf is subsequently withdrawn.

10. Ld. Counsel also argued the factual aspect that the revenue sought to invoke section 9(1)(i) of the Act but having failed, shifted ground and sought to invoke Section 9(1)(vii)(b) of the Act. The order of the Tribunal dated November 4, 2009 with respect to section 9(1)(i) of the Act in ITA No. 491/KOL/2009 for the assessment year 2004-05 is enclosed at page 7 of the assessee paper book. According to him the amendment made in the Explanation below section 9 by the Finance Act 2010 with retrospective effect from June 1, 1976 is applicable only in respect of income accruing under clause (v) or (vi) or (vii) of sub section (1). The professional service rendered by the non-resident attorneys is not covered by any of the said clauses. Even otherwise, for the reasons stated hereinbefore, clause (vii)(b) of section 9(1) of the Act has no application in the facts and circumstances of the instant case.

11. Ld. Counsel further explained that as far as assessee is concerned it does not utilize the services for which the fees are payable to the non-resident entities because it has no right to utilize such services. Accordingly, no income accrues or arise or deemed to accrue or arise in India under section 9 (1) (vii) (b) of the Act as he has no business connection or permanent establishment in India. The AO did not even understand as to what is the role of the assessee and that what services were sought

from the foreign law firms and the services rendered. To appreciate such services the AO was required to examine each of the transactions and given his findings on fact followed by his decision with reasons. The AO did not even understand as to who was the recipient of the service i.e. the assessee or the clients of the assessee. There is no evidence in the proceedings before Tribunal to support the case of the revenue. The AO failed to understand that the creation of the work e.g. inventions were made in India by the clients of the assessee the patent specifications were prepared in India by the clients of the assessee and/or the assessee and that the technical information was duly possessed by the clients of assessee and he had passed on such information to the foreign attorneys for filing patent applications/trademark applications. The foreign attorneys filed such applications, dealt with objections from the local patent and trademark offices and raised bills for such services. The AO never realized that the flow of information was from the client of the assessee to the foreign attorneys through the assessee and no information or advice was rendered by the foreign attorneys which could be said to add value to the invention/technology of the client of the assessee. The foreign attorneys were not meant to send any information or advice on the invention or technology or any other advice or opinion as none was sought by the assessee for its clients. All these would have been clear if the AO had applied his mind and examined the transactions in the correct perspective. It is sheer ignorance of the AO that he failed to realize that the client of the assessee in India had actually made the innovation in India and all technical developments took place in India. All technical information relating to the invention were communicated to the foreign practitioners/attorneys to enable them to file patent applications in their respective jurisdictions. Same was the case for trademark and design applications. Therefore the AO failed to appreciate that no technical information was received and there is nothing in the order passed by the AO to show what technical information or consultancy services were provided by the foreign attorneys.

12. Ld. Counsel further explained that in none of the transaction the foreign attorneys acted as consultants because no consultancy services were requested. All documents were made available to the AO but his findings does not contain reference to a single document or any transaction related thereto and also no evidence is on record before Tribunal which is placed or relied upon by the revenue in support of the

finding that consultancy services were obtained from foreign consultants. Consultancy means giving some sort of consultation de hors the performance or the execution of any work. In the present case each of the attorneys executed and performed functions relating to preparing, filing and prosecuting patent and trademark applications in their respective jurisdictions. No advice or opinion was made available to the assessee or to its clients. There is no evidence to this effect. Further, the assessee rendered services to its clients and not to its principals as held by the AO. The relationship between the assessee and the clients is on principal to principal basis and not principal and agent. The assessee charges its clients for all professional activities on a case to case basis and the charges depend on the services obtained by its clients. The AO did not even appreciate the relationship between the assessee and its clients. In any event taxes have been deducted by the clients of the assessee in respect of payments made to the assessee paid towards amounts paid to the assessee in India for the services rendered by the assessee to its clients. For effective rendering of services in India, the assessee has availed technical services of experts who are non-residents. There is no dispute that services were availed from IPR law professionals in different countries. The AO has failed to appreciate that all inventions for which protections were sought in different countries were made by the client of the assessee and the details of the inventions were captured in the form of technical specification by the clients of the assessee which were prepared in India by the client of the assessee. All documents were prepared and sent to foreign attorneys for filling in prescribed forms and taking all procedural steps and filing applications at their respective IP offices. Therefore the services availed was only limited to standard procedural and professional work which a patent attorney does on a day to day basis and such work did not involve rendering any consultancy or advise to the assessee or to its clients. The instructions of the clients of the assessee were followed by the foreign attorneys.

13. Ld. Counsel further explained that the AO termed the services as technical services without giving any finding in which case which specific act of the foreign attorney was found by the AO as amounting to rendering technical services or consultancy services. The AO failed to appreciate that the assessee is a IP law firm practicing in India under the various IPR laws in India and it does not require consultancy or other technical services from a foreign law firm to practice the Indian

laws sitting in India. It did not even strike to the AO as to why an Indian lawyer should seek consultancy from a foreign lawyer so as to use such advice in India in its business. Not one single transaction has been cited which goes to show that the assessee utilized in India consultancy and technical services received from foreign law firm. No such evidence is placed in the proceedings before Tribunal. Insofar as the well settled law is concerned what was material to be determined by the AO from the facts of the case as to whether the services were technical or consultancy services and whether such services were utilized or was for utilization within India. The AO wholly ignored the fact that the foreign attorneys were given Power of Attorney by the clients of the assessee and all applications in the foreign countries were made in the name of the clients of the assesses. The assessee acted merely as a facilitator.

14. Ld. Counsel also stated that the revenue's view on this issue from the very beginning is that assessee is not liable to TDS for the reason that certificates for non deduction of tax was obtained by assessee under old law and even new law and in turn revenue had granted non deduction certificate. From this, it is clear that the revenue i.e. International Taxation after considering the representation and after application of mind arrived at a considered opinion and such opinion is of relevance for the purpose of the nature of the services which is relevant for the purpose of Section 9 (1) (vii) of the Act to determine,

> *"Whether services rendered amount to fees for technical services within meaning of Section 9 (1) (vii) of the Act in the given facts and circumstances of the case"*

Accordingly, Ld. Counsel Sh. Khaitan finally closed the arguments.

15. We have heard rival submissions and gone through facts and circumstances of the case. We have also gone through elaborate arguments of Ld. Senior Advocate and also gone through assessee's papers and documents and case records. First we will deal with the argument of Ld. Counsel Sh. Khaitan, that the amended law effective May 8, 2010 will not be applicable in the present case inasmuch as the orders relate to Assessment Years 2006-2007, 2008-09 and 2009-2010 and the Law was amended after the assessment years in question. The law in this regard is already clearly laid down by the High Court and also by coordinate Bench of ITAT. We find that the case law of Hon'ble Delhi High Court in the case of CIT v Angelique International Ltd (2013) 359 ITR 9 (Delhi), wherein dismissing the appeal of revenue that by circular

No.23 of 23.07.1969, No. 163 of 29.05.1975 and No. 786 of 07.02.2000, it was clarified that payments in the form of commission or discount to a foreign party were not chargeable to tax in India u/s. 9(1)(vii) of the Act. These circulars were withdrawn by Circular No. 7 of 2009. Circular No. 7 of 2009 cannot be classified as explaining or clarifying the earlier circulars issued in 1969 and 2000. According to Hon'ble High court it did not have retrospective effect and accordingly, in the relevant accounting year tax did not have to be deducted. Hon'ble High court held as under:

> *"8. Referring to this decision, in Catholic Syrian Bank Limited versus Commissioner of Income Tax, (2012) 3 SCC 784, it has been observed that the Central Board of Direct Taxes has statutory right to issue circulars under Section 119 of the Act to explain or tone down the rigours of law and to ensure fair enforcement of the provisions. Circulars issued have force of law and are binding of the Income Tax authorities though they cannot be enforced adversely against the assessee. Normally these circulars cannot be ignored. Thus a circular may not override or detract from the provisions of the Act but can seek to mitigate the rigour of a particular provision for the benefit of an assessee in specified circumstances.*
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> *9. First circular in question had been in force for a long time, from 1969. The Board may have withdrawn this circular and other circulars vide Circular No. 7 dated 22nd October, 2009 but the said withdrawal cannot be retrospective. Circular No. 7 of 2009 cannot be classified as explaining or clarifying the earlier circulars issued in 1969 and 2000. This assertion in the assessment order is far-fetched and does not merit acceptance. Circular No. 7 does not clarify the earlier circulars but withdraws them. This is obvious and apparent. Circulars in force in the relevant assessment year have to be taken into consideration and should not be ignored.*
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> *10. So long as the circulars were in force, it aided in uniform and proper administration and application of the provisions of the Act. Read in this manner, we do not think the respondent-assessee was in default and had failed to deduct at source, though it was mandated and required. The respondent was entitled to rely upon the circulars. In light of the judgments of the Supreme Court in CIT versus Eli Lilly Company (India) Private Limited, (2009) 312 ITR 225 (SC) and G.E India Technologies Centre Private Limited versus CIT, (2010) 327 ITR 456 (SC), once the income was not exigible or chargeable to tax, TDS was not required to be deducted. Money paid to the third parties, who did not have any office or permanent establishment in India, was exempt and not chargeable to tax. Thus on the said payments or income, TDS was not required to be deducted. We also note that the payments in question were made prior to circular No. 7/2009. On this aspect, there is no dispute. We, therefore, do not find any reason to interfere with the order passed by the tribunal deleting the addition made by the Assessing Officer under Section 40(a)(i) of the Act. The appeal, being devoid of merit, is dismissed."*

16. Similarly, coordinate bench of ITAT, Agra in the case of DCIT Vs. Virola International (2014) 147 ITD 519 (Agra) has considered the similar issue and held as under:

> *"6. Hon'ble Supreme Court, in the case of Ishikawajima Harima Heavy Industries Ltd Vs DIT (288 ITR 408), had held that in order to bring a fees for technical*

services to taxability in India, not only that such services should be utilized in India but these services should also be rendered in India. Analyzing this legal position, Hon'ble Bombay High Court has, in the case of Clifford Chance Vs DCIT (318 ITR 237), observed as follows: "The apex Court had occasion to consider the above question in the case of Ishikawajma-Harima Heavy Industries Ltd. vs. Director of IT (2007) 288 ITR 408 (SC), wherein, while interpreting the provisions of s. 9(1)(vii)(c) of the Act, the Supreme Court held as under (p. 444): 'Sec. 9(1)(vii)(c) of the Act states that '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 any income from any source of India'.' Reading the provision in its plain sense, as per the apex Court it requires two conditions to be met—the services which are the source of the income that is sought to be taxed, has to be rendered in India, as well as utilized in India, to be taxable in India. Both the above conditions have to be satisfied simultaneously. Thus for a non-resident to be taxed on income for services, such a service needs to be rendered within India, and has to be part of a business or profession carried on by such person in India. In the above judgment, the apex Court observed that (p. 444) : 'Sec. 9(1)(vii) of the Act must be read with s. 5 thereof, which takes within its purview the territorial nexus on the basis whereof tax is required to be levied, namely, (a) resident; and (b) receipt of accrual of income'. According to the apex Court, the global income of a resident although is subjected to tax, the global income of a non-resident may not be. The answer to the question would depend upon the nature of the contract and the provisions of the DTAA. What is relevant is receipt or accrual of income, as would be evident from a plain reading of s. 5(2) of the Act subject to the compliance with 90 days rule.' As per the above judgment of the apex Court, the interpretation with reference to the nexus to tax territories also assumes significance. Territorial nexus for the purpose of determining the tax liability is an internationally accepted principle. An endeavour should, thus, be made to construe the taxability of a non-resident in respect of income derived by it. Having regard to the internationally accepted principle and the DTAA, no extended meaning can be given to the words 'income deemed to accrue or arise in India' as expressed in s. 9 of the Act. Sec. 9 incorporates various heads of income on which tax is sought to be levied by the Republic of India. Whatever is payable by a resident to a non-resident by way of fees for services, thus, would not always come within the purview of s. 9(1)(vii) of the Act. It must have sufficient territorial nexus with India so as to furnish a basis for imposition of tax. Whereas a resident would come within the purview of s. 9(1)(vii) of the Act, a non-resident would not, as services of a non-resident to a resident utilized in India may not have much relevance in determining whether the income of the non-resident accrues or arises in India. It must have a direct link between the services rendered in India. When such a link is established, the same may again be subjected to any relief under the DTAA. A distinction may also be made between rendition of services and utilization thereof. With the above understanding of law laid down by the apex Court, if one turns to the facts of the case in hand and examines them on the touchstone, s. 9(1)(vii)(c) which clearly states..... '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 any income from any source in India'. It is thus, evident that s. 9(1)(vii)(c), read in its plain, envisages the fulfilment of two conditions : services, which are source of income sought to be taxed in India must be (i) utilized in India, and (ii) rendered in India. In the present case, both these conditions have not been satisfied simultaneously."

7. The law laid down by Hon'ble Supreme Court, in the case of Ishikawajma-Harima Heavy Industries Ltd. vs. Director of Income Tax (supra), binds everyone under Article 141 of the Constitution of India. The legal position thus was that unless the services are rendered in India, the same cannot be brought to tax as

'fees for technical services' under Section 9. However, this legal position did undergo a change when Finance Act 2010 received assent of the President of India on 8th May 2010. Explaining the scope of this amendment, a coordinate bench of this Tribunal, in the case of Ashapura Minichem Ltd Vs ADIT (131 TTJ 291), has explained thus: ……(this legal position) does no longer hold good in view of retrospective amendment w.e.f. 1st June, 1976 in s. 9 brought out by the Finance Act, 2010. Under the amended Explanation to s. 9(1), as it exists on the statute now, it is specifically stated that the income of the non-resident shall be deemed to accrue or arise in India under cl. (v) or cl. (vi) or cl. (vii) of s. 9(1), and shall be included in his total income, whether or not (a) the nonresident has a residence or place of business or business connection in India; or (b) the non-resident has rendered services in India. It is thus no longer necessary that, in order to attract taxability in India, the services must also be rendered in India. As the law stands now, utilization of these services in India is enough to attract its taxability in India. To that effect, recent amendment in the statute has virtually negated the judicial precedents supporting the proposition that rendition of services in India is a sine qua non for its taxability in India.

8. It is thus clear that till 8th May 2010, the prevailing legal position was that unless the technical services were rendered in India, the fees for such services could not be brought to tax under Section 9(1)(vii). The law amended was undoubtedly retrospective in nature but so far as tax withholding liability is concerned, it depends on the law as it existed at the point of time when payments, from which taxes ought to have been withheld, were made. The tax deductor cannot be expected to have clairvoyance of knowing how the law will change in future. A retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability, with retrospective effect. The tax withholding obligations from payments to non-residents, as set out in Section 195, require that the person making the payment "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". When these obligations are to be discharged at the point of time when payment is made or credited, whichever is earlier, such obligations can only be discharged in the light of the law as it stands that point of time. Section 40(a)(i) provides that, inter alia, notwithstanding anything to the contrary in sections 30 to 38, any amount payable outside India, or payable in India to a non-resident, shall not be deducted in computing the income chargeable under the head 'profits and gains of business or profession' "on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted". The disallowance under section 40(a)(i) is not for the payments made to non-residents, which are taxable in India, but for the payments on which tax was deductible at source but tax has not been deducted, and such deductibility of tax at source, as we have discussed above, has to be in the light of the legal position as it stood at the point of time when payment was made or credited- whichever is earlier . Clearly, therefore, the disallowance under section 40(a)(i) can come into play only when the assessee had an obligation to deduct tax at source from payments to non-residents, and the assessee fails to comply with such an obligation. In view of these discussions, so far as payments made before 8th May 2010 are concerned, the assessee did not have any tax withholding liabilities from foreign remittances for fees for technical services unless such services were rendered in India, and a fortiori no disallowance can be made under section 40(a)(i) for assessee's failure to deduct tax at source from such payments.

9. In the case before us, there is no material whatsoever to demonstrate and establish that the design and development services, for which impugned payments were made, were rendered in India. Therefore, the assessee did not have any

liability under section 195 r.w.s. 9(1)(vii) to deduct tax at source from these payments. Once we come to the conclusion that the assessee did not have any obligation to deduct tax at source from these payments, in the light of the above discussions and as corollary thereto, no disallowance can be made in respect of these payments. As we have come to these conclusions in the light of the provisions of the domestic law, i.e. Income Tax Act, itself, there is no need to deal with the taxability of incomes embedded in these payments under the provisions of the applicable tax treaties. That would be relevant with respect to taxability of these payments in the hands of the recipients, but, for the reasons set out above and in the light of the legal position discussed above, will be academic in the present context. As regards learned Departmental Representative vehement reliance on a decision of Chennai A bench of this Tribunal in the case of ACIT Vs Evolv Clothing Pvt Ltd [(2013) 33 taxmann.com 309] wherein on the basis of taxability of income alone, the coordinate bench has confirmed the disallowance under section 40(a)(i), we can only say that a decision cannot be an authority for a legal question which has not been dealt with in that decision, or not having been raise d in that case.

10. In view of these discussions, as also bearing in mind entirety of the case, we uphold the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter. As we have decided this appeal on this short legal point regarding scope of section 40(a)(i) r.w.s section 195, we see no need to deal with other erudite contentions of the parties as also findings of the learned CIT(A), which, given our adjudication on this legal issue, are now rendered academic in the present context."

17. It is thus clear that till 8th May 2010, the prevailing legal position was that unless the technical services were rendered in India, the fees for such services could not be brought to tax under Section 9(1)(vii) of the Act. The law amended was undoubtedly retrospective in nature but so far as tax withholding liability is concerned, it depends on the law as it existed at the point of time when payments, from which taxes ought to have been withheld, were made. The tax deductor is not expected to know how the law will change in future. A retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability, with retrospective effect. The tax withholding obligations from payments to non-residents, as set out in Section 195 of the Act, require that the person making the payment *"at the time of credit of such income to the account 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".* When these obligations are to be charged at the point of time when payment is made or credited, whichever is earlier, such obligations can only be discharged in the light of the law as it stands that point of time. Section 40(a)(i) of the Act provides that inter alia, notwithstanding anything to the contrary in sections 30 to 38 of the Act, any amount payable outside India, or payable in India to a non-resident,

shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession" on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted.

18. In the present case Ld. Counsel for the assessee argued that the assessee cannot be held to be liable to deduct tax at source relying on the subsequent amendments made in the Act with retrospective effect. In this case, Explanations to sec. 9(2) was inserted by the Finance Act, 2010 with retrospective effect from 1.6.1976 and it was impossible for the assessee to deduct tax in the financial year 2005-06, 2007-08 &2008-09, when as per the relevant legal position prevalent in these financial years, the obligation to deduct tax was not on the assessee. He based his argument on the legal Maxim lex non cogit ad impossiblia meaning thereby that the law cannot possibly compel a person to do something which is impossible to perform and relied on the decision of Hon'ble Supreme Court in the case of Krishnaswamy S. Pd v. Union of India (2006) 281 ITR 305, wherein the said legal Maxim was accepted by the Hon'ble Supreme court.

19. This view is even taken by the revenue authorities, on this issue, from the very beginning that assessee is not liable to TDS for the reason that Certificates of Non Deduction Of Tax At Source u/s 197(1) of the Act was obtained by assessee under old law and even new law. He stated that under old law, in order to confirm that its understanding and interpretation of the relevant provisions of the Act was correct, the assessee made an applications dated 06.05.2009 and 08.06.2009 before the ITO-2(1), International Taxation-Kolkata for the issuance of certificate for Non- Deduction Of Tax At Source with respect to remittances in respect of professional services rendered by a law firm in the UK. The ITO of the International Taxation-2(1), Kolkata passed an order dated 16.06. 2009 in which the relevant passages read as under:-

> *"Please refer to your petitions dated 06.05.2009 and 08.06.2009 requesting for authorization to remit a sum of Euro 7,541.33 towards professional fees to Harrison Goddard Foote of UK.*
> *You are, hereby, authorized to remit the said sum of Euro 7,541.33 to Harrison Goddard Foote of UK without deduction of tax at source."*

Under the amended law, assessee made an application dated 30.06.2010 before ITO-2(1), International Taxation, Kolkata for issuance of certificate for Non Deduction Of Tax At Source with respect to remittances in various foreign countries such as USA,

Pakistan, Lebanon, Argentina, Germany. The Asst. Director of IT-2(1), International Taxation, Kolkata heard submissions of the assessee and passed an order dated 09.09.2010, which read as under:-

> *"On prima facie examination of your application and the submission made thereafter it appears that services rendered are for legal and professional services. Hence, you are hereby authorized to remit the said amount as legal fees without deduction of tax at source u/s. 195 of the I. T. Act, 1961".*

From the above it is clear that the revenue i.e. International Taxation after considering the representation and after application of mind arrived at a considered opinion and such opinion is of relevance for the purpose of the nature of the services which is relevant for the purpose of Section 9 (1) (vii) of the Act to determine under the un amended law before 08.05.2010.

20. From the above facts and circumstances of the case and also precedents cited above, we are of the view that till amendment in explanation to sec. 9(2) of the Act, the prevailing legal position was that unless the technical services were rendered in India, the fees for such services could not be brought to tax under Section 9(1)(vii) of the Act. The law amended was undoubtedly retrospective in nature but so far as tax withholding liability is concerned, it depends on the law as it existed at the point of time when payments, from which taxes ought to have been withheld, were made. The tax deductor is not expected to know how the law will change in future. A retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability, with retrospective effect. The tax withholding obligations from payments to non-residents, as set out in Section 195 of the Act, require that the person making the payment *"at the time of credit of such income to the account 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".* When these obligations are to be charged at the point of time when payment is made or credited, whichever is earlier, such obligations can only be discharged in the light of the law as it stands that point of time. Section 40(a)(i) of the Act provides that inter alia, notwithstanding anything to the contrary in sections 30 to 38 of the Act, any amount payable outside India, or payable in India to a non-resident, shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession" on

which tax is deductible at source under Chapter XVII-B and such tax has not been deducted. Accordingly, the assessee cannot be faulted for not deducting TDS and consequently, the deletion of disallowance by CIT(A) is confirmed. This common issue of all the three appeals of revenue is dismissed.

21. In the result, the appeals of revenue are dismissed.

22. Order is pronounced in the open court on 27.11.2015

Sd/-	Sd/-
(M. Balaganesh)	(Mahavir Singh)
Accountant Member	Judicial Member

Dated: 27th November, 2015

Jd. Sr. P.S

Copy of the order forwarded to:

1. APPELLANT –DCIT/ACIT, Cir-52, Kolkata.
2. Respondent – Shri Subhotosh Majumder, S. Majumder & Co., 5, Harish Mukherjee Road, Kolkata-700025.
3. The CIT(A), Kolkata
4. CIT Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.