आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री चंद्र पूजारी, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.774/Mds/2014**
निर्धारण वर्ष / Assessment Year :2008-09
&
आयकर अपील सं./**ITA No.641/Mds/2015**
निर्धारण वर्ष / Assessment Year : 2009-10

Foster Wheeler France S.A., C/o SRBC & Associates LLP, 6th & 7th floor, "A" Block, Tidel Park, No.4, Rajiv Gandhi Salai, Taramani, Chennai - 600 113.	v.	The Dy. Director of Income-tax, International Taxation -1, Chennai Chennai - 600 034.
PAN : AABCF 3849 C (अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Sh. B. Ramakrishnan, C.A.
प्रत्यर्थी की ओर से/Respondent by : Sh. Pathlavath Peerya, CIT

सुनवाई की तारीख/Date of Hearing : 18.01.2016
घोषणा की तारीख/Date of Pronouncement : 05.02.2016

आदेश /O R D E R

PER N.R.S. GANESAN, JUDICIAL MEMBER:

Both the appeals of the assessee are directed against the respective orders of the Assessing Officer, consequent to the direction of the Dispute Resolution Panel, pertaining to assessment

years 2008-09 and 2009-10. Since common issue arises for consideration in both the appeals, we heard these appeals together and disposing of the same by this common order.

2. Sh. B. Ramakrishnan, the Ld. representative for the assessee, submitted that the assessee is a non-resident company incorporated in France. According to the Ld. representative, the assessee-company entered into an agreement for providing technical and engineering services in India. During the assessment years 2008-09 and 2009-10, the employees of the assessee worked more than 180 days. The Ld. representative further submitted that the assessee entered into an agreement with Reliance Petroleum Limited for providing technical and engineering services with regard to delayed Coker Unit of Reliance Petroleum Limited. According to the Ld. representative, the entire services rendered at the premises of Reliance Petroleum Limited. For providing technical and engineering services to Reliance Petroleum Limited, the assessee in turn entered into another agreement with Foster Wheeler USA to monitor and review the work done by the assessee's employees on an agreed consideration. The Ld. representative further submitted that the matter was referred to the Transfer Pricing Officer. The

Transfer Pricing Officer found that there was no requirement for any adjustment with regard to above said transaction. The Assessing Officer passed the draft assessment order by disallowing the payment made to Foster Wheeler USA Corporation to the extent of ₹3,34,99,151/- and ₹14,94,99,978/- under Section 40(a)(i) of the Income-tax Act, 1961 (in short 'the Act') for the assessment years 2008-09 and 2009-10 respectively. The assessee explained before the Assessing Officer that the assessee is not liable to deduct tax in view of the Double Taxation Avoidance Agreement between United States of America and India. Referring to the nature of work to be performed by Foster Wheeler USA Corporation, the Ld. representative submitted that sharing of best practices in engineering services in the form of written procedure, forms, specifications and details does not mean that technical knowledge has been made available to the assessee. Merely because certain procedures were given to the assessee in the form of documentation it does not mean that the assessee could apply such procedures in future without the aid of Foster Wheeler USA Corporation. Referring to Section 195 of the Act, the Ld. representative submitted that when the profit earned on a transaction was chargeable to income-tax, the assessee required to

deduct tax under Section 195 of the Act. Referring to Explanation 2 to Section 9(1)(vii) of the Act, the Ld. representative submitted that the consideration paid for rendering managerial, technical or consultancy service has to be construed as fee for technical services. Referring to Double Taxation Avoidance Agreement, the Ld. representative submitted that unless the technical knowledge, expertise, skill, knowhow or process, etc. were made available to the assessee and the assessee could independently apply such technical knowledge, expertise, knowhow, etc. in future, the payment made by the assessee cannot be construed as fee for technical service. According to the Ld. representative, the key difference between the definition of "fee for technical services" in Indian Income-tax Act and Double Taxation Avoidance Agreement is that the technical knowledge, expertise, skill, etc. should be made available to the assessee. If such technical knowledge and skill are not available to the assessee, then the payment made by the assessee is not fee for technical services.

3. The Ld. representative further submitted that the services are said to be made available to the assessee only when the person acquiring the technical service is able to independently apply such

knowledge without any further reference to the service provider. Referring to the word “enable” used in Double Taxation Avoidance Agreement, the Ld. representative submitted that the technical service received by the assessee should make the assessee master in the subject. The Ld. representative further submitted that when the assessee does not get equipped with knowledge or expertise, it cannot be said that the knowledge or expertise was made available to the assessee by the service provider. In such a case it cannot be said that technical service was made available to the assessee.

4. The Ld. representative for the assessee placed his reliance on the judgment of Karnataka High Court in CIT v. Dee Beers India Minerals (P) Ltd. (346 ITR 467) and submitted that Karnataka High Court interpreted the word “make available”. The Ld. representative submitted that if the technical knowledge is not made available to the assessee along with technical service, this cannot be considered that technical service was made available. Therefore, it would not fall within the definition of “technical service” as provided in Double Taxation Avoidance Agreement. Therefore, the payment made by the assessee is not liable for taxation.

5. Referring to judgment of Delhi High Court in Guy Carpenter & Co. Limited (ITA No.202/2012), the Ld. representative submitted that once technical knowledge was not made available to the assessee, it cannot be construed as fee for technical service. The Ld. representative has also placed his reliance on the decision of Pune Bench of this Tribunal in Sandvik Australia Pty. Ltd. v. DDIT (ITA No.93/PN/2011) and submitted that at the best, the assessee can be said to have been provided back-up services. The Ld. representative has also placed his reliance on the decision of Authority for Advance Ruling in Ernst & Young (P) Ltd. [2010-TIOL-18-ARA-IT] and also on the decision of Mumbai Bench of this Tribunal in Mahindra and Mahindra Ltd. v. DCIT (313 ITR 263). The Ld. representative has also placed reliance on various other decisions and submitted that when technical knowledge is transferred through technical service, then alone the payment is considered as fee for technical services and liable for taxation in India. When the assessee was not made available any technical knowledge or expertise of Foster Wheeler USA so that the assessee could perform its function independently in future, it cannot be said that what was paid by the assessee is fee for technical service. Hence, according to the Ld. representative, in

view of the Double Taxation Avoidance Agreement, the payment made by the assessee cannot be construed as fee for technical services. Therefore, the assessee is not liable to deduct tax in respect of the payment made to Foster Wheeler USA.

6. Referring to levy of interest under Section 234A and 234B of the Act, the Ld. representative for the assessee submitted that the assessee being a non-resident taxes on income chargeable have to be deducted at source. Therefore, the tax on income will be NIL after reducing the tax deducted at source. Therefore, the provisions of Section 234A of the Act will not be applicable. Referring to Section 234B of the Act, the Ld. representative submitted that since the taxes on income chargeable to tax have to be deducted at source, there is no requirement to pay advance tax. Hence interest under Sections 234A and 234B cannot be levied. The Ld. representative placed his reliance on the judgment of Madras High Court in CIT v. Madras Fertilizers Limited (149 ITR 703).

7. On the contrary, Sh. Pathlavath Peerya, the Ld. Departmental Representative, submitted that “fee for technical service”is defined in Indian Income-tax Act and in Double Taxation Avoidance Agreement between India and USA. The assessee can

take advantage of Double Taxation Avoidance Agreement in case it is beneficial to it. Double Taxation Avoidance Agreement admittedly clarifies that the technical knowledge or expertise shall be made available to the assessee for considering payment as fee for technical service. The question arises for consideration is whether the payment made by the assessee to Foster Wheeler France USA is taxable in India or not? Referring to Explanation 2 to Section 9(1)(vii) of the Act, the Ld. D.R. submitted that when the assessee paid fee for technical service for utilizing service in the business or profession carried on in India for the purpose of earning income, then it is deemed that the recipient-company earned income from India. The Ld. D.R. placed his reliance in Section 9(1)(vii) of the Act. In this case, according to the Ld. D.R., the assessee received services from Foster Wheeler USA and utilized the same in the business carried on by the assessee in India. Therefore, the payment made by the assessee to Foster Wheeler France USA has to be construed as fee for technical service and the income accrued to Foster Wheeler France S.A in India. Hence, the income is taxable in India. The assessee is liable to deduct tax under Section 195 of the Act on the payment made to Foster Wheeler France USA.

8. Now coming Double Taxation Avoidance Agreement between India and USA, the Ld. D.R. pointed out that in order to classify a service as “technical service”, the expertise, skill or knowledge shall be made available to the assessee. In this case, according to the Ld. D.R., the assessee is executing engineering projects for Reliance Petroleum Limited. The assessee received best practices in different engineering specifications as well as engineering details to be adopted in execution of the different phases of the project. The engineering specifications, services, which are the best in the world, were being provided to the assessee by its USA associate. When the assessee-company completes projects with Reliance Petroleum Limited, the assessee would be well equipped and capable of executing identical project in engineering in respect of the details and skill, expertise and information provided by USA associate. According to the Ld. D.R., without the help of Foster Wheeler USA, the assessee-company can provide similar service in future to other companies including Reliance Petroleum Limited. Therefore, what was received by the assessee is not only technical services but also the technical knowledge, expertise and knowhow was made available to the

assessee by Foster Wheeler USA. Once the technical knowledge, expertise, knowhow were made available to the assessee, according to the Ld. D.R., even under Double Taxation Avoidance Agreement, the payment made by the assessee to Foster Wheeler USA has to be construed as fee for technical services. Therefore, according to the Ld. D.R., income accrued to Foster Wheeler USA is taxable in India. Hence, the assessee has to necessarily deduct tax under Section 195 of the Act. Since tax was not deducted, the Assessing Officer has rightly disallowed under Section 40(a)(i) of the Act and levied interest under Sections 234A and 234B of the Act.

9. We have considered the rival submissions on either side and perused the relevant material on record. The assessee, a non-resident company incorporated in France, entered into an agreement with Reliance Petroleum Limited for providing technical, engineering services in the premises of Reliance Petroleum Limited in relation to delayed Coker Unit. For providing such services, the assessee-company has entered into another agreement with Foster Wheeler USA, an associate of the assessee-company. The assessee paid ₹ 3,34,99,151/- for the assessment year 2008-09 and

₹ 14,94,99,978/- for the assessment year 2009-10 with regard to services rendered by Foster Wheeler USA, the associate concern of the assessee. The Assessing Officer referred the matter to the Transfer Pricing Officer under Section 92CA(1) of the Act to determine Arm's Length Price of the transaction between the assessee and Foster Wheeler USA. The Transfer Pricing Officer reported that no adjustment is considered necessary to the value of the international transaction entered into between the assessee and Foster Wheeler USA. Therefore, the Assessing Officer has not made any adjustment with regard to transaction between the assessee and Foster Wheeler USA, an associate concern at USA. While passing draft assessment order, the Assessing Officer found that the payment made by the assessee to the associate concern at USA was liable for deduction of tax at source under Section 195 of the Act. Since tax was not deducted, the Assessing Officer disallowed the entire payment made to Foster Wheeler USA, the associate concern by applying provisions of Section 40(a)(i) of the Act. On the objection filed by the assessee with regard to disallowance made under Section 40(a)(i) of the Act, the matter was referred to Dispute Resolution Panel. The main contention of the assessee was that Foster Wheeler USA, the associate concern has

not made available any technical knowledge, expertise, knowhow to the assessee. Therefore, the payment made by the assessee cannot be construed as fee for technical services under Double Taxation Avoidance Agreement between India and USA. Therefore, the recipient-company, namely, Foster Wheeler France S.A is not liable to be taxed in India. Consequently, no tax needs to be deducted by the assessee. Hence, there cannot be any disallowance under Section 40(a)(i) of the Act. To appreciate the contention of the assessee, let's first examine whether the payment made by the assessee is liable for taxation under the Indian Income-tax Act. We have carefully gone through the provisions of Section 9(1)(vii) of the Act which reads as follows:-

> " 9(1)(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 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 recepient or consideration which would be income of the recipient chargeable under the head "Salaries".”

We have also carefully gone through Explanation 2 to Section 9(1) of the Act, which reads as follows:-

“*Explanation* — For the removal of doubts, it is hereby declared that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident,-

(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident ; or

(b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident ; or

(c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents

controlling, controlled by, or subject to the same common control, as that non-resident :"

11. A bare reading of Explanation 2 to Section 9(1)(vii) and Explanation 2 to Section 9(1) clearly says that the payment made by the assessee with regard to managerial, technical and consultancy services is liable to be taxed in India since the services are utilized in the business for earning income in India. Therefore, this Tribunal is of the considered opinion that the income accrued to Foster Wheeler USA, an associate concern of the assessee in India is liable for taxation under the Indian Income-tax Act.

12. Let's now examine the Double Taxation Avoidance Agreement between India and USA. Under the Double Taxation Avoidance Agreement, the beneficial clause is used by invoking the concept of "make available". Therefore, to consider the payment of fee for technical services, the technical knowledge, expertise or knowhow shall be made available to the assessee. The question now arises for consideration is whether the technical knowhow, expertise, etc. were made available to the assessee by Foster Wheeler USA, the associate concern in USA.

13. We have carefully gone through the service rendered by Foster Wheeler USA. For the purpose of convenience, we are reproducing the service rendered by Foster Wheeler USA, the associate concern in USA, as reproduced by the Dispute Resolution Panel.

> "(1) Engineering Support Service in the nature of Sit Engineering, Structural Engineering, Soil Engineering, Architectural Engineering, Mechanical Engineering, Project Engineering, Electrical Engineering, Heat Transfer Engineering, Vessel Engineering, Piping Engineering, Control System Engineering, Design Technology Engineers, Materials Handling Engineers and Document Control Engineers.
>
> The services in the nature of
>
> Review and/or tracking execution plans and schedules with emphasis on key milestones.
>
> Sharing best practices in the engineering services in the form of written practices, procedures, forms, specifications and details.
>
> Review of information regarding technical reports, technical standards and quality management standards.
>
> Review and provide systems for meeting the project budget and client satisfaction.
>
> Review the work process and provide timely input for planned execution.
>
> Review of standards and job specifications indicating technical content.

(2) Information Technology (IT) Services in the nature of computer software, hardware, help desk, support services for email and engineering software applications, Remote Infrastructure Management, Application maintenance, Custom application development, Systems Integration, package software implementation and support, IT & Management consulting."

14. It is an admitted position that the assessee-company also engaged in the business of engineering and construction contract, engineering equipment and power equipment supplier. For the purpose of carrying out the business in India, the assessee received the above services from Foster Wheeler USA. In fact, the assessee has received execution plans with schedules, specifications, etc. Foster Wheeler USA reviewed the working of the assessee in respect of its plans, execution and also provided time schedule with emphasis on key milestones. The assessee has also received systems for meeting the project budget and client satisfaction. The job specification was also given by the foreign company Foster Wheeler USA.

15. Let's examine whether Foster Wheeler USA, the associate company in USA, has made its technical knowledge, expertise, knowhow to the assessee-company in the course of its business activity. The assessee claims that the technical knowhow and expertise were not made available to the assessee. The Ld.counsel

for the assessee has placed reliance on various judgments of the High Courts and decisions of this Tribunal. The majority of the judgments cited by the Ld.counsel for the assessee was considered by Cochin Bench of this Tribunal in US Technology Resources Pvt. Ltd. v. ACIT in I.T.A. No.222/Coch/2013 dated 27.09.2013. On identical set of facts, the Cochin Bench of this Tribunal found that the foreign company made available the technical knowledge, experience, experimentation to the assessee-cy. In fact the Cochin Bench of this Tribunal has observed as follows:-

> "28. Now the assessee here is admittedly making use of the advice, input, experience, experimentation and assistance rendered by the USA company in the decision making process of management, financial and risk management, etc. It is nobody's case that the USA company is taking any decision on behalf of the assessee. On the basis of the input, advice, assistance and service provided by the USA company, the management decision is taken by the assessee company in India by selecting suitable solution after considering all the alternatives available. It is also to be remembered that the USA company is giving training to the assessee's employees in making use of the inputs, experience, experimentation, assistance and advice rendered by them for taking a better and possible decision in order to achieve the desired objectives / goal. Therefore, in the context of professional management and decision making process, the advice and service rendered by the USA company which was made use by the assessee in managerial decision making process is in the nature of technical services which facilitate the assessee to take correct and suitable decision towards achievement of the desired objects and business goal. Therefore, it may not be correct to say that what was received by the assessee is only a managerial advice and not technical advice. The technological input acquired by the US

company through experience and experiment was tested at various stages and process and further it was made available to the assessee so as to enable the assessee to apply / use the same in its decision making process.

29. Apart from that financial and risk decision making process is a highly complicated and technical one. Unless the assessee gets a technical input and advice from financial and risk management experts it may be difficult to select a right process for the growth of the company. It is not the case of the assessee that in a given set of facts / problem, the USA company gave its solution or advice. The solution or decision is admittedly taken by the assessee company on the basis of the advice, service rendered by the USA company. Therefore, it is obvious that the technical knowledge, experience, skill possessed by the USA company with regard to financial and risk management was made available in the form of advice or service which was made use by the assessee company in the decision making process not only in management but also in financial matters. Another aspect is risk management service. Risk management service is a highly complicated one in the financial sector. Unless, the technical expertise and knowledge gained by the USA company is made available to the assessee company, they may not be able to analyse the situation to avoid risk in the business. It is also necessary to note that apart from providing the input, service and advice, the USA company is also providing training to the employees of the assessee company. Therefore, this Tribunal is of the considered opinion that the service of technical input, advice, expertise, etc. rendered by the USA company are technical in nature as provided in clause 4(b) of Article 12 of the DTAA.

30. We have carefully gone through the judgment of the Andhra Pradesh High Court in the case of GVK Industries Ltd (supra). In the case before the Andhra Pradesh High Court, the assessee company constructed and erected power generating station designed to operate using industrial gas as fuel near Rajamundri. The assessee company intended to utilize the expert service of qualified and experienced professional who would prepare a scheme for raising the finances and tie up the required loan. A non resident company offered its services as a financial advisor to the petitioner company's project.. The services offered by the non

resident company includes financial structure and security package to be offered to the lender, study of various lending alternatives for the local and foreign borrowings, making an assessment of export credit agencies world-wide and obtaining commercial bank support on the most competitive terms, assisting the petitioner-company in loan negotiations and documentation with lenders and structuring, negotiating and closing the financing for the project in a co-ordinated and expeditious manner. For its services the assessee company paid 0.75% of the total debt financing as "success fee". On the advice of the non-resident company at Zurich, the assessee approached the Indian finance institution for loan. The assessee also approached the International Finance Corporation, USA for a part of its foreign currency loan requirement. After successful rendering of service, the non resident Zurich company sent an invoice for payment of "success fee" to the extent of US$ 17,15,476.16 (Rs.5.4 crores). The assessee company approached the income-tax authorities in India for issuing a no objection certificate to remit the said amount claiming that the non resident company had no permanent establishment in India and all services were rendered from outside India. The Income-tax Officer refused to issue the certificate. On a writ petition before the High Court it was found that the scope of service / work undertaken by the non resident company was merely to draw up a scheme, advise on the terms and methods of negotiation and for documentation with the lender, evaluate the pros and cons of various lending alternatives, both for local and the foreign borrowings, prepare a preliminary information memorandum to be used as the basis for placing the foreign and local debt, and that the responsibility of entering into correspondence as per the advice of the non resident company and pursuing the matter was that of the assessee company itself, and not that of the non resident company. Therefore, the office of the assessee company could not be treated as the place of business of the non-resident company. In those facts and circumstances, the Andhra Pradesh High Court found that the business connection between the assessee company and non resident company had not been established. However, it was found that the "success fee" would fall within the definition of 9(1)(vii)(b) of the Act. The Andhra Pradesh High Court found that advice given to procure loan to strengthen finances would be as much a technical or consultancy

service, as it would be with regard to management, generation of power or plant and machinery. The "success fee" was chargeable under the provisions of the Income-tax Act, and therefore, the assessee was not entitled to no objection certificate.

31. During the course of hearing, the ld.counsel for the assessee was called upon to comment on the applicability of this judgment of the Andhra Pradesh High Court. The ld.counsel submitted that the Andhra Pradesh High Court had no occasion to consider the DTAA between India and USA. Therefore, the judgment of the Andhra Pradesh High Court is not applicable. No doubt, DTAA agreement between India and USA was not considered by the Andhra Pradesh High Court, but the ratio laid down by the Andhra Pradesh High Court clearly shows that advice given to procure loan to strengthen the finance would be managerial or technical or consultancy services for generation of power or plant and machinery. This finding of the Andhra Pradesh High Court is squarely applicable in respect of the service received by the assessee from USA company. Therefore, this Tribunal is of the considered opinion that advice / service said to be received by the assessee company from USA company is in the nature of technical or consultancy services within the meaning of clause (iv)(b) of Article 12 of DTAA.

32. We have also carefully gone through the judgment of the Karnataka High Court in the case of De Beers India Minerals Pvt Ltd (supra). In the case before the Karnataka High Court, the assessee engaged in the business of prospecting and mining for diamonds and other minerals. The assessee entered into an agreement with Netherland company to engage their services for conducting airborne survey for high quality, high resolution, geophysical data suitable for selecting kimberlite targets. For the technical services rendered by them the assessee had paid consideration as per the agreement. The assessing officer found that the payment made to Netherlands company was for technical services provided by them. Therefore, the assessee has to deduct tax on payments made to Netherlands company. However, the Commissioner (Appeals) found that the payment made by the assessee to the Netherlands company was not covered by Article 12(5) of the DTAA between India and Netherlands. He also found that the Netherlands company has not imported any technology to

the assessee and they have just used the technology and have gone back with the same. The CIT(A) further found that no technology has been made available to the assessee by the Netherlands company, therefore, the consideration paid does not fall within the definition of Article 12(5) between India and Netherlands. On further appeal by the revenue before the Tribunal it was held that the payment in question for services rendered would not fall within the definition of "fee for technical services" under Article 12(5) of the DTAA between India and Netherlands. The Tribunal found that Netherlands company has surveyed, collected and processed the data on behalf of the assessee. There is no doubt that Netherlands company performed the service using the technical knowledge and expertise, but such technical expertise, skill and knowledge has not been made available to the assessee. On those facts, the Karnataka High Court found that the assessee was not being possessed with technical know how to conduct the prospecting operation. The maps and photographs which were made available to the assessee cannot be considered as technology made available. Therefore, the question of Netherlands company transferring any technical plan or technical design does not arise in the facts of the case.

33. As observed by the Karnataka High Court, the Netherlands company surveyed the area, prepared plan and photographs which are made available to the assessee company locating the exact area for mining. In fact, the Netherlands company located the exact area where diamonds were available after analyzing the photograph and the assessee company has nothing to do except mining the earmarked area for excavating diamonds. In fact, the technology of locating the diamond by aerial survey was not given to the assessee company. Only, the result of the survey was furnished by the Netherland company. Therefore, it is not a case of making available any technical expertise. In fact, the decision was taken by the Netherlands company fixing the location for mining. In the case on our hand, the facts are entirely on different set of facts. The decision was not taken by the USA company. The USA company facilitated the assessee company for making decision in the managerial, financial and risk management system by providing their knowledge, expertise, experimentation to the assessee company. The entire experiment, knowledge, expertise was made available to the assessee and the assessee was facilitated to take a decision on

the knowledge, expertise, experimentation which were made available by the USA company. Therefore, this Tribunal is of the considered opinion that the judgment of the Karnataka High Court in the case of De Beers India Minerals Ltd (supra) may not be applicable to the facts of this case.

34. We have also carefully gone through the decision of the Mumbai Bench of this Tribunal in the case of Raymond Ltd (supra). In the case before the Mumbai Bench of this Tribunal the assessee engaged in manufacturing suiting, engineers' steel files and rasps and cement in India. With a view to muster funds it proposed to issue two types of Global Depository Receipts (GDRs) in the international market. The assessee company engaged a UK company as lead managers to the issue. The assessee paid necessary charges for the services rendered by the lead managers and the managers. However, no tax was deducted by the assessee company form the payment made to them. The assessing officer found that there was violation of the provisions of section 195(1) of the Act holding that the amounts paid to lead managers and managers were chargeable to tax in India as fees for technical services within the meaning of section 9(1)(vii) of the Act. The Appellate Commissioner also upheld the order of the assessing officer. On further appeal before the Mumbai Bench of this Tribunal, the Tribunal found that the services rendered by the lead managers and managers are managerial or consultancy services within the meaning of section 9(1)(vii) r.w.s. Explanation 2 of the Act and therefore the payment made to managers are income by way of fees for technical services deemed to accrue or arise in India. Referring to the DTAA between India and UK, the Tribunal found that no technical knowledge, experience, skill, know how or process, etc. was made available to the assessee company by the non resident managers to the Global Depository Receipts. However, considering the services rendered by the UK company, the Mumbai bench of this Tribunal found that the arrangement between the assessee and the managers of the Global Depository Receipt issued was for the purpose of engaging the service of the managers under the subscription agreement. The subscription agreement contained detailed clauses as to rights and liabilities of the assessee company and the managers. The Tribunal found that as per the agreement, the managers had undertaken to render service in connection with the issue of Global Depository

Receipts for which they are entitled for remuneration. The Tribunal found that the services of the managers for issue of Global Depository Receipt were utilized outside India for the purpose of carrying on its business in India. Since the arrangement is only for marketing the Global Depository Receipt outside India, the Tribunal found that the commission paid to UK company cannot be considered to be fee for technical service, therefore, there is no obligation on the part of the assessee to deduct tax u/s 195(1) of the Act. Therefore, it is obvious that only for marketing the GDR outside India, the service of managers are enjoyed. The decision to issue GDR was taken by Indian company without any assistance from managers. In the case before us, it is a clear case of using the technology, expertise of the foreign company in India for taking managerial, financial decision and risk management analysis. The expertise, analysis, technical knowledge supplied by the foreign company remains with the assessee for ever and it could be even used in future for the business of the assessee in the process of management decision, financial decision making and risk management analysis. Therefore, the decision of the Mumbai Bench of this Tribunal in the case of Raymond Ltd (supra) is also not applicable to the facts of the case.

35. We have also carefully gone through the decision of the Pune Bench of this Tribunal in the case of Sandvik Australia Pty Ltd (supra). The assessee, an Australian company provided I.T. support service to Indian group companies in Asia Pacific Region in order to achieve the consolidated and standardized I.T. environment in Sandvik group. The Tribunal, after considering the agreement between the parties found that the agreement provided only for back up services, I.T. support services for solving I.T. related problems in Indian subsidiary. The agreement with Sandvik Asia Ltd nowhere suggested that the assessee has to make available required technical know how for solving the problem in the I.T. related problems. In the case before us, the USA company has to provide all expertise to the assesee company which would be utilized in the decision making process related to management, financial and risk management. Therefore, this decision of the Pune Bench of this Tribunal may also not be applicable to the facts of the present case.

36. We have also carefully gone through the decision of the Mumbai Bench of this Tribunal in the case of Wokhardt Ltd (supra). In the case before the Mumbai Bench of this Tribunal, the assessee company was incorporated in USA and as per the agreement, the said company sent one of its professionals to India for a period of two days to address conference on future strategy of the company. The assessee company paid US$ 80,000 for the services rendered by the USA company and no tax was deducted. The Tribunal found that the presentation made by the professional was essential in the nature of sharing management, experience and business strategy. Therefore, the Tribunal found that the services rendered by US company could not be termed as technical services in nature. In the case before us, it is not a case of sharing of experience and business strategy. It is a case of providing technical information for taking managerial and financial decision. The assessee also used that technology, information and expertise of USA company in management risk analysis. The information and expertise made available to the assessee company was very much available with them and it can be used in future whenever the occasion arises. Apart from the employees of the assessee company was also trained by USA company. Therefore, this Tribunal is of the considered opinion that the decision of the Mumbai Bench of this Tribunal in the case of Wokhardt Ltd (supra) also may not be of any help to the assessee.

37. We have also carefully gone through the decision of the Authority for Advance Ruling in Intertek Testing Services India (P) Ltd (supra). The Authority for Advance Ruling considered the DTAA between India and UK and found that rendering of service and making use of service go together. It was found that rendering of service and making use of the service are two sides of the same coin. After considering the word "which" the Authority for Advance Ruling found that rendering technical or consultancy service is followed by relative pronoun "which" and it has the effect of qualifying the services. The service offered may be the product of intense technological effort and lot of technical knowledge and the experience of the service provider would have gone into it. The Authority for Advance Ruling found that the technical knowledge and the experience of the service provider should be imparted to and absorbed by the receiver, so that the receiver can deploy

> similar technology or techniques in future without depending on the provider. In this case also, the information, expertise and training provided by the USA company was absorbed by the assessee company in their decision making process and it was utilized for the purpose of business. The USA company made available all the technical data, information, expertise to the assessee company which was absorbed and made use of by the assessee company in their managerial and financial decision making process and other decision in the development of the business. Therefore, the expertise and technology which was made available by the USA company is technical service within the meaning of Article 12(4)(b) of the DTAA between India and USA. Hence, this ruling of the Authority for Advance Ruling may not of any assistance to the assessee."

16. We have also carefully gone through the judgment of the Karnataka High Court in Dee Beers India Minerals (P) Ltd. (supra). In fact, this judgment was also considered by the Cochin Bench of this Tribunal in the case of US Technology Resources Pvt. Ltd. In the case of Dee Beers India Minerals (P) Ltd. (supra), the assessee engaged in the business of mining for diamonds and other minerals. In the course of its business activity, the assessee before Karnataka High Court entered into an agreement with Nethrland company to engage its services in airborne survey for high quality, high resolution, geophysical data suitable for selecting the available minerals. The Netherland company gave data, maps and photographs by air borne survey and located the exact area for mining. On the basis of survey made by Netherland company, the

assessee excavated the mines. In the case before Karnataka High Court, the technology of locating the diamonds by air borne survey was not given to the assessee. Only the result of the survey was furnished by the Netherland company. In the case before us, the foreign company reviewed the execution plans, emphasis on key milestones, provided the best practices available in the form of written procedures and specifications and details When the procedures and specifications are provided to the assessee, which is also a specialized company in engineering and execution of construction, this Tribunal is of the considered opinion that the specifications and details provided by foreign company can very well be used in the business of engineering and construction. It is not a case of air borne survey or providing guidelines for locating or identifying the potential area to locate centres which could not be done by the assessee. It is a case of providing specifications and details, execution of engineering and construction contract. These specifications and procedures made available to the assessee by foreign company can very well be used by the assessee-company for execution of other projects also. But, in the case before Karnataka High Court the air borne survey done by the Netherland company can be used for locating diamonds and other minerals and

technology adopted by the Netherland company for locating the diamonds and other minerals was not transferred. Locating diamonds cannot be done by the assessee-company independently. The assessee-company before the Karnataka High Court is expertise only in excavation and not in performing air borne survey or locating the availability of the minerals. In this case, the assessee is also an expertise company in engineering and construction works. Therefore, when the specifications and other procedures are made available to the assessee-company and the foreign company is reviewing and tracking the execution plans periodically, not only the execution but also the project budget and client satisfaction, this Tribunal is of the considered opinion that Foster Wheeler USA has made available its technical knowledge, expertise, knowhow in execution of the contract by the assessee in India. Therefore, this judgment of Karnataka High Court is not applicable to the facts of the case.

17. We have also carefully gone through the judgment of Delhi High Court in Guy Carpenter & Co. Limited (supra). In the case of Delhi High Court, the assessee-company was an international reinsurance intermediary broker and was a tax resident of United

Kingdom. The assessee before the Delhi High Court received commission from various insurance companies operating in India. The Assessing Officer found that the receipt of commission is fee for technical services. While illustrating the transaction, the High Court extracted the observation made by the Tribunal at para 11 of its order. As per the illustrative transaction, New India Insurance Co. Ltd. has entered into an agreement to reinsure on an excess loss basis he catastrophe risk arising from its primary insurance cover in conjunction with J.B. Boda and Alsford Page and gems Ltd. The assessee will act as a claim administrator and will submit claims advices to relevant market systems. For the services rendered, the assessee along with other reinsurance brokers acting as an intermediary in the reinsurance process for New India Assurance Co. will be entitled to 10% brokerage. The assessee-company was rendering only an intermediary service while acting as a facilitator in getting the reinsurance cover for New India Insurance Co. The assessee is not doing any other work other than acting as an intermediary in the reinsurance process. In the case before us, It is not the case of the assessee that it is playing only an intermediary role. It is receiving technical services like specifications, procedures, project management, etc. and it is utilizing the same in

the project undertaken with Reliance Petroleum Limited. The specifications, technical knowledge, advice received from Foster Wheeler France S.A is vey much available with the assessee-company and it can be used in execution of the engineering and contract with other clients. Therefore, this Tribunal is of the considered opinion that the judgment of the Delhi High Court is not of any assistance to the assessee.

18. We have also carefully gone through the case of Intertek Testing Services India (P.) Ltd. the decision rendered by Authority For Advance Rulings. The Authority For Advance Rulings found that technical knowledge and experience of service provider should be imparted and absorbed by the receiver so that the receiver can deploy similar technology or techniques in future without depending on the service provider. In this case also, the information, expertise, execution plan, project budget, technical standards and quality management standards provided by the service provider Foster Wheeler USA is absorbed by the assessee-company and the assessee-company is capable of deploying such technology in future without depending on Foster Wheeler USA. Therefore, the ruling rendered by Authority For Advance Rulings in Intertek Testing

Services India (P.) Ltd. also may not be of any assistance to the assessee.

19. We have also gone through the decision of Pune Bench of this Tribunal in Sandvik Australia pty. Ltd. (supra). In the case before Pune Bench, the assessee-company providing IT support services to its group companies in the nature of help desk, administrative and maintenance of IT support. The assessee claimed before the Assessing Officer that the assessee was offering only IT support services and not imparting any technical knowhow and knowledge to its Indian companies. However, the Revenue disputed the claim of the assessee. The case of the Revenue before the Pune Bench is that the assessee-company not only rendering back-up IT support service but also transferring knowledge and other said services to Indian companies. After analysing the agreement filed before it, the Pune Bench found that the agreement entered into by the assessee-company and Sandvik Asia Ltd. is not supporting the case of the Revenue. The Tribunal found that the assessee has provided only IT back-up service for solving IT related problems to its Indian subsidiary and not such services are available to the Indian companies. In the case before

us, what was provided by Foster Wheeler USA is the service in the nature of tracking execution plans, schedules with emphasis on key milestones, written practices, procedures, specifications and details in execution of the project, furnished review of information regarding technical reports, technical standards and quality management standards, provided systems for meeting project budget and client satisfaction. On the basis of the technical knowledge, information provided by Foster Wheeler USA, the assessee-company can implement the same in the project while executing the project with Reliance Petroleum Limited. Unless the assessee-company acquires the knowledge, expertise, technical standards, quality management, etc. provided by Foster Wheeler USA, the same cannot be adopted or implemented while executing the project with Reliance Petroleum Limited When the assessee-company absorbs the technical knowledge, expertise, quality management, etc. for the purpose of implementing project with Reliance Petroleum Limited, such knowledge is very much available with the assessee and the same can be implemented with other projects with other clients. It is to be remembered that the assessee is not a layman. The assessee company is expert in providing technical and engineering service. Therefore, the assessee is capable of observing the

opinion / advice given by USA associate and implement the same vide their future project. Therefore, this Tribunal is of the considered opinion that the technical knowledge, expertise, knowhow were made available to the assessee. Hence, the decision of Pune Bench of this Tribunal in Sandvik Australia Pty. Ltd. (supra) is not applicable to the facts of the case.

20. We have also gone through the decision of Authority For Advance Rulings in Ernst & Young (P) Ltd. (supra). The assessee-company engaged in providing consultancy services as chartered accountancy and management studies in India. The Authority For Advance Rulings found that what was provided by EMEIA to the assessee-company is information on various business by providing support services like commercial matters, guidelines, templates, best practices and strategies that could be adopted in various spheres of their business which ultimately lead to protection of EY's image and client relationship. The Authority For Advance Rulings found that dissemination of information, furnishing guidelines and suggesting plans of action aimed at uniformity and seamless quality in business dealings of participating group entities do not *per se* amount to making available the technical knowledge and

experience possessed by EMEIA to a substantial extent. In the case before us, the assessee-company received specification, execution plans, schedules with emphasis on key milestones, written practices, procedures, specifications and details. Apart from that, the systems were reviewed periodically to meet the project budget and client satisfaction for execution of specific project with Reliance Petroleum Limited. Unless and until the specifications, technical standards and quality management are made available to the assessee, it cannot execute the project entered into with Reliance Petroleum Limited. Therefore, this decision of Authority For Advance Rulings also may not be of any assistance to the assessee.

21. In view of the above discussion, this Tribunal is of the considered opinion that the technical knowledge, expertise, knowhow, provided by Foster Wheeler USA were very much made available to the assessee. Hence, the assessee is liable to deduct tax while making payment. Therefore, the assessee is also liable to pay interest under Section 234a and 234B of the Act. Accordingly, this Tribunal do not find any reason to interfere with the order of the lower authority and the same is confirmed.

22. In the result, both the appeals of the assessee are dismissed.

Order pronounced on 5th February, 2016 at Chennai.

sd/-	sd/-
(ए. मोहन अलंकामणी)	(एन.आर.एस. गणेशन)
(A.Mohan Alankamony)	(N.R.S. Ganesan)
लेखा सदस्य/Accountant Member	न्यायिक सदस्य/Judicial Member

चेन्नई/Chennai,
दिनांक/Dated, the 5th February, 2016.

Kri.

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. DRP
4. CIT (International Taxation), Chennai
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.