IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH 'A', BENGALURU

BEFORE SHRI. INTURI RAMA RAO, ACCOUNTANT MEMBER

AND

SHRI. LALIET KUMAR, JUDICIAL, JUDICIAL MEMBER

1. I.T(TP).A No.1103/Bang/2013
(Assessment Year : 2010-11)
2. IT(TP)A.No.304/Bang/2015
(Assessment Year : 2011-12)

ABB FZ – LLC,
C/o. ABB Ltd, 2nd floor, East Wing,
Khanija Bhavan, 49, Race Course Road,
Bengaluru 560 001 .. Appellant
PAN : AAICA6462B

v.

Deputy Commissioner of Income tax
(International Taxation),
Circle – 1(1), Bengaluru .. Respondent

Assessee by : Shri. Percy Pardiwala, Sr. Counsel
Revenue by : Shri. G. R. Reddy, CIT –DR-I

Heard on : 17.05.2017
Pronounced on : 21.06.2017

ORDER

PER LALIT KUMAR, JUDICIAL MEMBER:

These are appeals filed by the assessee against the order of the DCIT, Circle-1(1), Bengaluru, passed u/s.143(3) r.w.s.144C of the Act,

dt.10.05.2013 and u/s.143(3) r.w.s. 144C(13), dt.08.01.2013, in pursuance to the directions of the DRP, for the assessment years 2010-11 and 2011-12 respectively.

02. Grounds of appeal raised by the assessee for AY 2010-11 are as follows :

1. **Holding the payments received by the appellant as royalty under the Income-tax Act, 1961 ('Act') and under the Double Taxation Avoidance Agreement between India and United Arab Emirates ('DTAA')**

   On the facts and in the circumstances of the case, the learned Assessing Officer ('AO') erred in law and facts in holding and the learned Dispute Resolution Panel ('DRP') erred in law and facts in confirming the fees received by the appellant amounting to INR 17,842,635 for services rendered as 'royalty' under the Act and the DTAA and taxing the fees under section 115A of the Act.

2. **Holding that where there is no specific Article for taxability of particular payment in the DTAA, the provisions of the Act would be applicable**

   a) On the facts and in the circumstances of the case, the learned AO erred in law in holding and the learned DRP erred in law in confirming that where there is no specific Article for taxability of a particular payment in the DTAA, the provisions of the Act would be applicable.

   b) On the facts and in the circumstances of the case, the learned AO erred in law in taxing the fees received by the appellant under section 115A of the Act irrespective of there being no Article in the DTAA for taxation of fees for technical services and the appellant not having Permanent Establishment ('PE') in India.

3. **Levy of interest under section 234B of the Act**

   On the facts and in the circumstances of the case, the learned AO has erred in levying interest of INR 37,799 under section 234B of the Act.

4. **Penalty proceedings under section 271(1)(c)**

   The learned AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act.

5. **Relief**

   a) The appellant prays that directions be given to grant all such relief arising from the above grounds and also all relief consequential thereto.

   b) The appellant craves leave to add to or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal.

   c) Further, the appellant prays that all the above adjustments / additions / disallowances made by the learned AO and upheld by the learned DRP are bad in law and liable to be deleted.

03. Grounds of appeal raised by the assessee for AY 2011-12 are as follows :

1. **Holding the payments received by the appellant as royalty under the Income-tax Act, 1961 ('the Act') and under the Double Taxation Avoidance Agreement between India and United Arab Emirates ('DTAA') and taxing the entire fees at the rate of 10% (plus surcharge and education cess) under section 115A of the Act**

   a) On the facts and in the circumstances of the case, the learned Assessing Officer ('AO') erred in law and facts in holding and the learned Dispute Resolution Panel ('DRP') erred in law and facts in confirming the fees received by the appellant amounting to INR 66,813,781 for services rendered, as 'royalty' under the Act and the DTAA, without taking cognizance of the fact that the fee received by the appellant is in the nature of Fees for Technical Services ('FTS').

   b) Without prejudice to above, having held the fees received to be taxable as 'royalty' under the Act and the DTAA, the AO erred in levying surcharge and education cess on the amount of tax determined, without taking cognizance of the fact that no surcharge and education cess is to be levied on tax payable as per the rates specified in the DTAA (i.e. 10%).

2. **Holding that where there is no specific Article for taxability of particular payment in the DTAA, the provisions of the Act would be applicable**

   a) On the facts and in the circumstances of the case, the learned AO erred in law in holding and the learned DRP erred in law in confirming that where there is no specific Article for taxability of a particular payment in the DTAA, the provisions of the Act would be applicable.

   b) On the facts and in the circumstances of the case, the learned AO erred in law in holding that the fees received (i.e. FTS) as taxable under the Act, irrespective of there being no Article in the DTAA for taxation of FTS.

3. **Penalty proceedings under section 271(1)(c)**

   The learned AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act.

4. **Relief**

   a) The appellant prays that directions be given to grant all such relief arising from the above grounds and also all relief consequential thereto.

   b) The appellant craves leave to add to or alter, by deletion, substitution, modification or otherwise, the above grounds of appeal, either before or during the hearing of the appeal.

   c) Further, the appellant prays that all the above adjusments / additions / disallowances made by the learned AO and upheld by the learned DRP are bad in law and liable to be deleted.

04. Brief facts of the case are as follows.

4.1 The assesse is a non-resident company incorporated in United Arab Emirates. It claims to be engaged in the business of providing regional service activities for the benefit of ABB legal entities in India, Middle East and Africa. In pursuance of the regional headquarter service agreement between the assessee company and ABB Limited, the asessee company has rendered services to ABB Limited during F.Y.2009-10 and 2010-11. The assessee has received from its associated enterprises an amount of Rs.1,78,42,635/- and Rs.6,68,13,781/- in the F.Y.2009-10 and 2010-11 respectively.

4.2 The assessee claimed the above amounts to be non-taxable in India as per India – UAE Double Tax Avoidance Agreement (DTAA), as the DTAA does not have a clause for fees for Technical services (FTS) and since this clause has been specifically excluded from the treaty, the taxability would fall under Article 22 – other income and as per which, the said amount would be taxed in India only if the entity has a Permanent Establishment (PE) in India and as there is no PE in India, the sum is not liable to be taxed in India.

4.3 The Assessing Officer examined the nature of services rendered by the assessee to M/s. ABB Limited vis-à-vis the Service Agreement entered into by the two companies. It has been brought out clearly by the AO in his order that the assessee, apart from claiming that its income is not taxable in India in absence of the clause in DTAA, has not taken trouble of proving its

claim w.r.t. non-existence of PE in India, despite giving ample opportunities by the AO. The assessee has not been able to produce any satisfactory evidence even before the DRP in support of its claim. The assessee seems to have been banking on its only argument that in the absence of the clause of FTS in the DTAA, its income is not taxable in India. None of the **specific details** called for by the AO has been furnished by the assessee, barring a letter which claimed that some services were provided by the assessee through e-mail, phone calls, video conference and the like. Even for a proposition by the AO that assessee's services would be treated as FTS both under the I.T. Act and under DTAA as prescribed under Explanation (2) to Section 9(1)(vii) of the I.T.Act, the assessee repeated its stand taken as above that there is no clause of FTS in the DTAA.

4.4 The Assessing Officer, at para 9.5 of the order has held as under :

"It is true that the India-UAE DTAA does not have any article dealing with fees from technical services. In such a scenario the domestic Act will prevail and as discussed in the earlier paragraphs the sums paid to ABB FZ-LLC are covered by the definition of FTS as per Explanation 2 to Section 9(1)(vii) of the Act. Where there are specific provisions to the contrary, a treaty enacted under Section 90 (which itself is a part of the Act) would override the other provision of the Act with an additional advantage of applying more beneficial provision of the Act, Hence, so far as chargeability to tax and computation of income are concerned, where the tax treaty provides for a particular mode of computation on income, the same should be

followed irrespective of the provision in the Act. However, where there isno specific provisions in the treaty, the provision of the Act will govern taxation of income. Thus, if treaty is silent as regard taxability of particular category of income, its taxability has to be ascertained as per domestic law."

Case laws in taken in support are :

1.CIT vs.Hindustan paper Corporation Ltd. (1996) 77 taxman 450 (cal)

2.CIT Vs.DavyAshmore India Ltd. (1991) 190 ITR 626 (cal)

3. CESC Ltd. V. DCIT (2003) 80 ITJ 806 (Kol)

4. PILOM vs.ITO (2001) 77 ITD 218 (Kol)

5. A.P. Moller Maersk Agency India (P) Ltd., V DCIT (2004) 89 ITD 563 (Mum)

6. Micoperi SPA Milano V DCIT (2002) 82 ITD 369 (Mum)

7. Samsung Heavy Industries Co. Ltd., V. ADIT (intl. Taxn.), Dehradun (2011) 13 taxmann.com 14 (Delhi)

8. DCIT v.TVS Electronic Ltd. (22 Taxmann.com 215)(2012)

4.5 Thus, the AO treated the consideration received by ABB FZ-LLC for rendering technical services as that to have been covered u/s.9(1)(vi) of the Act and not as per DTAA.

4.6 Thus, the AO treated the consideration received by ABB FZ-LLC for rendering technical services as that to have been covered u/s.9(1)(vi) of the Act and not as per DTAA.

4.7 In the alternative argument, the AO found that most of the services rendered by the assessee were covered under the definition of 'Royalty' as per Explanation 2(ii), 2(iv) and 2(vi) u/s.9(1)(vi) of the I.T. Act, 1961, as well as under Article 12(3) of the India –UAE data. The AO also elaborately discussed the expression 'Information concerning industrial, commercial or scientific experience' to prove that the payment made to the assessee was within the purview of the meaning of "Royalty".

4.8 The DRP confirmed the action of the AO and a final assessment order was passed by the AO. Aggrieved by the same, the assessee is in appeal before Tribunal.

5. The Ld. AR for the assessee has submitted that the assessee has submitted that the assessee has rendered the managerial and consultancy services to its Indian counterpart (ABB Ltd). All the services rendered by the assessee formed part and parcel of fees for Technical Services (FTS). It was also submitted that as there is no provision in the DTAA between India and UAE, therefore, in view of the order passed by the Tribunal in the case of the assessee for the Assessment Year 2012-2013 reported as ABB FZ-LLC VS Income Tax Officer (2017) 184 TTJ 351 , the FTS cannot be charged in India as there is no permanent establishment of the assessee in India. Tribunal has held as under :

It is clear that the Tribunal has given the finding after considering the decision of the coordinate bench as well as decision of Hon'ble Madras High Court in the case of Bangkok Glass Industry Co. Ltd. Vs. ACIT (supra). In view of the above discussion and by following the decision of the co-ordinate bench in the case of IBM India Pvt. Ltd. Vs. DD IT (I.T) (supra), we are of the considered opinion that in the absence of the provision in the DTAA to tax Fees for Technical Services the same would be taxed as per the Article 7 of the DTAA applicable for business profit and in the absence of PE in India, the said income is not chargeable to tax in India. Accordingly, we set aside the orders of the authorities below and delete the addition made by the Assessing Officer.

Further In support of this argument, the Ld. AR relied on the decision of the coordinate bench of this Tribunal in IBM India P. Ltd v. DDIT (Intl.Taxation) [IT (IT)A Nos.489 to 498/Bang/2013, dt.24.01.2014], for the A.Ys. 2007-08 to 2011-12. In para 6 of the order it was held by the Tribunal as under :

"6. In the Ground at S. No.2, the assessee contends that the payments made to IBM- Philippines for services rendered cannot be regarded as 'Managerial', 'Technical' or Consultancy' and consequently the said payments do not constitute 'FTS' u/s.9(1)(vii) of the Act. The learned Authorised Representative argued that the said

payments to IBM – Philippines are not chargeable to tax under the India – Philippines DTAA. It was submitted by the learned Authorised Representative that since the provisions of the DTAA are more beneficial than the provisions of the Act, no detailed arguments were made in respect of categorisation of the above payments as 'FTS' u/s.9(1)(vii) of the Act. Considering these arguments of the learned Authorised Representative, we are not adjudicating the above Ground No.2 dealing with the taxability of payments made to IBM – Philippines as 'FTS' u/s.9(1)(vii) of the Act. Ground no.2 raised against the order u/s.201(1) of the Act for Assessment Years 2008-09 to 2011-12 being identical to that of Assessment Year 2007-08 and therefore the same consequence follows for these years also."

6. In the alternative it was submitted that the finding of the AO/ DRP that the fees charged by the assessee for rendering the managerial and consultancy services falls within the purview of 'royalty' was also incorrect as there is no imparting or alienation of information, technical or scientific. For the purposes of buttressing the assessee's case, the Ld. Senior Advocate relies upon the following judgments :

- CIT v. HEG Ltd [(2003) 130 Taxman 72 (MP)]
- TNT Express Worldwide (UK) Ltd v. DDIT (Intl.Taxation) [(2016) 70 taxmann.com 129
- Gecf Asia Ltd v. DDIT [ITA.8922/Mum/2010]
- IAC v. Diamler Benz AG West Germany[(1991) 36 ITD 508];
- Marck Biosciences Ltd v. ITO (Intl.Taxation-II) [80 taxmann.com 275]

7. On the other hand, the Ld. DR has filed written submissions as well as argued the matter before the Tribunal. The main thrust of the argument of the Ld. DR is summarised as under :

i) That the services rendered by the assessee were in the nature of 'royalty', as the domain and expert knowledge of the assessee was permitted to be used by the counterpart in India and therefore the fees received on account of rendering all these services are subjected to Indian Tax.

ii) As can be seen from the terms provided and the terminologies used in the agreement, most of the services rendered / information provided by ABB FZ LLC to ABB ltd , if not all, are covered by the definition of Royalty in Explanation 2(ii), 2(iv) and 2(vi) u/s.9(1)(vi)of the I.T. Act, 1961.

iii) It was submitted that if the nature of the activities of the assessee are considered, then it clearly shows that the information was parted with / shared by the assessee with its counterpart. In this regard, DR drew our attention to the following clauses of the agreement entered between the assessee and its counterpart in India.

I. Under Regional Occupational Health and Safety (OHS) services :

1. Development of regional OHS strategies in line with ABB strategies – The strategies belong to the assessee and is transferred and developed to the requirement of service recipient (SR) in India, constitutes Royalty.
2. Provision of information about strategies, goals, targets and instruction in the field of OHS.
3. Coaching and Monitoring the OHS advisors of the SR in implementing and developing OHS plan and strategies.
4. Acting as a contact point between the Group Safety Advisor and the SR.
5. Development and maintenance of OHS management systems
6. Assisting in adopting OHS legislation, ...
7. Organising and carrying out of personal training within the OHS area
8. Implementation and provision of control programs and safety inspections for activities carried out by the SR.
9. Provision of advice, training and coaching in hazard controls, methods, procedures and processes to eliminate and reduce health and safety incidents.
10. Review of potential weak areas and support to managers of the SR for completion of improvement actions.
11. Provision of information to enable managers of the SR to monitor and review progress through the monthly and quarterly reports and provision of suggestions of corrections in order to meet the key performance indicators targets.

II. Under Regional Security Services :

1. Collection, analysis and delivery of security intelligence information to the SR
2. Education in basis security procedures and regulations to new employees to SR
3. Training in security standards, routines and expeiences to management teams of the SR
4. Basic and advanced training in Crisis Management....
5. Support with security assessments in risk reviews and rendering processes.
6. Etc...etc.

III. Under Regional Business Development services :

1. Launch and implementation of Working proof for ethylene.
2. Development of business concepts and ideas and support of the roll out of new developments within the business Unit Oil & Gas.
3. Development of a regional training program for the front end sales in the oil, gas and petrochemical industries.
4. Provisions of strategic industry and technology input to support the business growth of the SR.
5. Provision of industry & technology support to Strategic Account Managers of the SR.

IV. Under Regional Group Account Management (GAM) Services :

1. Monitoring and assistance to the Strategic Account Managers of SR w.r.t. yearly account plans, yearly strategic direction budgets and tactical pursuits for each of the strategic accounts.
2. Follow up and review on a quarterly basis.....
3. Assistance and guidance to capture teamsenquring the offering of right sales proposition and correct approaches.
4. Ensurement that the team meets and exceeds set sales targets.
5. .....making sure that full support is given to strategic accounts during the whole value chian cycle.
6. .....customer feed back through surveys and other cusomers satisfaction tools.
7. Direction interation with the SR's customers to gain entry into the customer organization or for high level discussions taking place at executive level. Etc....etc..

V. Under Regional EPC services :

1. Collection and consolidation of project and market data and distribution to the SR.
2. Provision of executive sponsorship for selected EPC projects.
3. Organisation and carrying out of capture training.
4. Setting up of target and follow up of achievements. Etc...etc.

VI. **Under Regional Project risk Management Services :**

1. Supply of information of best practices, lessons learnt, bench marking information and internal audit reports. Etc...

VII. Under Regional market development services ;

1. Monitoring of the implementation of the IMA Region strategic initiatives, including quarterly reviews, and support work..
2. Organizing and carrying out business development workshops
3. Developing business plans for and provide implementation support.
4. Preparation of weekly market updates for regional management team
5. Support with market, customer and competitor analysis. Etc..

iv) On the basis of above terms of agreement ld DR submitted that it is evident from the above that ABB FZ LLC has received payment from ABB Limited as a consideration of providing of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill and has rendered services in connection with such activities and would essentially constitute a know-how contract and therefore, the payments received by ABB FZ LLC are covered by Explanation 2(ii), 2(iv) and 2(vi) to section 9(1)(vi) of the Act and hence are taxable in India. Further it was urged that the whole idea behind entering into DTAA and entering into agreement is to propagate group business in India.

v) It was submitted the above services are covered under DTAA, Article 12(3) of the INDIA – UAE DTAA inasmuch as that the payment has been made for use of plan and for information concerning industrial, commercial or scientific experience.

vi) It was also submitted by DR that the assessee vide submission dated 26.06.2012 that ABB FZ-LLC rendered services via e-mail, telephone calls and telephone conferences though no evidence to that effect was furnished. Even this activity of the assessee is covered under Explanation 6 to Section 9(1)(vi), which reads as under :

Explanation 6.—;For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret

vii) It was submitted that the clause 9 of the agreement is significant as observed by the DRP in A.Y.2011-12which reads as under :

"Secrecy. Intellectual property rights : The parties undertake to keep information received from the other party secret. Theys hall take all measures necessary for secrecy, in particular by binding their employees w.r.t secrecy, in line with the ABB group rules. Excluded from this obligation to secrecy is information, which is already published, which on

receipt was already known to the receiving party or which has been made available by a third party without violating an obligation of secrecy, as well as information which for the purposes of marketing, supply or use of ABB goods and products must be made available to third parties.The provisions concerning secrecy shall continue to apply also after termination of this agreement. All rights to information, including **corresponding intellectual property rights, shall remain with the Party that supplied the information."**

viii) It is thus, seen that the information provided by the assessee were in the nature of technical knowledge and experience acquired by the assessee company over a period of time which is also considered by the assessee company as secret information. Such information partakes the character of IPR which is to remain with the assessee. It is thus evident that clause 9 of the agreement also supports the contention of the AO that there was a consideration paid for transfer of rights of information which included IPR.

ix) Thus, it is concluded that the terms and conditions of the agreement show a stipulation on transfer of industrial, scientific, commercial experience by the assessee for a payment which is therefore to be characterized as royalty.

x) It was submitted that assessee has shared information concerning industrial, commercial or scientific experience which is in the nature of know-how which is undivulged and arising from previous experience. Case laws wherein it has been held that know-how could be imparted through :

a) Documentation (ITO v Munak Galva Sheets Ltd. (1990) 35 ITD 304(Del).
b) Discussion of technical problems in working committee set up by the licensee of the know-how (IAC V Daimler Benz AG (1990 36 ITD 508 (Mum)
c) Licensee's representative participating in discussion held by supplier (ITO V. Hindustan Latex(1992) 42 ITD 325(Cochin)

d) Technicians of licensor (ACITv.SNIA SPA (1996) 55 TTJ 554 (Del)

xi) It can be seen that the description of some of the services provided by the assessee can be categorized as forming part of above. Thus, the assessee has received consideration for imparting information concerning industrial, commercial or scientific experience and not because it has rendered technical services as claimed by the assessee.

xii) Next alternative argument raised by the Revenue was that the assessee is rendering the technical services in India. Therefore, it was submitted though there was conspicuous absence of the applicable clause to charge for rendering of technical services in India and UAE DTAA. But in view of the provisions of Section 90 of the IT Act and DTAA, if the clause is not provided by the DTAA, then the scope of DTAA cannot be expanded by interpretation. It was submitted that the aim and object of entering into DTAA is given in Section 90 of the IT Act and the treaties are code in itself and are therefore required to be interpreted on the basis of the clauses mentioned in the treaty. It was submitted that as there was no provision for charging of FTS, therefore, the IT Act shall be applicable to such a situation. It was submitted that the income was received from India and services were rendered in India, therefore by invoking the provisions of Section 9 (1)(iv) of the Act, the income is also taxable in India

xiii) In the alternative, it was submitted that even if it is assumed that the clause for FTS (the charges recovered by the assessee for rendering service in India), though not there in the DTAA and FTS are to be charged in clause 7 of the DTAA forming part of the business than also it was chargeable in India as the assessee is having service PE in India. For that purpose, the Ld. DR relied upon clause 5(2)(i) of the DTAA.

xiv) Lastly, it was submitted that the assessee has not cooperated in the assessment proceedings before the AO as well as before the DRP and has not produced the documents / evidence to show that the

services were actually rendered by the assessee to its counterpart in India and therefore assessee is not entitle to any relief under law.

8. The case was heard on 17.05.2017 and the assessee was directed by the bench to submit the tax residency certificate in accordance with the provision of section 90 of Act and also in terms of Article 4 of DTAA.

9. The assessee in compliance of the direction of the bench had filled the certificate issue by UAE authorities and also filled further submission dated 18.05.2017.

10. The revenue had also filled the written submissions in response to submissions of assessee to the following effect :

"*4. One more important aspect which needs to be considered now is – the assessee has filed 'Tax Residency Certificate' issued by the UAE authorities on 27.10.2014. It is also clearly mentioned in the certificate that the certificate is valid for one year from 01.04.2012. This certificate is clearly not applicable to the case on hand for the subject assessment years for the reason that the assessee filed its returns of income for A.Ys.2010-11 and 2011-12 on 09.09.2010 and 27.07.2011 respectively and it is very clear that the assessee was not eligible to claim the benefit of DTAA for the above said assessment years.*

5. Mere tax residency certificate also is not enough because, as per definition of 'residence company' under DTAA, the appellant is not getting covered. What is relevant is whether the appellant is

having control and management in UAE to become eligible for provisions of DTAA of UAE. The appellant, according to this definition, is not a resident for the purpose of DTAA"

11. We have heard the rival contentions of the parties and perused the records. Before we examine grounds raised in present appeals , it would be useful to reiterate the applicable provisions under income tax Act and also under Indo –UAE DTAA .

12. Section 90 of the Income Tax Act, which deals with agreement with foreign countries or specified territories reads as under:

90. (1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India, -

(*a*) for the granting of relief m respect of-

(*i*) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or

(*ii*) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(*b*) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, or

(*c*) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(*d*) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be,

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

(3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf.

Explanation 1.- For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company.

Explanation 2.- For the purposes of this section, "specified territory" means any area outside India which may be notified as such by the Central Government."

13. Section 9 of the Act deals with income deemed to accrue or arise in India, which reads as under:

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

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

Section 9(1)(*vi*) of the Act reads as under:

(*vi*) income by way of royalty payable by-

(*a*) the Government; or

(*b*) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of 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 royalty is payable in respect of any right, property or information used or services utilised for the purposes of 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 so much of the income by way of royalty as consists of lump sum consideration for the transfer

outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property, if such income is payable in pursuance of an agreement made before the 1st day of April 1997, and the agreement is approved by the Central Government:

Provided further that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum payment made by a person, who is a resident, for the transfer of all or any light (including the granting of a license) in respect of computer software supplied by a non-resident manufacturer along with a computer or computer-based equipment under any scheme approved under the Policy on Computer Software Export, Software Development and Training, 1986 of the Government of India.

Explanation (2) reads as under:

Explanation 2. - For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for-

(*i*) the transfer of all or any rights (including the granting of a license) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;

(*ii*) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;

(*iii*) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

(*iv*) the imparting of any information concerning technical, industrial, commercial or scientific knowledge experience or skill;

[(*iva*)the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB,]

(*v*) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

(*vi*) the rendering of any services in connection with the activities referred to in stab-clauses (i) to [(iv), (iva) and] (v).

(*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** .....(not relevant).....]

[*Explanation 1*.....(not relevant).....]

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

15. Section 5 provides as under

Scope of total income.

[4] **5.** [5](1) Subject to[6] the provisions of this Act, the total income[7] of any previous year of a person who is a resident includes all income from whatever source derived which—

(*a*) is received[8] or is deemed to be received[8] in India in such year by or on behalf of such person ; or

(*b*) accrues or arises[8] or is [8]deemed to accrue or arise to him in India during such year ; or

(*c*) accrues or arises[8] to him outside India during such year :

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6)[*] of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.

(2) Subject to[6] the provisions of this Act, the total income[7] of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(*a*) is received[9] or is deemed to be received in India in such year by or on behalf of such person ; or

(*b*) accrues or arises[9] or is [9]deemed to accrue or arise to him in India during such year.

Explanation 1.—Income accruing or arising outside India shall not be deemed to be received[9] in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued[10] or arisen[10] or is deemed to have accrued[10] or arisen[10] to him shall not again be so included on the basis that it is received or deemed to be received by him in India.

16. The Articles dealing with resident, permanent establishment , business profit, royalty . any other income , residual clause etc (DTAA Articles 1,3, 4, 5, 7, 12,

22, 25 & 29) in DTAA agreements entered into with foreign country namely UAE reads as under

ARTICLE 1

PERSONAL SCOPE

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

RTICLE 3

GENERAL DEFINITIONS

1. In this Agreement, unless the context otherwise requires :

(*a*) the term "India" means the territory of India and includes the territorial sea and air space above it, as well as any other maritime zone in which India has sovereign rights, other rights and jurisdictions, according to the Indian law and in accordance with international law ;

(*b*) the term "U.A.E." means the United Arab Emirates and when used in a geographical sense, means all the territory of the United Arab Emirates including its territorial sea in which the U.A.E. laws relating to taxation apply and any area beyond its territorial sea within which the United Arab Emirates has sovereign rights of exploration or the exploitation or resources of the seabed and its sub-soil and superjacent water resources in accordance with international law ;

(*c*) the terms "a Contracting State" and "the other Contracting State" mean U.A.E. or India as the context requires ;

(*d*) the term "tax" means "Indian tax" or "U.A.E. tax" as the context requires, but shall not include any amount which is payable in respect of any default or omission in relation to the taxes to which this Agreement applies or which represents a penalty imposed relating to those taxes ;

(*e*) the term "person" includes an individual, a company, and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting State ;

(*f*) the term "company" means any body corporate or any entity which is treated as a company or body corporate under the taxation laws in force in the respective Contracting States ;

(*g*) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively, an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State ;

(*h*) the term "national" means :

(*i*) in the case of U.A.E. all individuals possessing the nationality of U.A.E. in accordance with U.A.E. laws and any legal person, partnership and other body corporate deriving its status as such from U.A.E. laws ;

(*ii*) in the case of India, any individual possessing the nationality of India and any legal person, partnership, or association deriving its status as such from the laws in force in India ;

(*i*) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise which has its place of effective management in a Contracting State except when the ship or aircraft is operated solely between places in the other Contracting State ;

(*j*) the term "competent authority" means :

(*i*) in the case of U.A.E., the Minister of Finance and Industry of his authorised representative ; and

(*ii*) in the case of India, the Central Government in the Ministry of Finance (Department of Revenue) or their authorised representative.

2. As regards the application of the Agreement by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the laws of that State concerning the taxes to which the Agreement applies.

ARTICLE 4

RESIDENT

[1][1. For the purposes of this Agreement the term 'resident of a Contracting State' means:

(*a*) in the case of India: any person who, under the laws of India, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. This term, however, does not include any person who is liable to tax in India in respect only of income from sources in India; and

(*b*) in the case of the United Arab Emirates: an individual who is present in the UAE for a period or periods totalling in the aggregate at least 183 days in the calendar year concerned, and a company which is incorporated in the UAE and which is managed and controlled wholly in UAE.

2. For the purposes of paragraph 1:

(*a*) The Republic of India, its political sub-divisions or local authority thereof shall be deemed to be resident of the Republic of India;

(*b*) The United Arab Emirates and its political sub-divisions or local Governments shall be deemed to be resident of the United Arab Emirates;

(*c*) Government institutions shall be deemed, according to affiliation, to be resident of the Republic of India or the United Arab Emirates. Any institution shall be deemed to be a Government institution which has been created by the Government of one of the Contracting States or of its political sub-divisions or local authority/Governments, which are wholly owned and controlled directly or indirectly by the Government of the Contracting State or political sub-division or local authority/Governments which are recognized as such by mutual agreement of the competent authorities of the Contracting States;

(*d*) For the purposes of this article, Abu Dhabi Investment Authority is recognized as a resident of the United Arab Emirates.]

[1][*3.*] Where by reason of the provisions of paragraph (*1*), an individual is a resident of both Contracting State, then his status shall be determined as follows :

(*a*) he shall be deemed to be resident of the State in which he has a permanent home available to him ; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests) ;

(*b*) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;

(*c*) if he has an habitual abode in both States or in either of them, he shall be deemed to be a resident of the State of which he is a national ;

(*d*) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

[1][*4.*] Where by reason of the provisions of paragraph (*1*), a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which its place of effective management is situated.

ARTICLE 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially :

(*a*) a place of management ;

(*b*) a branch ;

(*c*) an office ;

(*d*) a factory ;

(*e*) a workshop ;

(*f*) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources ;

(*g*) a farm or plantation ;

(*h*) a building site or construction or assembly project or supervisory activities in connection therewith, but only where such site, project or activity continues for a period of more than 9 months ;

(*i*) the furnishing of services including consultancy services by an enterprise of a Contracting State through employees or other personnel in the other Contracting State, provided that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any twelve-month period.

3. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include :

(*a*) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise ;

(*b*) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery ;

(*c*) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise ;

(*d*) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise ;

(*e*) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character.

4. Notwithstanding the provisions of paragraphs (*1*) and (*3*), where a person - other than an agent of independent status to whom paragraph (*5*) applies - is acting on behalf of an enterprise and has, and habitually exercises in a Contracting State an authority to conclude contracts on behalf of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to the purchase of goods or merchandise for the enterprise.

5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, he will not be considered an agent of independent status within the meaning of this paragraph.

ARTICLE 7

BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph (*3*), where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

[1][*3.* In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere, in accordance with the provisions of and subject to the limitations of the tax laws of that State.]

4. Insofar as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph (*2*) shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary ; the methods of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by the permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

(*7*) Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

ARTICLE 12

ROYALTIES

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties the tax so charged shall not exceed 10 per cent of the gross amount of such royalties.

3. The term "royalties" as used in this Article means payment of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematography films, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience but do not include royalties or other payments in respect of the operation of mines or quarries or exploitation of petroleum or other natural resources.

4. The provisions of paragraphs (*1*) and (*2*) shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein or performs in that other State independent personal services from a fixed base situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

ARTICLE 22

OTHER INCOME

1. Subject to the provisions of paragraph (*2*), items of income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in the foregoing articles of this Agreement, shall be taxable only in that Contracting State.

2. The provisions of paragraph (*1*) shall not apply to income, other than income from immovable property as defined in paragraph (*2*) of Article 6, if the recipient of such income, being a resident of a Contacting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

ARTICLE 25

ELIMINATION OF DOUBLE TAXATION

1. The laws in force in either of the Contracting States shall continue to govern the taxation of income and capital in the respective Contracting States except where express provisions to the contrary are made in this Agreement.

2. Where a resident of India derives income or owns capital which, in accordance with the provisions of this Agreement, may be taxed in U.A.E., India shall allow as a deduction from the tax on the income of that resident an amount equal to the income-tax paid in U.A.E. whether directly or by deduction; and as a deduction from the tax on the capital of that resident an amount equal to the capital tax paid in U.A.E. Such deduction in either case shall not, however, exceed that part of the income-tax or capital tax (as computed before the deduction is given) which is attributable, as the case may be, to the income or the capital which may be taxed in U.A.E. Further, when such resident is a company by which surtax is payable in India, the deduction in respect of income-tax paid in U.A.E. shall be allowed in the first instance from income-tax payable by the company in India and as to the balance, if any, from the surtax payable by it in India.

3. Subject to the laws of the U.A.E. where a resident of the U.A.E. derives income which in accordance with the provisions of this Agreement may be taxed in India, the U.A.E. shall allow as a deduction from the tax on income of that person an amount equal to the tax on income paid in India. Such deduction shall not, however, exceed that part of income-tax as computed before the deduction is given, which is attributable to the income which may be taxed in the U.A.E.

4. For the purpose of paragraph (*3*), the term 'tax paid in India' shall be deemed to include the amount of Indian tax which would have been paid if the Indian tax had not been exempted or reduced in accordance with the special incentive measures under the provisions of the Income-tax Act, 1961, which are designed to promote economic

development in India, effective on the date of signature of this Agreement, or which may be introduced in the future in modification of, or in addition to, the existing provisions for promoting economic development in India, and such other incentive measures which may be agreed upon from time to time by the Contracting States.

5. Where, in accordance with any provision of the Agreement, income derived or capital owned by a resident of a Contracting State is exempt from tax in that State, such State may, nevertheless, in calculating the amount of tax on the remaining income or capital of such resident, take into account the exempted income or capital.

[ARTICLE 29

LIMITATION OF BENEFITS

An entity which is a resident of a Contracting State shall not be entitled to the benefits of this Agreement if the main purpose or one of the main purposes of the creation of such entity was to obtain the benefits of this Agreement that would not be otherwise available. The cases of legal entities not having *bona fide* business activities shall be covered by this Article.

17. Section 90 of the IT Act empowered the Central Government to enter into an agreement with any country outside India for granting relief in respect of income on which tax has been paid both under the Indian Income-tax and Income-tax in that country or specified territory. The purpose of entering into the agreement with the Government of any other country is for the purpose of avoiding the double taxation and under the corresponding laws in force in that country. Further the purpose of agreement is for exchange of information for prevention of evasion of avoidance of tax chargeable in India or in other country and also for bringing into the ambit of Income-tax under the IT Act and also the corresponding laws in force in that country / specified territory.

18. Further Section 90 of the IT Act, the assessee not being a resident to whom the DTAA applies, shall not be entitled to claim any relief under such agreement, unless a certificate of the assessee being a resident of any country outside India, as the case may be, is obtained by it from the Government of that country of the specified territory. It is made clear by virtue of Section 90(3) of the Act that where the Central Government entered into agreement (DTAA), with the Government of any other country for granting relief of tax, avoidance of double taxation, then in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to the assessee. The Hon'ble Supreme Court in *Union of India* v. *Azadi Bachao Andolan* [2003] 263 ITR 706/ 132 Taxman 373 (SC) has laid down that provisions of DTAA prevails over the provisions of the Act if the provisions of DTAA is more beneficial to the assessee.

19. From the reading of the above, in our view, for the purposes of Section 90 of the Act, it is necessary :

i) That the income of the assessee has been assessable under the IT Act of India as well as under the Income-tax Act of the other country.

ii) The assessee for the purposes of availing the benefit of the said agreement is required to furnish a certificate of the assessee being a resident of the other country.

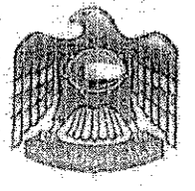
iii) The assessee would have the benefit of IT Act in India as well as of the DTAA and the provision of whichever is more beneficial to the assessee out of the two shall be applicable to the assessee.

20. In the present case, though it is the case of the assessee that the assessee is a company incorporated in UAE, but the certificate has not been furnished by the assessee before the authorities below saying that the assessee is a resident of UAE. In our view, though assessee is a company, but for the purpose of qualifying for the benefit under DTAA in term of Article 1 and Article 4 of DTAA, it is necessary assessee company is managed and controlled wholly in UAE. In the absence of any such finding by the authorities below and also in the absence of evidence produced by the assessee, it is difficult to give the benefit of DTAA to the assessee. In our view, it is for the assessee to furnish the certificate of residence of UAE and the onus is on the assessee to prove that the assessee is managed and controlled wholly in UAE. The scope of DTAA is clear from Article 1 and it clearly provides that the agreement shall apply to persons who are residents of one or both the contracting states. Therefore, for the purposes of enjoying the benefit of DTAA, the assessee is required to establish by way of certificate by the UAE authorities that it is the resident of UAE and is further required to prove that assessee is managed

and controlled wholly in UAE. There is inbuilt purpose for satisfying these twin conditions namely to prevent treaty shopping and to ensure that the benefits under treaty should only be available legal entities having *bona fide* business activities in the contracting states.

21. As per our direction issued on the lasf date of hearing, the assessee has filed certificate of residence, along with the written submission dt.23.05.2017. the certificate issued by the UAE authorities is as under :

UNITED ARAB EMIRATES
MINISTRY OF FINANCE



الإمارات العربية المتحدة
وزارة المالية

TAX/15109/2014 27/Oct/2014

TAX RESIDENCE CERTIFICATE

The Ministry of Finance of the United Arab Emirates hereby certifies that, pursuant to the Agreement between The Government of the United Arab Emirates and the Government of the Republic of India for Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital signed on 1992-04-29, ABB FZ-LLC License No.: 17129 is qualified to enjoy the benefit of the mentioned Agreement as a resident in the United Arab Emirates.

This certificate is valid for one year from 1/4/2012.
Issued in Dubai on 27/10/2014.

Khalid Ali Al-Bustani

Assistant Undersecretary for International financial Relations

22. From a perusal of the certificate, it is clear that this certificate was issued only for a period of one year, w.e.f 01.04.2012 and the said certificate was issued on 27.10.2014.

23. In this regard, as reproduced hereinabove, a resident alone under Article 4 of DTAA can avail the benefit of DTAA. Since the certificate issued by the UAE authorities, was issued only for one year from 01.04.2012, whereas the assessment years under consideration are 2009-10 and 2010-11. The returns of income for these years were filed on 09.09.2010 and 27.02.2011 respectively; therefore this certificate would not help the assessee as this is not relevant for the years under considerations. Thus it is amply clear that the assessee was not a resident of UAE at the filing of returns of income within the meaning of Article 4 of DTAA. Further the assessee has not placed any evidence showing that the assessee was wholly managed and controlled in UAE and is a tax entity in UAE. Accordingly, the assessee is not entitled to any benefits of DTAA. In view thereof, appeal of the assessee deserves to be dismissed on this ground alone .

24. Heading of Chapter IX of the IT Act, deals with double taxation relief. Chapter comprises of Section 90, 90A and 91. U/s.90(1)(a) relief can be granted in respect of income on which tax has actually been paid

under the IT Act and under the IT Act of the other country. Actually levy of such double taxation may be avoided by an agreement entered into in exercise of powers conferred on Central Government under clause (b) of Section 90(1) of the Act. Thus the agreement entered between the Central Government and a foreign government can only be in respect of tax leviable under law in force in that country of the same income which is subjected to tax in India. If the income is not subjected to tax in India, then the Central Government is not authorised to enter into an agreement with a foreign country for the purpose of avoiding double taxation. Therefore, in our view, taxation of income is sin-qua-non in both the contracting and other contracting state. In the present case, the assessee has not filed any document to show that the income arising out of the services rendered by the assessee are taxable in UAE.

25. Though the appeal of assessee is liable to be dismissed on the ground of assessee was not resident of UAE , however we deem it appropriate to deal with all the grounds raised before us in both the appeals in the following paragraphs collectively as these are inter related .

All GROUNDS OF BOTH THE APPEALS

26. The issue for our consideration is whether during the financial year 2009-10 the assessee company had received fees for providing technical

services to ABB Ltd, its AE in India amounting to Rs.178,42,635/-, is required to be charged to tax in India as FTS u/s.9(1)(ii) of the Act. In the absence of the article dealing specifically with FTS under India-UAE DTAA.

27. The assessee contends that this issue is covered by the judgment of the Tribunal in the case of the assessee for the earlier assessment year 2012-13 and relies upon para 6 of the said judgment.On the other hand, the Ld. DR has submitted that in the absence of FTS clause in DTAA, Article 25 thereof would be applicable and the taxability of the said payment would be governed by the domestic laws, i.e., Section 9(1)(vii) of the Act.

28. In our view, the scope and ambit of DTAA is required to be interpreted in view of the clause mentioned therein. It will be violation of the principles of interpretation that if a clause which is not mentioned or defined in the treaty would be permitted to be read in the treaty.

29. We may point out that in the order referred to by the Ld. AR, the coordinate bench had not examined either the assessee is resident of UAE or not or whether the assessee is having PE or not or the applicability of Article 22 or Article 25 or 29 of the DTAA between India and UAE Treaty. Moreover in the said judgment, there is no examination by the coordinate

bench with regard to the nature activities of the Assessee as to under which clause of DTAA such activities of the assessee would fall.

30. Article 7, which deals with 'Business Profits', it clearly indicates that the profit of an enterprise of the contracting state shall be taxable in that state if it has a PE and it is restricted to the profit of the enterprise, which is attributable to the PE.

31. Further case cited by the assessee very clearly indicates that if there is no PE of the assessee in India, then the services rendered by the assessee in the form of FTS cannot be taxed in India. But the application of these judgments hinges on the two premises, viz., i) whether the services rendered by the assessee were in the nature of FTS or in the nature of royalty. If the services rendered by the assessee were found to be falling in the lap of royalty, then the requirement of adjudication whether the assessee is rendering FTS or not would not be required .

32. The DTAA for avoidance of double taxation of prevention of fiscal evasion with foreign countries was entered into between the Government of UAE and Government of Republic of India on 22.09.1993. Article 1 of the agreement gives the personal scope of the agreement. Article 2 gives the taxes covered. Article 3 gives the general definitions. Article 4 defines 'Resident'. Article 5 defines 'Permanent Establishment'. Articles 6 to 21,

it provides for the income arising to the resident from immovable property, business profits, shipping, AE, dividends, interest, royalties, capital gains, independent person services, dependent personal services, director fees, income earned by entertainers and athletes, remuneration and pensions in respect of government service, non-government persons and annuities, students, trainees and apprentices, professors, teachers and researchers, etc., Thus approximately all facets of income are covered in Articles 6 to 21 of the DTAA. However, in Article 22, which is in the form of residual article, it is mentioned that income of the Resident of a contracting state, wherever arising, which is not expressly dealt in the form of Article, shall not be taxable in the contracting state, i.e., to say that income not forming part of Articles 6 to 21 shall be taxed in the country where the person is a resident.

33. In our view, for the purposes of falling in other income under Article 22, it is necessary that the income should not be expressly dealt in Articles 6 to 21. In view thereof, it is necessary for us to examine from the given facts of the case whether the income received by the assessee from ABB India would fall in any other article other articles 6 to 21 or not. If we come to the conclusion that the income is not falling within Articles 6 to 21 then the said income will be falling within the category of 'Other Income'.

The sequel to that is that if a company is earning any income other than the income specified under Articles 6 to 21, then whether such income can be termed as 'Business Income' or not. This view has been discussed elaborately by the coordinate bench in the matter of IBM India Ltd (supra) (supra), wherein it is held that if the income is not falling under any of the categories mentioned in the DTAA, then it will fall in residual Article 22. Therefore it will have a trapping of business profit and therefore, it is required to be dealt under Article 7, instead of Article 22. In our view the Article 22 would become redundant if residual income is to form part of Business Income. In our view any income which is also not forming part of business profit under Article 7 as well would also form part of residual clause namely Article 22, therefore to say and hold that residual clause (Article 22) would become part of business profit (Article 7) would made the Article 22 incongruous and otiose. Having said so, we will now examine whether the activities of the assessee fall in any other Article of the DTAA.

34. The assessee during the assessment proceedings before the AO has mentioned that assessee is a non-resident company, incorporated in the UAE and in pursuance of the Regional Headquarter Services Agreement between the assessee company and ABB Ltd, the assessee company has

rendered the services to ABB Ltd, during the financial year 2009-10 and received an amount of Rs.178,42,635/-., in respect of the aforesaid services. Thereafter, it was submitted by the assessee that the assessee is not taxable in India in view of the DTAA Treaty between India and UAE, there is no clause for FTS and since the clause has been specifically executed for the treaty, therefore, it would fall in Article 22 (other income). It was further submitted that as the assessee is not having a Permanent Establishment in India, therefore, the sum received by the assessee is not to be taxed in India.

35. Vide letter dt.17.05.2012, the assessee was asked to explain the nature of services rendered along with evidence, such as documents, e-mails, reports and copy of invoices, as proof of having rendered the services. In response thereto the assessee vide letter dt.14.06.2012 filed a letter along with Annexures 1 and 2, named 'Regional Headquarter Services Agreement' and ''Simple agreement' document relating to entity in India in connection with rendering of services'. The response given by the assessee vide letter dt.14.06.2012, is reproduced hereinbelow, for the sake of clarity :

We refer to the captioned notice issued by your office for the assessment proceedings of the Company for AY 2010-11 and the subsequent discussion our authorised representatives M/s B S R & Co., Chartered Accountants had with your goodself on 6 June 2012 and 7 June 2012.

In this connection, we submit the following, in respect of the queries raised by your goodself:

1 **Question 1: Complete details of nature of services rendered/ work carried out in India, with copy of Agreement/Contract/Memorandum of Understanding**

A copy of the Regional Headquarter Services agreement entered into between ABB FZ-LLC and ABB Limited is enclosed as ***Annexure 1***.

2 **Question 2: In respect the services rendered/ work carried out in India, submit sample of Reports/ Documents/ Job description/Certificate furnished to the entity in India**

Seven so called Group Functions at the ABB Regional Headquarters in Dubai are providing services to Group companies within the Region India, Middle East & Africa. India, and some smaller countries, was added to this Region two years ago. The services rendered to the benefit of ABB Ltd, India, therefore started as per January 1, 2010 (please see the agreement as per item 1 above). ABB Ltd, India is the largest ABB company in the Region, and therefore receives a lot of attention. Various service activities have been carried out by ABB FZ-LLC for the benefit of ABB Ltd, India. Please find enclosed in ***Annexure 2*** some examples of documents related to the entity in India in connection with the rendering of services.

3 **Question 3: In case where services were rendered/ provided outside India the following details in respect of the payment received for FY 2009-10 in respect of the AY 2010-11 be furnished:**

In this regard, we wish to submit that services were rendered from both within India and outside India. Please note that most of the services have been rendered from outside India. Further, as sought for, please find below the following:

Sl No.	Date of payment	Amount	TDS
1.	11 March 2011	Rs. 17,842,635	1,784,264

The copy of the TDS certificate has already been filed *vide* our submission dated 6 June 2012.

4 **Question 4: Please clarify whether services rendered/ work carried out in India was by way of deputing personnel to India along with agreement/contract/MOU.**

In this regard, we submit the following:

Sl No.	Name and designation	No. of days of Stay in India	Place of stay
1.	Rajiv Malhotra - Regional Project Risk Manager	3	Bangalore
2.	Gary Foote - Regional OHS Manager	6	Bangalore and Vadodara
3.	Roman Schafer - Regional Market Development Manager	16	Bangalore

5 **Question 5: Furnish sample copies of the invoices raised by the recipient**

The invoice copy is enclosed as ***Annexure 3***.

In the event that you require any further explanations/ clarifications, kindly provide us with an opportunity to present our case and make submissions.

36. The various services to be rendered as per the Regional Headquarter Service agreement, were mentioned in the said agreement and some of the services are reproduced herein above while recording the submissions of ld DR.

37. In the reply dt.14.06.2012, it was mentioned that only three employees were sent to India for 25 days and AO had asked the assessee as to which branch of ABB Ltd the services were provided and when it was provided. Rather a vague reply was submitted stating that the services were provided either during visits to ABB Ltd (India) or mainly outside India over the phone .

We refer to the captioned notice (enclosed as ***Annexure 1***) issued by your good-self for the assessment proceedings of the Company for AY 2010-11 wherein your good-self has asked the Company to show cause as to why :

- The payments made to the Company should not be treated as royalty under the Income tax Act, 1961 ('the Act') as well as the Double Taxation Avoidance Agreement ('DTAA'); and
- The payments made to the Company should not be treated as fees for technical services under the Act.

In this connection, we submit the following:

- In the notice issued your goodself has mentioned that there is no clarity from the presentations and submissions made as to which branch or division of ABB Limited were the services rendered to. In this regard, we wish to inform you that the Company has provided the services mentioned below to ABB Limited as a whole and not to a particular branch or division of ABB Limited. Further, your goodself has mentioned that the Company has not provided a copy of the invoice raised on ABB Limited. In this regard, we wish to inform you that a copy of the invoice was filed *vide* our submissions dated 14 June 2012. However, a copy of the invoice is attached herewith (enclosed as *Annexure 2*) for your ready reference.
- Further as sought for, we wish to inform you that certain services were rendered through telephone calls. The details of dates of rendering of services are mentioned below:
  - 6 January 2010;
  - 20 January 2010;
  - 3 February 2010;
  - 17 February 2010;
  - 3 March 2010;
  - 24 March 2010; and
  - 31 March 2010

38. In reply to the assessee dt.22.06.2012, the assessee has submitted the following submissions besides relying on earlier submissions dt.26.06.2012:

We refer to the captioned notice issued by your office for the assessment proceedings of the Company for AY 2010-11 and the subsequent discussion our authorised representatives M/s B S R & Co., Chartered Accountants had with your goodself on 6 June 2012, 7 June 2012, 14 June 2012 and 25 June 2012.

In this connection, as sought for by your goodself, please find below a write-up on the services rendered by ABB FZ-LLC to ABB Limited during the financial year 2009-10.

Services provided by ABB FZ LLC to ABB Limited

Within the ABB Group, ABB FZ LLC is a Regional Headquarter company for the Region India, Middle East & Africa (IMA). The company hosts the IMA Regional Managers and Group Functions with various specialties, who have the responsibility to manage, guide and coordinate all ABB companies in the IMA Region.

Already during the first contractual and short service period of January to March 2010 (the Service Agreement is valid for calendar year and is automatically renewed from year to year), this Group Function in ABB FZ LLC was involved in various supportive communication via e-mail, telephone calls and telephone conferences with ABB Ltd.

The below mentioned Group Functions in ABB FZ LLC were providing services in 2010, under the Regional Headquarter Agreement, to amongst others ABB Ltd, India.

1. Regional Occupational Health and Safety (OHS) services

   Below services were provided either during visits to ABB Ltd, India or, mainly, from outside India:

   - Monthly OHS audits in India and follow up through telephone conferences, visits and video conferences
   - Implementation of OHS strategies on an IMA Regional basis, via quarterly Country Safety Strategic Planning and monitoring

- Coaching and monitoring the OHS Advisors of ABB Ltd in implementing and developing OHS plans and strategies (via visits, telephone calls, meeting trainings etc.)
- Follow up of the work of ABB Ltd's OHS Advisors to ensure proper implementation of Group processes and procedures
- Carrying out of Energized safety audits, Electrical safety audits, Factory inspections
- Assistance with investigations of fatal and serious incidents
- Shared lessons learned from other Group incidents
- Provided Regional templates, Group tools and monitoring of performance
- Made quarterly presentations thereof to Regional Management

2. **Regional Security Services**

Below services were provided either during visits to ABB Ltd, India or, mainly, from outside India:

- Planning and execution of Crisis Training with Central Crisis team, (including the Emergency Web)
- Security Awareness training with the Central Management of ABB Ltd
- Collection of intelligence and information on the security situation, and updating it on the General Threat Map for ABB travelers going to India.
- Reviewing and approving Travel Information Sheets for ABB travelers going to India and countries within the India sub region (Sri Lanka, Nepal and Bangladesh).
- Issuing travel alerts during times of limited crises or environmental emergencies, such as floodings etc. (e.g. ABB TSU 2010:27, 2010:4 to be found on inside ABB web page).

3. **Regional Project Risk Management services**

Below services were provided either during visits to ABB Ltd, India or, mainly, from outside India:

- Preparation and implementation of a Risk Management plan for all countries in IMA. Details in Risk Management plan document:
- Established and managed the Risk Management training for all countries in IMA.
- Organized and implemented the IMA Risk management bi-weekly phone meetings which covered:
  - ✓ update of Risk Management plan
  - ✓ sharing best practices among the different countries
  - ✓ detailed discussions with risk management team members for each country

4. **Regional Market Development services**

Below services were provided either during visits to ABB Ltd, India or, mainly, from outside India:

- Development of business plans for ABB in Sri Lanka and Bangladesh, which are countries managed by ABB Ltd, India. The plans were developed together with the local management team and Sub-Regional Manager. Services were provided during meetings in both countries with local ABB staff as well as customers.

- Creation of a weekly update on changes in the ABB markets. The updates have been published on inside.abb web page.
- Support to the Country Management team of India to develop a plan for ABB Ltd, India on how to become more competitive.

In the event that you require any further explanations/ clarifications, kindly provide us with an opportunity to present our case and make submissions.

39. In the notice dt.27.06.2012, the AO asked the assessee to reply to various issues including the following :

1. Perusal of the agreement of ABB FZ-LLC ("assessee company") with ABB-Ltd shows that the following services are being provided with a mark-up cost:

a) Regional OHS services
b) Regional Security Services
c) Regional Business Development Services
d) Regional Group Account Management (GAM) Services
e) Regional EPC services
f) Regional Project Risk Management Services
g) Regional Market Development Services

2. Vide letter dated 17.5.2012 the assessee company was asked to substantiate with evidence such as reports/documents/invoices for having rendered the services in India. In response it was claimed that services were rendered from Jan 2010 to March 2010 and in the Annexure 2 to the submission dated 14th June 12 copy of Power Point presentations for "Risk Management" and "Power and Productivity for a better world" were enclosed as proof of having rendered the services.

Alternatively if your contention is accepted that payments are not in the nature of Royalty even then the payments are taxable in India for the reasons discussed here. The payments made to the assessee company are also covered by Explanation [2] to section 9(1)(vii) which is reproduced below for reference:

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

The services rendered by ABB FZ-LLC are in the nature of managerial, technical and consultancy services. Hence the payments are to be taxed in India as per Section 9(1)(vii) of the Act.

40. In reply to the said notice the assessee had submitted the services rendered by the assessee were in the nature of technical services. We are required to examine this aspect in the context of the various clauses mentioned herein above, either before the AO or before the DRP, or before this Tribunal. However before examine this issue we would be adverting to other important issue of Permanent Establishment.

41. "PE" has been referred to in the definition of "enterprise" in section 92F(iii) of the Act by the Finance Act, 2001 and subsequently in Section 44DA of the Act and reads as under :

Section 92F(iii)

"Enterprise" means a person (including a permanent establishment of such person) who is, or has been, or is proposed to be, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights, or the provision of services of any kind, [or in carrying out any work in pursuance of a contract,] or in investment, or providing loan or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, whether such activity or business is carried on, directly or through one or more of its units or divisions or subsidiaries, or whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or places;"

(iiia) "permanent establishment", referred to in clause (*iii*), includes a fixed place of business through which the business of the enterprise is wholly or partly carried on;]

42. The DRP in Para 11, after extensively quoting the judgment of Authority For Advance Rulings (Income Tax) in Golf In Dubai, In re* [2008] 174 Taxman 480 (AAR) recorded as under :

> Hence, it cannot be ruled out that a PE is in existence so far as this assessee is concerned. This panel is of the view that the factual matrix, of the decision in the case before the AAR, does not apply in the case of the assessee, even the case of the assessee also being the case of DTAA between India and UAE.

43. As mentioned herein above, the DRP has held that the assessee is having a PE in India. During the course of argument, the Ld. Senior Advocate raised an objection that the Revenue cannot take a stand contrary to the stand of the lower authorities and for that purpose, relies upon the decisions of the Special Bench of the Mumbai Tribunal in the matter of Mahindra & Mahindra Ltd v. DCIT [ITA No.2606, 2607, 2613 & 2614/Mum/2000] and ACIT v. Prakash L. Shah [(2008) 115 ITD 167]. It was submitted by him that the Ld. DR cannot be permitted to set up a new case by stating that the assessee is having a service PE in view of Article 5(2)(i) of the DTAA.

44. On the objection raised by the Ld. Senior Advocate, we would like to bring on record that the Ld. DR has not submitted altogether different case dehors the view of the lower authorities.

45. As noted herein above, the DRP has categorically held that the assessee is having a PE. In our view, in view of Rule 29 of the ITAT Rules, the Revenue can support the order passed by the authorities below on the basis of Article 5(2)(i), to say that the assessee is having service PE within the meaning of DTAA. The objection raised by the assessee with respect to applicability of the said two Special Bench decisions (supra), in our view, is not correct. From the proceedings before the DRP, it is clearly deducible that the objection with respect to PE was raised by the assessee and in support thereof, various judgments were cited by the assessee. After considering the judgments cited by the assessee, the DRP had held that the assessee is having a PE. It is not a case of the assessee that the objection of PE was not at all addressed or raised before the lower authorities. More over the finding of the DRP holding that there existed a PE of the assessee has not been challenged by the assessee before the Tribunal. Even otherwise the Ground 2 raised before us has inbuilt argument to oppose the ground that the assessee is not having PE as the assessee is claiming it do not have PE. In the light of the above, we do not find any merit in the objection raised by the Ld. Senior Advocate.

46. If we examine the Article 5 of DTAA, then it is clear that the requirement of Article 5(1) of the treaty, namely, that there should be a fixed place of business and secondly, the business of the enterprise should be carried on wholly or partly through that place. The fixed place of business is necessary for a PE under Article 5(1) of the DTAA. But if we look into the Article 5(2) , which is an inclusive provision , it includes various activities enumerated in clauses (a) to (l). Nature of places are specified in clauses (a) to (h), whereas in clause (i) of Article 5(2) , reads as under :

> (*i*) the furnishing of services including consultancy services by an enterprise of a Contracting State through employees or other personnel in the other Contracting State, provided that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any twelve-month period.

47. Paragraph 3 of Article 5 specifies provides the circumstances in which the PE shall be not include various activities. Paragraphs 4 and 5 are complementary and mentions of a person or agent of an independent status who is working on behalf of the enterprises in a contracting state, the enterprises has been deemed to have a PE. Similarly, if an enterprise carrying on the business in the other State through broker, general commission etc., in ordinary course of business, and then the enterprise

shall not be deemed to have a PE. However when the activities of such a broker /agent are almost devoted wholly on behalf of that enterprise, then the agent will not be considered to have an independent status within the meaning of Article.

48. Now, if we read clause (2)(i) of Article 5 of the DTAA, then it is clear that for the purpose of service PE, the following ingredients are required to exist :

i) That the enterprise furnishing services including consultancy services of the other contracting state ;

ii) The said services were furnished through the employees or other personnel in the other contracting state ;

iii) Such activities continued for the same project or connected project for a period or periods aggregating more than 9 months within any twelve-month period.

49. Therefore it is clear that furnishing of services including consultancy services by assessee to ABB ltd for the project in India or with connected Project was for a period 3 months after commencing it activities in January 2010. Thus it fulfil are the prerequisite of service PE and in our view service PE do not require permanent establishment as well. In the present age of technology where the services, information, consultancy, management etc., can be provided with various virtual modes like email, internet, video conference, remote monitoring, remote access to desk-top,

etc., through various software, therefore, the argument of fixed place of business, raised by the Ld. Senior Advocate for the assessee that three employees were rendered services only for 25 days cannot be sustained, as the services can be rendered without the physical presence of employees of the assessee.

50. The clause 2 of Article 5 is by way inclusive definition in nature and the definition given in clause no1 of Article 5 has been enlarged by clause 2, therefore Article 5(2) do not required to fulfil the requirement of Clause 1 of article 5 of DTAA. The Hon'ble Supreme court has decided the inclusive clauses in various judgments we would be reproducing some of the following Judgments to draw support for our reasoning. In Ramala Sahkari Chini Mills Ltd v. Commissioner Central Excise [(2010 (13) SCR 1152]:

> *13. At this juncture, it would be expedient to refer to the observations in The State of Bombay and Ors. v. The Hospital Mazdoor Sabha and Ors., AIR 1960 SC 610, wherein a three judge Bench of this Court has held that:*
>
> > *"10. There is another point which cannot be ignored. Section 2(j) does not define "industry" in the usual manner by prescribing what it means; the first clause of the definition gives the statutory meaning of "industry" and the second clause deliberately refers to several other items of industry and brings them in the definition in an inclusive way. It is obvious that the words used in an inclusive definition*

denote extension and cannot be treated as restricted in any sense. (Vide: Stroud's "Judicial Dictionary", Vol. 2, p.1415). Where we are dealing with an inclusive definition it would be inappropriate to put a restrictive interpretation upon terms of wider denotation."

14. Similarly, in Regional Director, Employees' State Insurance Corporation v. High Land Coffee Works of P.F.X. Saldanha and Sons and Anr., (1991) 3 SCC 617, another three judge Bench of this Court had observed that:

"The amendment is in the nature of expansion of the original definition as it is clear from the use of the words "include a factory". The amendment does not restrict the original definition of "seasonal factory" but makes addition thereto by inclusion. The word "include" in the statutory definition is generally used to enlarge the meaning of the preceding words and it is by way of extension, and not with restriction. The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include."

15. Therefore, it is trite that generally the word "include" should be given a wide interpretation as by employing the said word, the legislature intends to bring in, by legal fiction, something within the accepted connotation of the substantive part. (Also see: C.I.T., Andhra Pradesh v. Taj Mahal Hotel, Secunderabad, (1971) 3 SCC 550; Indian Drugs & Pharmaceuticals Ltd. and Ors. v. Employees' State Insurance Corporation and Ors., (1997) 9 SCC 71; T.N. Kalyana Mandapam Assn. v. Union of India and Ors., (2004) 5 SCC 632). It is also well settled that in order to determine whether the word "includes" has that enlarging effect, regard must be had to the context in which the said

word appears. (See: The South Gujarat Roofing Tiles Manufacturers Association and Anr. v. The State of Gujarat and Anr., (1976) 4 SCC 601; R. D. Goya/ and Anr. v. Reliance Industries Ltd., (2003) 1 SCC 81 and Philips Medical Systems (Cleveland) Inc. v. Indian MRI Diagnostic and Research Limited and Anr., (2008) 10 SCC 227).

51. Similarly in Karnataka Power Transmission Corporation v. Ashok Iron Works P. Ltd [CA No.1879/2003 with CA No.7784/2002, dt.09.02.2009 :

11. The question that falls for our determination is: is a private limited company a 'person' as contemplated under Section 2(1)(d). The contention of the learned counsel for the KPTC is that persons specified and enumerated in Section 2(1) (m) are the only categories of persons covered by that clause and a company incorporated under the Companies Act is not covered thereunder. The learned counsel would submit that a company is excluded from the definition of 'person' since the object of the Act, 1986 is to provide an affordable remedy to individuals or four categories of collectivities or associations of individuals which may constitute legal entities for suing or being sued. According to learned counsel, the companies incorporated were never intended to be covered by Act, 1986 as they could always pursue the ordinary remedy provided in law. The learned counsel also submitted that the word "includes" must be read as "means". In this regard, the learned counsel placed reliance upon two decisions of this Court namely; (1) The South Gujarat Roofing Tiles Manufacturers Association and Another v. The State of Gujarat and Another ((1976) 4 SCC 601) (2) Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd, and others ((1987) 1 SCC 424))

12. *Lord Watson in Dilworth v. Commissioner of*

Stamps (1899) AC 99 made the following classic statement:

"The word "include" is very generally used in interpretation clauses in order ***to enlarge the meaning of words or phrases occurring in the body of the statute****; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include", and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."*

13. Dilworth (supra) and few other decisions came up for consideration in Peerless General Finance and Investment Co. Ltd. and this Court summarized the legal position that inclusive definition by the Legislature is used; (one) to enlarge the meaning of words or phrases so as to take in the ordinary, popular and natural sense of the words and also the sense which the statute wishes to attribute to it; (two) to include meaning about which there might be some Dispute; (three) to bring under one nomenclature all transactions possessing certain similar features but going under different names.

14. It goes without saying that interpretation of a word or expression must depend on the text and the context. The resort to the word includes' by the Legislature often shows the intention of the Legislature

that it wanted to give extensive and enlarged meaning to such expression. Sometimes, however, the context may suggest that word 'includes' may have been designed to mean "means". The setting, context and object of an enactment may provide sufficient guidance for interpretation of word includes' for the purposes of such enactment.

15. Section 2(1)(m) which enumerates four categories namely, (i) a firm whether registered or not; (ii) a Hindu undivided family; (iii) a co-operative society; and (iv) every other association of persons whether registered under the Societies Registration Act, 1860 (21 of 1860) or not while defining person' cannot be held to be restrictive and confined to these four categories as it is not said in terms that 'person' shall mean one or other of the things which are enumerated, but that it shall 'include' them.

16. The General Clauses Act, 1897 in Section 3(42) defines 'person':

"Person shall include any company or association or body of individuals whether incorporated or not."

17. Section 3 of the Act, 1986 upon which reliance is placed by learned counsel for KPTC provides that the provisions of the Act are in addition to and not in derogation of any other law for the time being in force. This provision instead of helping the contention of KPTC would rather suggest that the access to the remedy provided to the Act of 1986 is an addition to the provisions of any other law for the time being in force. It does not in any way give any clue to restrict the definition of the 'person'.

18. Section 2(1)(m), is beyond all questions, an

interpretation clause, and must have been intended by the Legislature to be taken into account in construing the expression 'person' as it occurs in Section 2(1)(d). While defining 'person' in Section 2(1)(m), the Legislature never intended to exclude a juristic person like company. As a matter of fact, the four categories by way of enumeration mentioned therein is indicative, categories (i), (ii) and (iv) being unincorporate and category (iii) corporate, of its intention to include body corporate as well as body unincorporate. The definition of 'person' in Section 2 (1)(m) is inclusive and not exhaustive. It does not appear to us to admit of any doubt that company is a person within the meaning of Section 2(1)(d) read with Section 2(1)(m) and we hold accordingly.

52. Thus we hold the Article 5(2) is independent clause and the condition of having fixed permanent place of business under article 5(1) is not attracted for Permanent Establishment under Article 5(2) .

53. It is not disputed by the assessee that the assessee was providing the services of consultancy in the other contracting state i.e., in India. It is also not disputed that the enterprise was rendering these services through its employees. It is however, submitted by the Ld. Senior Advocate that the employees of the company remained in India only for 25 days and, therefore, the third condition of stay in India for more than 90 days, is not attracted.

54. As per our reading it is not the stay of the employees for more than 9 months, which is required to be there but it is fact of rendering of services or activities which was required to be rendered for a period of nine months. If we look into the reply submitted by the assessee in April, 2012 and June, 2012, then it is clear that the assessee :

(a) Has rendered the services through its three employees and their stay was for 25 days; and

(b) As is clear from the second reply, the assessee has rendered the services on various occasions from January to March 2010.

55. The providing of services for a period of nine months is stipulated in the period of 12 months. In our view, once the activity of the assessee commenced only in the month of January, 2010, then the argument of completing 9 months service before March, 2010, is preposterous, implausible and against the common sense. It is not expected to complete 9 months between January, 2010 to March, 2010. The completion of 9 months activities by the enterprise was only conceived in a period of 12 months. However is not disputed by the assessee before us that the enterprise / assessee continues to render the services with effect from January, 2010 and thereafter also in the subsequent assessment year.

56. In the light of the above, if we literal interpretation to clause 5(2)(i) of the DTAA, then it is clear that the services are required to be rendered by the enterprise through its employees or other personnel for a period of nine months within any 12 months period. We also draw strength from the law laid down by Hon'ble Supreme Court in the case of Calcutta Knitwears 362 ITR 673 held–

> **"34.** Thus, the language of a taxing statute should ordinarily be read understood in the sense in which it is harmonious with the object of the statute to effectuate the legislative animation. A taxing statute should be strictly construed; common sense approach, equity, logic, ethics and morality have no role to play. Nothing is to be read in, nothing is to be implied; one can only look fairly at the language used and nothing more and nothing less. *(J. Srinivasa Rao* v. *Govt. of A.P.* 2006(13) SCALE 27, *Raja Jagdambika Pratap Narain Singh* v. *CBDT* [1975] 100 ITR 698(SC))
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> **35.** It is also trite that while interpreting a machinery provision, the courts would interpret a provision in such a way that it would give meaning to the charging provisions and that the machinery provisions are liberally construed by the courts. In *Mahim Patram (P.) Ltd.* v. *Union of India* [2007] 3 SCC 668 this Court has observed that:
>
> "20. A taxing statute indisputably is to be strictly construed. [See *J. Srinivasa Rao* v. *Govt. of Andhra Pradesh and Anr.*, 2006(13)SCALE 27]. It is, however, also well-settled that the machinery provisions for calculating the tax or the procedure for its calculation are to be construed by ordinary rule of construction. Whereas a liability has been imposed on a dealer by the charging section, it is well-settled that the court would construe the statute in such a manner so as to make the machinery workable.
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> 21. In *J. Srinivasa Rao* (*supra*), this Court noticed the decisions of this Court in *Gursahai Saigal* v. *CIT*[1963] 48 ITR 1 (SC) and *Ispat Industries Ltd.* v. *Commissioner of Customs, Mumbai*, 2006(202)ELT561(SC).In *Gursahai Saigal* (*supra*), the question which fell for consideration before this Court was construction of the machinery provisions vis-à-vis the charging provisions. Schedule appended to the Motor Vehicles Act is not machinery provision. It is a part of the charging provision. By giving a plain meaning to the Schedule appended to the Act, the machinery provision does not become unworkable. It did not prevent the clear

intention of the legislature from being defeated. It can be given an appropriate meaning."

36. A reference to the observations of this Court in *J.K. Synthetics Ltd.* v. *CTO* [1994] 4 SCC 276 would be apposite:

"13. It is well-known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax; including penal provisions meant to deal with defaulters. ... Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. *(Whitney* v. *Commissioners of Inland Revenue 1926 A C 37, CIT v. Mahaliram Ramjidas* (1940) 8 ITR 442, *Indian United Mills Ltd.* v. *Commissioner of Excess Profits Tax, Bombay,* [1955] 27 ITR 20(SC) *and Gursa-hai Saigal* v. *CIT, Punjab,* [1963] 1 ITR 48 (SC)."

37. It is the duty of the court while interpreting the machinery provisions of a taxing statute to give effect to its manifest purpose. Wherever the intention to impose liability is clear, the Courts ought not be hesitant in espousing a commonsense interpretation to the machinery provisions so that the charge does not fail. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same (*Whitney* v. *Commissioners of Inland Revenue 1926 A C 37*, *CIT* v. *Mahaliram Ramjidas* [1940] 8 ITR 442 (PC), *Indian United Mills Ltd.* v. *CIT* [1955] 27 ITR 20(SC), *and Gursahai Saigal* v. *CIT* [1963] 48 ITR 1 (SC); *CWT* v. *Sharvan Kumar Swarup & Sons* [1994] 6 SCC 623; *CIT* v. *National Taj Traders* [1980] 121 ITR 535/[1979] 2 Taxman 546 (SC); *Associated Cement Co. Ltd.* v. *CTO* [1981] 48 STC 466 (SC). Francis Bennion in *Bennion on Statutory Interpretation, 5th Ed., Lexis Nexis* in support of the aforesaid proposition put forth as an illustration that since charge made by the legislator in procedural provisions is excepted to be for the general benefit of litigants and others, it is presumed that it applies to pending as well as future proceedings.

57. Thus respectfully following the path shown by the apex court (supra), in our view, the requirement of fixed place of business is not applicable to the clauses (2), (4) and (5). Clause (i) of Article 5(2) which

provides the service PE, is not dependent upon the fixed place of business as is only dependent upon the continuation of the activity for the same project or connected project for a period / periods aggregating to more than 9 months within 12. Accordingly we hold that assessee is having the service PE in India. However the determination of this issue will only have any bearing on the issues under considerations if on examination of facts we come to conclusion that the activities of the assessee do not fall in any of the Article of DTAA.

58. Now, we would examine the claim of the assessee that it is rendering technical services based on the service agreement regarding 'Regional Headquarter Service Agreement' and its various reply falls under royalty or any other clause of DTAA. The information provided by the assessee to ABB Ltd, were acquired by the assessee of its expertise, experience and knowledge based on its association with ABB group Zurich. The said information are not available in the public domain or cannot be acquired by ABB Ltd on its own effort and the information which are provided were in the nature of special knowledge, skill and expertise. As is clear from the reply submitted by the assessee, the assessee has merely provided the access to such specialised knowledge, skill and expertise and has not done

anything more, for rendering the services . For the above said purpose, some of the important clauses, which we feel throw light on the activities of the assessee are as under :

i) Development of Regional OHS strategies in line with ABB strategies and considering the risk profile of the IMA region.

ii) Provision of information about strategies, goals, targets and instructions in the field of OHS.

iii) Coaching and monitoring the OHS Advisors of the service recipient in implementation of any procedure in line with **group directives**

iv) Acting as a contact point between the Group Safety Advisor and the Service Recipient.

v) Provision of information to provide information to monitor and review progress from the managerial, clerical and suggestion of corrections in order to provide key information indicators targets

vi) Setting up and marinating a Project Development Board in UAE.

vii) Development of a group business in Waste Heat to Power.

viii) Development of a working example of joint value proposition with IBM.

ix) Monitoring and assistance to Strategic Account Managers of the service recipient with respect to the yearly account plans, ensuring alignment with the Business Unit.

x) Setting up of sales targets, thereby utilising local business unit opportunities which sustain and to ensure mutual alignment with business unit goals.

xi) Ensurement that the customer feedbacks are available to the service recipient through surveys and other customer satisfaction tools.

xii) Guidance and development of strategicAccount Manager team to move from a product sales view to an account management view and to understand and effectively operate and navigate within each organisation etc.,

59. The agreement gives opportunity to ABB ltd of using the information pertaining to industrial / commercial / scientific experience belonging to Assessee. Can on the basis of material available on record it can be concluded that the assessee had rendered the services mentioned in the agreement? In our view it would not be possible for the assessee to render these activities or services merely with the help of three persons sent only for 25 days to India as the nature of activities scope and ambit of clauses in the agreement is very wide and it is not possible to render these services either through 3 employees or through phone call (moreover the assessee has not provided any evidence of actual rendering of services) , therefore instead of providing the services by the assessee through it

employees, the assessee had merely given the access to ABB Ltd various secret, confidential, IPRs information and other information acquired by it from its past experience to ABB Ltd. If the services were actually rendered by the assessee, (as claimed by the assessee) than it is essential that the assessee would have sent some of its officer on its pay-roll to actually execute the services at various branch offices of ABB Ltd . In our view the assessee is required to undertake collecting, analysing and delivering of security intelligence and information to the service recipient under "The Regional Headquarter Services" to ABB Ltd , then the deployment of manpower by the assessee was necessary and similarly the deployment of manpower is equally necessary in case of education in basic sector procedure and regulations to new employees of service recipient (ABB Ltd).

60. In the reply of the assessee to AO , it is by the assessee , that coaching and monitoring the OHS advisors of ABB Ltd in implementing and developing OHS plans and strategies, were rendered via visits, telephone calls, meeting trainings etc but no evidence was given by the assessee to AO or CIT or the Tribunal. In our view, these activities which were allegedly rendered by the assessee were in the form of sharing or

permitting to use the special knowledge, expertise and experience of the assessee,(which the assessee had acquired from its parent company,) and was shared by it with ABB Ltd. squarely falls within the realm of 'royalty', as defined in Article 12(3) INDO -UAE DTAA and in the form of rendering the services. The visits of the officials of the assessee to ABB Ltd was only for the purposes of providing access for using the information pertaining to industrial / commercial / scientific experience belonging to Assessee and to help ABB Ltd to commercially exploiting it.

61. In our view the judgment relied by the assessee in matter of TNT Express Worldwide (UK) Ltd v. DDIT (Intl.Taxation) [(2016) 70 taxmann.com 129, support the case of revenue is clear from the following paras 18 and 19 :

> **18.** In the case in hand, it is not the case of Revenue that the payment received by the assessee is a consideration for use or right to use for any copyright, patent, trademark, design, etc. Even otherwise, from the description of services as provided in Schedule-2 of the agreement, it was not for use or right to use any copyright, patent, trademark, design or model, plan, secret formula or process. Thus, the case of assessee has to be examined in the context of the last part of the definition to say a consideration for use or right to use for information, concerning industrial, commercial or scientific experience. To bring the case in the definition of royalty, imparting of experience, information by the assessee to TNT India is necessary. The AO has also observed in the assessment order that it is possible to suggest that some information being provide liked sales support, liaisoning with professional advisors, lobbying activities and coordination with trade associations may not be in the nature of supply of know-how. However, the remaining services where R&D nature of imparting knowledge, information or expertise, which is already in possession and in existence with the assessee, can be ascertained only from the details of the actual nature of the services provided under various categories and the basis of the

compensation received by the assessee for providing such services, whether the assessee charged the Indian entity on the basis of Cost Plus or on the basis of gross revenue. If the compensation is charged by the assessee based on the gross revenue, then it implies that assessee did not incur any cost in providing such services as these are the kind of information, knowledge or expertise as well as experience already in existence and in the possession of assessee. There is no quarrel that using the experience and expertise by the assessee itself for providing the services in the form of report or design developed specifically for Indian entity which was not already in existence, then providing such report, plan or design by using the expertise would not constitute imparting of such expertise, information or experience and therefore would not fall under the purview of royalty, as held by the Hon'ble Bombay High Court in the case of *Diamond Services International (P.) Ltd.* (*supra*) as under:—

'9. .....

10. Article 12(3)(a) of the DTAA is a tax liability and as per has to be interpreted on the said principles of interpretation of taxation provisions as explained in *A.V. Fernandez* v. *State of Kerala* AIR 1957 SC 657 :.....

11. ..... In our opinion there is no imparting of its experience in favour of the client. What the client receives is the report where the GIA uses its commercial or technical knowledge to give a report to the client. Illustrative example would be a lawyer giving advise to his client, a doctor giving his medical opinion, a laboratory submitting blood analysis report and the like. These cannot be said to be imparting of information by the person who possesses such information. What such person does is uses his experience and technical know-how for a consideration without parting with that information. In our opinion, therefore, considering the definition of royalty under art. 12 of DTAA there is no parting or rendering of technical services either of managerial, technical or consultancy nature or industrial, commercial or scientific experience. Once the consideration/fees received do not fall within the expression "royalty" the action of the respondents in refusing the certificate under s. 195 of the IT Act was clearly without jurisdiction and consequently the impugned orders are set aside with a further direction to the respondent No. 2 to issue the certificate as applied for by the petitioners.'

19. It is not the nomenclature of the agreement, but the substance and contents and terms and conditions of the agreement which are material to ascertain the real intention of the parties and the nature of mutual obligations of the parties. As it is manifest from the list of services as provided under Schedule-2 that some of the services are clearly for new process information including specification and application, evaluation of new opportunities, management information and other automatic system services, which may be the assessee's

own expertise and experience and acquired during due course of time. Therefore, these services *prima facie* appear to be in existence and being provided in the form of information, which are definitely related to the commercial and business activity of the Indian entity. It is not the case of the assessee that all these services provided to the Indian entity is available in the public domain, rather, there is a confidential clause in the agreement which prohibits the parties to reveal the information exchanged between the parties to a third party or to public. The commentary on OECD Model Tax Convention is a relevant guidance for deciding the issue of nature of payment, whether it is royalty or business income. The relevant extracts of the OECD Model Tax Convention in paragraphs 10.2 to 11.6 are as under:—

'10.2.....'

62. The dominant character of agreement between the assessee and Indian company was for sharing secret, confidential and IPRs information made available during the years under consideration under the said agreement clearly suggest that the activities of the assessee were covered under the Royalty clause of DTAA. This is further clear from the secrecy and confidential clause in the agreement to the following effect

> "Secrecy Intellectual property rights : The parties undertake to keep information received from the other party secret. They shall take all measures necessary for secrecy, in particular by binding their employees w.r.t secrecy, in line with the ABB group rules. Excluded from this obligation to secrecy is information, which is already published, which on receipt was already known to the receiving party or which has been made available by a third party without violating an obligation of secrecy, as well as information which for the purposes of marketing, supply or use of ABB goods and products must be made available to third parties.The provisions concerning secrecy shall continue to apply also after termination of this agreement. All rights to information, including

corresponding intellectual property rights, shall remain with the Party that supplied the information."

63. In our view the information's provided by the assessee were in the nature of expert knowledge and experience acquired by parent company of the assessee company related to industrial and commercial . During the course of argument it was submitted by the Ld Senior advocate that the assessee do not own any IPRs in its name and this secrecy clause is a standard form contract to bound the employees.

64. In our view no clause in the agreement can be said to innocuous, reasonable , literal and meaningful interpretation is required to be given to said clause. Our reading of the clause make it abundantly clear that 1) this clause was kept in the agreement to protect secret, confidential and IPRS of the assessee as well as of the parent company 2) the assessee is rendering services as regional Hub for for the benefit of ABB legal entities in India, Middle East and Africa on behalf of its parent company in Zurich and therefore it is duty bound to protect the interest of parent company as well. 3) All the employees of the assessee and ABB ltd are bound to adhere to the policies of ABB global .

65. Therefore the information provided by the assessee to ABB Ltd were *in the nature of know-how contract, given by* assessee *to ABB Ltd , so*

that such know how can used ABB Ltd , for its commercial and industrial purposes and further this special knowledge and experience would remain unrevealed to the public. These information were not already existing and were supplied by the assessee after its development or creation to ABB Ltd and there also exist specific provisions concerning the confidentiality of these information(clause 9) . Moreover the assessee has done very little after giving access to these information to ABB Ltd . thus the information provided of the assessee given to ABB ltd with the right to use and exploit commercially were concerning industrial, commercial or scientific experience activities would fall under Royalty of DTAA . As we had held that the activities under consideration of the assessee falls under Royalty Clause 12 of DTAA and not under residual clause, therefore the assessee is liable to be taxed with in India in accordance with Article 12 of DTAA, section 5 read with section 9 of Income Tax Act.

66. In our view, the judgment relied upon by the assessee are not applicable to the facts and circumstances of the case. *In the matter of CIT Vs.HEG Ltd., in (2003) 130 Taxman 72(MP)* is not applicable to the present case as in the said case services rendered were in the form supply of a booklet as claimed by the assessee themselves unlike the situation in the instant case. In the instant case, the assessee has rendered various

services to support the Service Recipient in its business and has rendered full support to the assessee in the functioning of the same starting from implementation to the improvement of the same. The category of information provided were with special features which were not available in open market by the assessee thus it materially differs from the category of services rendered in case referred .

67. *Similarly in* the case of *Diamond Services International P. Ltd., V. Union of India in [2008] 169 Taxman 201(Bom)* the assessee is a tax resident of Singapore and was appointed as sub-participant of Lab Direct Programme of Gemological Institute of America (GIA), who will help people in getting their diamonds graded is involved in the work of grading diamonds and issues certificates stating properties such as colour, carat etc., of diamonds. Assessee's obligations were to collect and ship diamonds on behalf of clients in India and to collect payments from them and forward the same to GIA, for which the assessee made an application to Deputy Director requesting for a certificate u/s.197 to receive diamond grading and certification charges from Indian customers without TDS. This was denied by the Deputy Director by considering the activities of GIA to be that of transfer of commercial experience in shape of diamond grading report and was covered by definition of 'royalty' within meaning of explanation 2(iv)

to Section 9(1)(vi) and article 12 of DTAA between India and Singapore. The Hon'ble Court of Bombay held the action of Deputy Director in refusing certificate to be without jurisdiction.

68. As can be seen from the above, the issue involved is grading of diamonds and there is no similarity to the present case on hand, which deals with various services which tantamount to 'Royalty' and are **clearly distinguishable**. Also, there is no information or know-how passed-on in the above case w.r.t. grading of diamonds and issuance of certificate. GIA may be having experience of grading but it does not impart the said experience to the client. What the client receives is the report where the GIA uses its commercial or technical knowledge to give a report to the client. IN view of this, there is no parting or rendering of technical services either of managerial, technical or consultancy nature or industrial, commercial or scientific experience in this case. In the said judgment in para 9 it was held as under:

> 9. The question that remains to be answered is whether there is imparting of specific experience by GIA to the person. Impart in *Webster's Encyclopaedic Unabridged Dictionary* has been defined "to give, to bestow, communicate; to grant a part or share of". In *Oxford English Reference Dictionary* it is prescribed as "give a share of (a thing)". A plain reading, therefore, of the meaning of the word "impart" implies that it means to give, to bestow, communicate, to grant a part or share of or give a share of a thing. Considering that the term 'royalty' envisages grant or share of industrial or commercial experience. In other words there should be a transfer of "industrial or commercial experience" from assignor to the assignee for a consideration. Therefore, to fall within the meaning of the term 'royalty' under article 12 of the DTAA it must envisage the person who is the owner of any intellectual property right, designs or model, plan, secret formula or process, etc. to retain the property in them and permit the use or allow the right to use such patents, designs or models, plans, secret formula, etc. to another

person. Where there is no transfer of the right to use, payment made cannot be treated as royalty. To be considered as royalty normally the following factors should be present in the transaction:—

(*a*)There should be a consideration for use or transfer of right to use;

(*b*)The payment shall be towards grant or share for acquiring *inter alia* information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information;

(*c*)Such use or right to use of such property or information shall be for the stipulated period in accordance with the terms of the contract."

69. Thus Hon'ble High court held that there should be making of payment toward such use or right to use information. In the present case the assessing is receiving payment for making available various information for commercial, industrial experience (made available to it by ABB global to the ABB limited which were secret in nature, having IPR rights and confidential conditions.

70. Next decision relied by assessee was in the case of *GECF Asia Limited v. DDIT, Intl. Taxn.-3(1), Mumbai* The only issue raised in the said case was whether the payment is 'royalty' under Article 12(3) which defined in para-8 as under :

"Article–12(3)

The term "royalties" as used in this article means payments of any kind received as a consideration for the alienation or the use of, or the right to use, any copyright of literary, artistic or scientific work (including cinematograph films, phonographic records and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience."

In paragraph 9 of the order, the concept of know-how w.r.t. royalty was reproduced from the Philips baker book to the following effect is discussed as follows :

"11. In classifying as royalties payments received as consideration for information concerning industrial, commercial or scientific experience, paragraph 2 alludes to the concept of "know-how". Various specialist bodies and authors have formulated definitions of know-how which do not differ intrinsically. One such definition, given by the "Association des Bureaux pour la Protection de la Propriete Industrielle" (ANBPPI), states that "know-how is all the undivulged technical information, whether capable of being patented or not, that is necessary for the industrial reproduction of a product or process, directly and under the same conditions; inasmuch as it is derived from experience, knowhow represents what a manufacturer cannot know from mere examination of the product and mere knowledge of the progress of technique".

11.1 In the know-how contract, one of the parties agrees to impart to the other, so that he can use them for his own account, his special knowledge and experience which remain unrevealed to the public. It is recognised that the grantor is not required to play any part himself in the application of the formulas granted to the licensee and that he does not guarantee the result thereof.

11.2 This type of contract thus differs from contracts for the provision of services, in which one of the parties undertakes to use the customary skills of his calling to execute work himself for the other party. Payments made under the latter contracts generally fall under Article 7.

11.3 The need to distinguish these two types of payments, i.e. payments for the supply of know-how and payments for the provision of services, sometimes gives rise to practical difficulties. The following criteria are relevant for the purpose of making that distinction:

Contracts for the supply of know-how concern information of the kind described in paragraph 11 that already exists or concern the supply of that type of information after its development or creation and include specific provisions concerning the confidentiality of that information.

In the case of contracts for the provision of services, the supplier undertakes to perform services which may require the use, by that supplier, of special knowledge, skill and expertise but not the transfer of such special knowledge skill or expertise to the other party.
In most cases involving the supply of know-how, there would generally be very little more which needs to be done by the supplier under the contract other than to supply existing information or reproduce existing material. On the other hand, a contract for the performance of services would, in the majority of cases, involve a very much greater level of expenditure by the supplier in order to perform his

contractual obligations. For instance, the supplier, depending on the nature of the services to be rendered, may have to incur salaries and wages for employees engaged in researching, designing, testing, drawing and other associated activities or payments to sub-contractors for the performance of similar services.

11.4 Examples of payments which should therefore not be considered to be received as consideration for the provision of know-how but, rather, for the provision of services, include:

- *payments obtained as consideration for after-sales service*
- *payments for services rendered by a seller to the purchaser under a guarantee, payments for pure technical assistance,*
- *payments for an opinion given by an engineer, an advocate or an accountant, and*
- *payments for advice provided electronically, for electronic communications with technicians or for accessing, through computer networks, a trouble-shooting database such as a database that provides users of software with non-confidential information in response t frequently asked questions or common problems that arise frequently. (emphasis supplied)'"*

71. In the DTAA with UAE, in Article – 12, clause (3), the term 'royalty' has been differently defined than what it was defined in the treaty under consideration(Thailand) in Gecf Asia Ltd (supra) as expression alienation and imparting is not used in the treaty. In this case the bench was discussing the issue of Indo-Thailand Treaty in respect of 'Royalty', and as held if there is imparting or alienation of any knowhow while rendering the service on account of information concerning industrial, commercial and scientific expertise than it is royalty and if there is no alienation or use of any right to use of knowhow or, then it cannot be termed as 'Royalty'

72. In our view the DTAA under consideration, clearly uses the word for the "use of" or "right to use of", commercial, scientific equipment and has not used the word either 'imparting' or 'alienation' of knowhow. In our view the DTAA entered into

between the two contracting states is a complete code in itself and is required to be strictly interpreted. The language used in the clause under consideration is plain and unambiguous and therefore reading of words 'alienation' or 'imparting' of knowhow in the treaty would tantamount to rewriting the treaty by this Tribunal, which is not permissible . Following the rules of interpretation of statute as held by the Hon'ble Supreme court in the matter of Calcutta knitwear(supra) and also in the matter of Raghunath Rai Bajera v. Punjab National Bank [(2007) (2) SCC 230 restrictive meaning is required to be given to the treaty between India and UAE.

73. Further above case law is distinguishing for the following reasons:

(i) The expertise is transferred by the assessee company through various means including training of the Indian company and this expertise is derived from experience. As held in para-9 of the above cited order, there are specific provisions of confidentiality.

(ii) It is observed in this order that in the case of FTS a supplier undertakes to perform services but in royalty, it involves transfer of such specialised knowledge, skill of expertise to the other party.

(iii) In the case of contract for services, it involves greater level of expenditure by the supplier in order to perform his contractual obligations. IN the case of the assessee, no such thing is established except sending 4 people for a short duration and providing rest of the services through e-mails etc., as claimed by the assessee. Hence, the payment is under the category of 'royalty' in the instant case on hand.

(iv) In the present case the assessee is providing of information and is permitting the Indian company to use this information. This is so admitted by the assessee in its reply to AO. The AO had summarised it as under :

i) Regional Project Risk Management Services : supply of information of best practices, bench marking information and internal audit report.

ii) Regional market development services : Creation of a weekly update on changes in the ABB markets, support to the country management team of India to develop a plan for ABB Ltd., India on how to become more competitive.

iii) Regional Occupational health and safety (OHS) services : Provision of information about strategies, goals, targets and instructions in the field of OHS, OHS audit, implementation of OHS strategies, coaching and monitoring OHS advisors in implementing and developing OHS plans and strategies.

iv) Regional Security services : collection analysis and delivery of security intelligence information, basic and advance training in crisis management.

74. One more case relied upon by the assessee is on that of the decision of ITAT, Ahmedabad 'I' Bench, in ITA No.203/Ahd/2014 dated 28.03.2017 in the case of *Marck Biosciences Ltd., v. ITO, International Taxation-II, Ahmedabad. In this case* the payment was made on account of professional fee for global biopharmaceutical strategic counselling and advisory services rendered by the service provider, on which no TDS was made. The services rendered in this case is limited to strategic and financial counseling services and there are no secret, confidential and IPRs right information was permitted to be used by the assessee pertaining to industrial, commercial or scientific information Hence there are clear distinguishing factors in the relied upon case vis-à-vis the instant case.

75. Therefore once payment of any kind received as a consideration for the use for the use of, or the right to use, industrial, commercial or

scientific equipment by the assessee it will fall within the realm of Royalty as per DTAA.

76. It is worthwhile to mention here that the assessee has placed its reliance on the decision of *ITAT, Bangalore Bench 'C' in IT(IT)A No.188/Bang/2016 dated 28.10.2016 in assesses own case for A.Y.2012-13.* In our view, there was no quarrel with respect to residence status of the assessee in the said assessment year. Moreover, on examination of the agreement and information provided by the assessee to ABB Ltd, with a right to use the said information, was held by us to be 'Royalty'. We have not examined the character of the services rendered by the assessee as FTS or not, as has been so examined by the coordinate bench in the case cited above. In our view, this exercise would be of no use as mentioned in para 31 (supra). Therefore, even on this count, the decision relied upon by the assessee is not applicable.

77. Before we conclude, we would like to record a note of appreciation for the valuable efforts and contribution made by the Ld Senior DR, Mr G. R. Reddy for the revenue and Mr Percy Pardiwala Ld Senior Advocate for assessee, in adjudication of present appeals.

78. In the result, appeals of the assessee for A.Y. 2010-11 and A. Y. 2011-12, are dismissed.

Order pronounced in the open court on 21st day of June, 2017.

Sd/- Sd/-

(INTURI RAMA RAO)
ACCOUNTANT MEMBER

(LALIT KUMAR)
JUDICIAL MEMBER

Bengaluru
Dated : June, 2017