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[2018] 95 taxmann.com 165 (Mumbai - Trib.)

IT/ILT: Payment received by assessee a Singapore based company from its AE in India towards reimbursement of salary for seconded employees, being pure reimbursement of salary, cost incurred by assessee would be covered under exception in Explanation 2 to section 9(1)(vii) and could not have been regarded as FTS under Act as well as India-Singapore DTAA

[2018] 95 taxmann.com 165 (Mumbai - Trib.)

IN THE ITAT MUMBAI BENCH 'K'

Morgan Stanley Asia (Singapore) Pte. Ltd.

v.

Deputy Director of Income tax (International Taxation) 4(1), Mumbai*

MAHAVIR SINGH, JUDICIAL MEMBER
AND MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER
IT APPEAL NOS. 8595 (MUM.) OF 2010 AND 4365 (MUM.) OF 2012
[ASSESSMENT YEARS 2006-07 AND 2007-08]
JULY 6, 2018

Section 9, read with section 195, of the Income-tax Act, 1961 and article 13 of the India-Singapore DTAA - Income - Deemed to accrue or arise in India (Fees for technical services) Assessment years 2006-07 and 2007-08 - Assessee had seconded one of its employees to India for development of business of its AE and as per terms of contract, assessee agreed to continue paying salary of employee in Singapore and cross charging India for same - Assessing Officer held that Director/employee deputed to India was highly qualified, having vast technical experience and further there was no evidence to suggest that providing of managerial and consultancy services to AE was not business of assessee, accordingly sum received by assessee was FTS - However, it was found that assessee, made payment towards reimbursement of salary expenditure, which clearly showed that there was no element of profit in said payment - Whether thus, payment by associate concern being a pure reimbursement of salary, cost incurred by assessee was in nature of payment of salary covered under exception mentioned in Explanation 2 to section 9(1)(vii) and, therefore, same could not be regarded as FTS given in definition of term of FTS but as salary in hands of deputed employee only - Held, yes - Whether even otherwise, entire amount of salary had been subjected to tax in India and hence could not have been taxed in hands of assessee - Held, yes [Paras 10 & 13] [In favour of assessee]

FACTS

- The assessee-company a resident of Singapore deputed one of its Director/employee to India in earlier years and who remained in the year under consideration with the assessee to set up the business in the name and style of Morgan Stanley Advantage Services Private Limited (MSAS), an associate concern engaged in providing information technology enabled services and software development to overseas Morgan Stanley entities. The assessee, as per the terms of contract, agreed to continue paying salary of the employee in Singapore and cross charging India for the same. The assessee received an amount of Rs. 5.78 Lakhs as reimbursement from the Indian company.

- The assessee before the Assessing Officer claimed that the amount received by the assessee was in the nature of reimbursement of cost incurred by the assessee on behalf of MSAS and accordingly, no income arose in the hands of the assessee. The Assessing Officer however, rejected the assessee's explanation and contended that Director/employee deputed to India was highly qualified and having vast technical experience and expertise in this area and the role of the assessee was more than employer and further there was no evidence to suggest that providing of managerial and consultancy services to Associated Enterprise (AE) was not business of the assessee. Further, the Assessing Officer noted that the remittances of the amount to the assessee had been done on a single day, whereas salary was always paid on a monthly basis. Thus, the Assessing Officer held that the sum received by the assessee was FTS and charged markup of 23.3 per cent on the reimbursement received by the assessee.

- On appeal, the Commissioner (Appeals) confirmed the action of the Assessing Officer by treating the reimbursement and mark up there on as FTS.

- On appeal to the Tribunal:

HELD

- It is a fact that there is contractual agreement between MSAS and assessee, which clearly provides that salary is paid by assessee on behalf of MSAS and the same is recharged by assessee to MSAS. It is viewed that the amount received/receivable by assessee is in the nature of reimbursement of cost incurred by assessee on behalf of MSAS because the same cannot be brought within the definition of FTS as defined in explanation to section 9(1)(*vii*) provided in exception. The exception provided clearly stated that the income of the recipient chargeable under the head 'salary' in view of the expenses will not be considered as falling under the definition of FTS. The payment by MSAS being a pure reimbursement of salary cost incurred by the assessee is in the nature of payment of salary which is covered under exception mentioned in Explanation 2 to section 9(1)(*vii*) and therefore, the same cannot be regarded as FTS given in the definition of the term of FTS but as salary in the hands of the deputed employee only. [Para 10]

- The coordinate bench of Delhi Tribunal in regard to reimbursement of salary to personnel deputed with the AE has considered the issue in the case of *United Hotels Ltd.* v. *ITO* [2005] 2 SOT 0267 (Delhi) wherein it is held for each deputed person, the amount received by it is income chargeable under the head 'salary' and therefore, it cannot be termed as 'fees for technical services'. [Para 11]

- Similarly, the co-ordinate Bench of this tribunal in the case of *Addl. DIT (IT)* v. *Mark & Spencer Reliance India (P) Ltd.* [2013] 38 taxmann.com 190/[2014] 147 ITD 83 (Mum. - Trib.) has considered this issue on identical facts and held that expatriation of employee under secondment agreement without transfer of technology would not fall under the term 'make available' and will not be taxable under the treaty.[Para 12]

- In view of the above facts of the instant case and considering the judicial precedence, it is viewed that the payment in question being reimbursement of salary is not fee for technical services in the light of relevant provisions of the Act and India-Singapore DTAA. Further, there is no dispute that the assessee has made payment towards the reimbursement of salary expenditure, which clearly shows that there is no element of profit in the said payment. The agreement clearly supports this fact. Even otherwise, the entire amount of salary received by the seconded employee, has been subjected to tax in India and there is no dispute on this. Accordingly, it is viewed that the salary cannot be taxed in the hands of the assessee. Thus, this main issue is decided in favour of assessee. [Para 13]

CASE REVIEW

United Hotels Ltd. v. *ITO* [2005] 2 SOT 267 (Delhi) (para 13) and *Addl. DIT (IT)* v. *Mark & Spencer Reliance India (P.) Ltd.* [2013] 38 taxmann.com 190/[2014] 147 ITD 83 (Mum. - Trib.) (para 13) *followed*.

CASES REFERRED TO

Morgan Stanley International Incorporated v. *Dy. DIT (International Taxation)* [2015] 53 taxmann.com 457/153 ITD 403 (Mum. - Trib.) (para 9), *Dy. DIT (International Taxation)* v. *JC Banford Excavators Ltd.* [2014] 43 taxmann.com 343/150 ITD 553 (Delhi - Trib.) (para 9), *Addl. DIT (International Taxation)* v. *Mark & Spencer Reliance India (P.) Ltd.* [2013] 38 taxmann.com 190/[2014] 147 ITD 83 (Mum. - Trib.) (para 10) and *United Hotels Ltd.* v. *ITO* [2005] 2 SOT 267 (Delhi) (para 11).

Sunil M. Lala and **Tushan Hathiraman**, ARS *for the Appellant.* **Saurabh Deshpande**, DR *for the Respondent.*

ORDER

Mahavir Singh, Judicial Member - Out of these two appeals by the assessee, one appeal for AY 2007-08 in ITA No. 4365/Mum/2012 is arising out of the order of Commissioner of Income Tax (Appeals)-15, Mumbai [in short CIT(A)], in appeal No. CIT(A)-15/Curr.110/11-12 dated 3.4.2012 & the other appeal for AY 2006-07 in ITA No. 8595/Mum/2010 is arising out of Objection No. 170 by Dispute Resolution Panel-II (in short DRP) vide order dated 27-09-2010. The Assessment for AY 2006-07 was framed by the Dy. Director of Income Tax (IT), 4(1) Mumbai (in short 'DDIT/AO') under section 143(3) read with section 144(C) of the Income Tax Act, 1961 (hereinafter 'the Act') vide dated 05-10-2010. The assessment for AY 2007-08 was framed by Dy. Director of Income Tax (IT), 4(1) Mumbai (in short 'DDIT/AO') under section 143(3) read with section 144(C) of the Act vide dated 07-02-2011.

2. The only common issue in these two appeals of the assessee against order of the CIT(A) upholding the action of the TPO/AO in making adjustment of Transfer Pricing to determine the Arms Length Price (ALP) on account of reimbursement of personnel costs amounting to Rs. 5,78,25,175/- by Morgan Stanley Advantage Services Pvt. Ltd. (MSAS) to the assessee. For this assessee has raised following 3 grounds which are alternative and without prejudice to each other: —

> *"1. Ground No.1: In upholding that the reimbursement of personnel costs amounting to Rs. 57,825,175 by Morgan Stanley Advantage Services Private Limtied (MSAS) to the Appellant is the Appellant's income and in respect of which transfer pricing provisions would be applicable in order to determine the Arm's Length Price (ALP).*

2.Gound No.2: Without prejudice to the above, in upholding the mark-up of 23.23 percent levied by the Additional Commissioner of Income-tax, Transfer Pricing – Range II(3), Mumbai (hereinafter referred to as 'the learned TPO') on the above reimbursement of personnel costs by MSAS to the Appellant resulting in an adjustment of Rs. 13,432,788 to the total income of the Appellant.

In this regard, the learned CIT(A) has erred in upholding that Mitsui O.S.K. Lines Maritime (India) Private Limited (Mitsui) is a company comparable to the Appellant without inter-alia considering the following:

2.1 Mitsui is a company engaged in the business of inspection, manning, training and communication which are not activities comparable to the activities undertaken by the Appellant;

2.2 Mitsui was selected as a comparable on an arbitrary basis; and

2.3 Mitsui's financial statements were not available in the public domain and the segmented information was neither audited nor authenticated by a Chartered Accountant.

3. Ground No.3: Without prejudice to the above, in upholding that the reimbursement of personnel cost by MSAS to the Appellant is 'Fees for Technical Services' (FTS).

In this regard, the learned CIT(A) erred on the following grounds:

3.1 In upholding that the reimbursement of personnel cost by MSAS to the Appellant is FTS under the provisions of section 9(1)(vii) of the Act.

3.2 Without prejudice to the above, in holding that the reimbursement of personnel cost by MSAS to the Appellant qualifies as FTS under Article 12 of the India – Singapore Double Taxation Avoidance Agreement (IS Treaty). In this regard, the learned CIT(A) specifically erred in:

a. *holding that the Appellant was rendering services to MSAS through its employee;*
b. *such services rendered by the Appellant to MSAS were "making available" technical knowledge, skill, know-how, etc. which could be applied by MSAS for its own benefit."*

3. Brief facts are that the assessee company was incorporated in Singapore and is a resident of Singapore for the purpose of taxation. The assessee deputed one of its Director/employee to India in earlier years and who remained in the year under consideration with the assessee to set up the business in the name and style of Morgan Stanley Advantage Services Private Limited (MSAS), an associate concern engaged in providing information technology enabled services and software development to overseas Morgan Stanley entities. The assessee, as per the terms of contract, agreed to continue paying salary of the employee in Singapore and cross charging India for the same. As per Form-16 of the expatriate an amount of Rs. 7,31,62,201/- had been paid as salary and in return, the assessee received an amount of Rs. 5,78,25,175/- as reimbursement from the Indian company. The AO during the course of assessment proceedings asked the assessee as to why the amount of Rs. 5,78,25,175/- received from the MSAS should not be treated as Fee for Technical Services (FTS) and brought to tax accordingly. The assessee before AO claimed that as per contractual agreement between MSAS and assessee, salary is paid by assessee on behalf of MSAS and the same is recharged by the assessee to MSAS. It was therefore claimed that the amount received by the assessee is in the nature of reimbursement of cost incurred by the assessee on behalf of MSAS and accordingly, no income arises in the hands of the assessee. The AO was not convinced with the explanation of the assessee, who held that Director/employee deputed to India was highly qualified and technical experience having vast

experience and expertise in this area and the role of the assessee was more than employer and further there is no evidence to suggest that providing of managerial and consultancy services to Associated Enterprise (AE) is not business of the assessee. Further, the AO noted that the remittances of the amount to the assessee have been done on a single day, whereas salary is always paid on a monthly basis. Therefore, the total remittances on account of reimbursement of salary of Rs. 5,70,25,125/- was treated as FTS and further mark up of 23.3% was charged and ALP was determined on the basis of margin of percentage earned by another assessee Mitsui OSK Lines Maritime (India) Pvt. Ltd. For mark up, the AO made adjustment of Rs. 1,34,32,788/- by determining the ALP on the basis of TPO's order. Aggrieved, assessee preferred appeal before CIT(A).

4. The CIT(A) confirmed the action of the AO by treating the reimbursement and mark up there on as FTS by observing in para 6.3 as under:

'6.3 I have considered the facts of the case and contentions/submissions of the appellant as against the observations/findings of the AO in his order. The contentions/submissions of the appellant are being discussed and decided as under:

i. *The issue in respect of the fact that such payments received cannot be merely considered to be in the nature of reimbursement and that a mark-up is necessary has been dealt and decided against the appellant in ground No.1 and 2 above. Accordingly, the contention of the appellant that what has been received by it is merely a reimbursement is not found to be acceptable. Further it is not the facts of the case that what has been received by the appellant is salary in its hand, Shri Nagarni who was deputed to the MSAS by the appellant was not receiving money from MSAS in his individual capacity at all. On the contrary the salary it received was from the appellant, which would be the case in respect of the any company who is rendering FTS through its employees. Such company would pay salary to its employees and charge FTS to the company to whom the services are rendered. Accordingly in the facts of the case the contention of the appellant that what was received by it was salary and therefore it is covered under the exception given in explanation 2 1 to the section 9(1)(vii) is not found to be acceptable, Further given the facts as above the case laws relied upon by the appellant are considered to be distinguishable as in the facts of the case there is nothing like salary which the appellant has received. The appellant has only paid to its employee and has recovered payments from the company to which such employee was deputed. Such recovery in the facts of the case and as per the findings in the ground no. 1 & 2 has not been found to merely reimbursement and further not at arm's length.*

ii. *It is the fact of the case that the appellant has deputed one senior and experienced person of its organization to MSAS for a period of three years, who had to render his services to ;the MSAS. There is agreement in this regard. Further it is not the case that such deputed person has not provided services to the MSAS. According]y the appellant's contention that there is no agreement between it and MSAS for services to be rendered is not material. It is further stated that for services to be rendered what is important is the factum of services rendered and payments received. Existence of a contract/agreement for the same is not material. In such facts of the case the case laws/decisions relied upon by the appellant are distinguishable as in none of the cases the facts are as in the case on hand.*

iii. *It has been contended by the appellant that Mr, Nagrani was an employee of MSAS during the period. Such contention of the appellant is away from facts. Mr. Nagrani was the employee of the appellant all along who only was deputed to the MSAS for a*

period of three years. In the facts of the case Mr Nagrani rendered his services to the MSAS during the period of deputation.

iv. *Under such facts of the case it is arrived at that the services rendered by Mr. Nagiaoi to MSAS for which the appellant paid salary to Mr. Nagrani and then claimed consideration though calling the same as reimbursement is nothing but rendering of FTS to MSAS by the appellant and accordingly the case of the appellant is covered under FTS as per section 9{1)(vii) of the Act In this view of the facts, the Sub-Ground 3.1 so raised by the appellant is dismissed.*

v. *The appellant: in respect of its Sub-Ground 3,2 has stated that as per the provisions of section 90(2) of the Act, the provisions of DTAA or the I. T, Act, whichever; is more beneficial will apply and that the expression "make available" is not defined in IS treaty but is a. defined expression in the India-USA DTAA itself and that the services received by the appellant does not per se mean that technical knowledge skill is made available within the meaning of para 4(b) of article 12 of the DTAA.*

vi. *In this regard it is stated that either in article 3 or article 12 of US treaty does not contain any definition of the expression. However in the memorandum forming part of the treaty, the term has been explained by way of examples. Accordingly it cannot be said that such phrase has been defined in that treaty as well.*

vii. *In the MOU, it is only mentioned that "generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology.*

viii. *Accordingly it can be stated that in the facts of the case where payments are made by the MSAS for services rendered by Mr. Nagrani, such services which have been received by the MSAS, have been applied by the recipient for its business purposes. If such! services were not applied for the purposes of business, such payments would not be allowable u/s 37 (1) of the Act. Further if such services have been applied, then in its generality it can be stated that such services could be considered to be made available to the MSAS.*

ix. *The expression '.make available is not defined in the Income Tax Act or DTAA signed by India with various countries. In view of above, one has to look forward for Its meaning in other legal enactments or in the general dictionary to understand its meaning. It is found that the expression has been used in various other enactments in United Slaves. The expression has been used in enactment 'Terrorism Risk Insurance Act 'of United 'States and in 'Copyright Infringement Act' of USA. On later Act number of decisions has come up regarding meaning of expression 'make available' which means "offer or make available or provide for" in the contexts. If these words are substituted in sub para-4(b) of article -12 of India US treaty (where first time word make available was used in treaty context), it will be as under - If such services offered/supply technical knowledge, experience, skills, know-how or processes..,...., it makes perfect sense. A person having such technical knowledge/experience/skills/know-how will not be offering through its services these technical knowledge/experience/skills/know-how to the recipient of the services for the price of only services. If that be the case such services would be covered as royalties under para- 3(a) of article-12 of India USA DTAA. Para-4(b) of article-12 deals with provision of services to the recipient through use of one's technical .knowledge/experience, etc. and not for transfer of such technical knowledge/experience to the recipient of services. These agreements are for provision*

of services and do not contain provision for transfer of related experience/technical knowledge/know-how etc.

x. *The Boston court in the USA has given a ruling on the phrase "make available", which again supports above contention. Quoting from the below mentioned website further supports contention—*

"Another Court Ruling Actually Des Say Making Available Is Not Distribution, While the ruling in the Elektra V. Barker case got plenty of attention, even if some of it was misleading, the EFF points out that in another ruling on the same day (which got much less publicity) a court In Boston seems to have made a much stranger case for why making available is not distribution. Once again, the judge did not throw out the case, saying that an "offer to distribute" is still enough of a claim, to, have the case move forward to trial (at which point the copyright holder would need to show that actual distribution occurred). However, with so many different court rulings making so many different interpretations of "making available," there are going to be appeals and eventually it will move up the chain. If (as is likely) different appeals courts end up disagreeing it may eventually make it to the Supreme Court, where we can get a final ruling on whether making available is or is not the equivalent of distribution."

(Website reference

http:techdirt.com/blog.php?tag=make+available)

xi. *Treaty with the Netherlands also uses phrase 'make available', but again same has not been defined in the treaty or elsewhere. The official web site belonging to the Netherlands government has also used word 'make available* in same context as has been discussed earlier. It has been quoted from web site-*

"You make available personnel in the Nether lands: If you make an employee available on the Dutch labour market you will be liable in Dutch law to make salary deductions, submit wage tax and social security declarations and probably withhold and deduct them. Whether the latter will be the case will depend on the tax law of the Netherlands, the tax treaty between the Netherlands and the country of habitual residence and on various international social security treaties such as EU Regulation 1408/11 and the European Social Charter.

Please Note:

'Making available' should be taken to mean any kind of supply of personnel such as posting, transfer or supply. If you make available personnel, you are a supplier, The employer to whom you make available personnel is referred to as the recipient":

(Website reference- http://www.belastingdienst.nl/variabellb uitenland/en/business tax payers/business

xii. *The meaning of above expression was also searched on the Internet and it was found in the free dictionary by Farlex that 'Make Available' is the meaning of the word 'offer' and this meaning clearly fits into in para-4 of article-12.*

xiii. *Further efforts made to search the meaning of above expression i.e. 'make available' on the google search on the Internet and it was found that the other persons are using this expression 'make available' in the sense of "making accessible/supply things in the context;*

xiv. *There are certain examples and other technical notes provided in protocol of India —*

US treaty, which suggest that transfer/teaching of such experience/know-how is not required to treat these services as make available. Examples from protocol related to technical and consultancy services could make technology available in a variety of settings, activities and industries. An example given in MOU which is relevant for interpreting term make available is as under:-

Example-12

Facts:

An Indian wishes to install a computerized system in his home to control lighting, hearing and air-conditions, a stereo sound system and a burglar and fire alarm system. He hires an American electrical engineering firm to design the necessary wiring system, adapt standard software, and provide instructions for instillations, Are the fees paid to the American firm by the Indian individual fees for 'Included services?

Analysis:

The services in respect of which the fees are paid are of (he type which would generally he treated as fees for included services under paragraph 4(b). However, because the services are for (he personal me of the individual making the payment under paragraph 5(4} the payments would not be fees for included services:

xv. *This example clearly suggests that the recipient has not been provided by service provider any technical knowledge regarding computerized system so that he can develop such system of his own. hi feet, he has been merely advised how he can apply that knowledge for automation for its use. The recipient has not become expert in the technology of the computer system for controlling, lighting, heating etc. in this example,*

xvi. *This clearly suggests that word 'Make available' was used in treaty in above said! context. Treaty too suggest these services of technical knowledge/experience/skill etc. were offered or made accessible to the other party and it never meant that the other party should be trained or made expert in such technical knowledge etc. It will be absurd on of a person to make other person expert of its own core competency, which will result in situation that the recipients of service will not look again to him when these services are again needed in future. Teaching/educational services have been separately dealt elsewhere in the treaty. The appellant has also not argued on interpretation of word 'make available* in US courts. In view of above the meaning of expression 'Make available5 has to be read in the above context. In the present case, service provider has provided or made accessible the services of its technical knowledge/experience .... 'Enabled to apply' phrase used in same protocol does not mean that service provider also has to teach technology embedded in the service provided.*

xvii. *Further in the facts of the case Mr. Nagrani who is a person of high skill, knowledge and experience was deputed to the MSAS and was rendering his services to the M$AB was nothing but making his knowledge, skill etc. available to the MSAS, In the process he was also enabling the MSAS to acquire such knowledge, skill etc. from him by the MSAS so that after the period of deputation gets over, MSAS could still apply the same for its benefit, and continue to sustain and grow on its own.*

xviii. *In view of the discussion here in above the contention of-the appellant regarding making available and context and meaning given to this phrase by the appellant is*

not found to be acceptable

xix. *The appellant has relied upon rulings of Hon'ble IT AT in the case of Raymond Limited (Supra). The rulings relate to India- UK DTAA. Further in the case of Raymond: Ltd., the issue pertained to provisioning of managerial service and whether such managerial service could be considered as technical services since the word managerial did not find place in Article concerned. In the case on hand, there is no dispute on to the fact that the nature of services are such which are covered within the meaning of technical services as defined in Sec 9(1)(vii) of the Act and also in clause 4b of Article 12 of India US DTAA, The issue raised by the appellant is in respect of the 'make available? and not whether the! services received are technical services and not covered under section 9(1)(vii) of the Act.*

xx. *The appellant has also made a reference to the case of Mckinseys and Co., (Supra) in respect of the foreign company supplying commercial and industrial inform Bostonation input and the Indian branch carrying on this and rendering services to its client in; India. The appellant company is in the provisioning of equity broking services and it is not the case that it is providing services in India based on any commercial and industrial information input that is available with the vastly experienced and highly qualified employee of the appellant. Such ruling of Hon'ble ITAT is in the specific facts of the case in Mckinseys and Co. and could not be held to be applicable in the case of the appellant.*

xxi. *The other decisions relied upon by the appellant are similarly distinguishable on facts.*

xxii. *In view of the facts of the case and discussion here in above the contentions of the appellant in this regard are not found to be acceptable and accordingly the Sub-Ground 3.2 is dismissed.'*

Aggrieved assessee is in second appeal before the Tribunal.

5. Before us, Ld. Counsel for the assessee argued that the contractual agreement between MSAS and assessee clearly provides that the salary is paid by the assessee on behalf of MSAS and the same is recharged by by assessee to MSAS. Accordingly, the amount received by the assessee is in the nature of reimbursement of cost incurred by the assessee on behalf of MSAS. Ld. Counsel for the assessee argued that this payment cannot be termed as FTS as defined in explanation-2 to section 9(1)(vii) of the Act. He contended that the payment by MSAS is purely in the nature of salary reimbursement on account of cost incurred by the assessee. Once the payment is in the nature of salary, the same is covered under the exception mentioned in explanation-2 to section 9(1)(vii) of the Act. Therefore, the same cannot be regarded as FTS given in the definition of the term of FTS but as salary income in the hands of the deputed employee. The relevant provision of section 9(1)(vii) *Explanation*-2 reads as under:

"Section 9(1)(vii) Explanation 2:

For the purposes of this clause, "fees for technical services" means any consideration (including any lumpsum 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"."

6. The above definition reads as in consideration including any lumpsum consideration, for the rendering of any managerial, technical or consultancy services (including the provision of

services of technical or other personal) but does not include consideration for any construction, assembly, mining or like project undertaken by the resident or consideration which would be income of the resident chargeable under the head 'salaries'. It means that the payment by MSAS being pure reimbursement of salary cost incurred by the assessee in the nature of payment of salary, which is covered under the exception mentioned in explanation-2 to section 9(1)(vii) of the Act. In view of this, Ld. Counsel argued that the same cannot be regarded as FTS given in the definition of the term FTS but is pure salary income in the hands of the deputed employee. It was also stated by Ld. Counsel that applicable taxes on salary earned by deputed employee are deducted and deposited into the Government treasury.

7. Ld. Counsel stated that the AO has erred in disregarding the provisions of section 90(2) of the Act and ignored the definition of FTS as provided as per the provisions of India Singapore Treaty and applicable on the payments made to the assessee by MSAS. It was stated that the AO has made this addition of Rs. 1,34,32,788/- to the amount paid by MSAS to the assessee based on the adjustment made by the TPO and the total amount of payment made to the assessee and mark up there on by considering the same as FTS under the provisions of section 9(1)(vii) of the Act. He argued that the amount paid by MSAS to assessee represents reimbursement of salary cost incurred by assessee, which does not result into any income chargeable to tax in the hands of the assessee. He explained that assessee is a tax resident of Singapore and accordingly, the provisions of India Singapore Treaty, which is beneficial, should be considered to determine the taxability of amount paid to assessee. Ld. Counsel for the assessee relied on Article 12 of India Singapore Treaty and contended that FTS arising in India may be taxed in India. He referred to paragraph 4 of Article 12, which defines the term FTS and clause (b) contains that such technical knowledge should be made available. He referred to the following:

"1. Royalties and fees for technical services 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 and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent.]

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use:

(a) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information;

(b) any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b) or 4(c) of Article 8.

4. The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or

(b) make available technical knowledge, experience, skill, know-how or processes, which

enables the person acquiring the services to apply the technology contained therein; or

(c) *consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.*

For the purposes of (b) & (c) above, the person acquiring the service shall be deemed to include an agent, nominee or transferee of such person."

8. Based on the above definition of FTS in Article 12(4) of the India Singapore Treaty, to qualify as FTS, the services should be made available of technical knowledge, experience, skill, knowhow or process, which enable the person acquiring services to apply the technology contained therein. The India Singapore Treaty does not define the term 'make available' and accordingly it was contended that according to the MOU to the India US Tax treaty, technology is made available when the services recipient is enabled to apply the technology. In terms of the above, Ld. Counsel for the assessee drew the distinct feature between India Singapore Treaty and India US Treaty. He finally argued that the reimbursement of salary of the deputed employee is in the nature of salary and not in the nature of FTS and cannot be taxed in India in the hands of the assessee.

9. On the other hand, the Ld. CIT(DR) relied on the India US Treaty Article 12, the definition of Royalties and fee for included services. He also relied on Article 7 of India US Treaty terming the FTS as business profits. Ld. Sr. DR relied on the decision of the coordinate bench of this Mumbai in the case of *Morgan Stanley International Incorporated* v. *Dy. DIT* [2015] 53 taxmann.com 457/153 ITD 403 (Mumbai - Trib) for the proposition, wherein it is held that in regard to employees seconded by assessee constitute its service PE in India and therefore, payment made by Indian entity to assessee on account of reimbursement of salary was to be taxed under Article 7 of India US Treaty. Ld. CIT(DR) also relied on the decision of ITAT Delhi 'G' Bench in the case of *Dy. DIT, International Taxation* v. JC *Bamford Excavators Ltd.* [2014] 43 taxmann.com 343/150 ITD 553 (Delhi - Trib.), wherein it is held that *"JCB India constituted the assessee's service PE in India, the AO held that it carried no the business in India and royalties/fees for technical services received from JCB India was effectively connected with such service Permanent Establishment (PE). Relying on para 6 of article 13, the AO held that such royalties/fees for technical services was liable to be considered as Business Profits' under article 7 of the DTAA as it was effectively connected with the P.E.".* In view of this argument, Ld. CIT(DR) stated that the reimbursement of salary by MSAS to assessee is FTS falling within the provisions of section 9(1)(vii) of the Act and chargeable to tax in India.

10. We have heard the rival contentions and gone through the facts and circumstances of the case. The facts are that one Shri Vineet Nagrani, was employee with the assessee with effect from 16.1.2002 for its business operations and holds a MBA degree. Shri Vineet Nagrani was deputed to India with effect from 1.5.2004 to 30.4.2007 i.e. for a period of 3 years. As per the facts of the case, Shri Vineet Nagrani was seconded to MSAS for 3 years and through this period, the assessee remains his employer and works under the same terms and conditions of employment of which he was employee. As per the arrangement, the remuneration/salary would be paid by the assessee while the expenses during the period of secondment would be the responsibility of the MSAS. We find that the AO was of the view that Shri Vineet Nagrani who was working with the assessee with effect from 16.1.2002, had acquired essential business acumen and he was working for the group, before he was deputed to look after the operation of MSAS. According to the AO and TPO no unrelated party would lend the services of its experienced employees for mere reimbursement of expenditure or salary and other entitlement incurred on the employee. According to the AO and TPO, the reimbursement is nothing but

FTS and he also applied mark up of 23.23 percent so taken for the purpose of computing the ALP of the payment and accordingly adjustment was made. The CIT(A) also confirmed the action of the AO/TPO. In the given facts, now the question arises whether the reimbursement of salary to the deputed employee will fall under explanation to section 9(1)(vii) of the Act or not. It is a fact that there is contractual agreement between MSAS and assessee, which clearly provides that salary is paid by assessee on behalf of MSAS and the same is recharged by assessee to MSAS. According to our view, the amount received/receivable by assessee is in the nature of reimbursement of cost incurred by assessee on behalf of MSAS because the same cannot be brought within the definition of FTS as defined in explanation to section 9(1)(vii) of the Act provided in exception. The exception provided clearly stated that the income of the recipient chargeable under the head 'salary' in view of the expenses will not be considered as falling under the definition of FTS. The payment by MSAS being a pure reimbursement of salary cost incurred by the assessee is in the nature of payment of salary which is covered under exception mentioned in explanation 2 to section 9(1)(vii) of the Act and therefore, the same cannot be regarded as FTS given in the definition of the term of FTS but as salary in the hands of the deputed employee only. For this, first we will place reliance on the decision of coordinate bench of this Tribunal in the case of *Addll. DIT (IT)* v. *Mark & Spencer Reliance India (P) Ltd.* [2013] 38 taxmann.com 190 [2014] 147 ITD 83 (Mumbai – Trib.).

> "*4.7 The present case is a case of part reimbursement of expenses and therefore there is no income element present in part reimbursement. The services rendered by the four persons deputed to the appellant are assistance in management and set up of business, assistance in property selection and evaluation and leading the retail operation, merchandising and product matter and set up of merchandising team under direct control, management and supervision of the appellant. This means that the four persons deputed to the appellant have worked as per the needs of the appellant to set up its retail business operations. The services necessary to set retail business operations cannot be said to be technical services within the scope of treaty between India and U.K. and as explained by ITAT Mumbai in the case of Raymonds Ltd (supra). Further, from the above it also cannot be said that the services have been 'made available1 to the appellant to be taxable in India.*
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> *4.8 Reference in this regard is made to the judgment of ITAT Bangalore 'A' Bench In case of IDS Software Solutions (India (P) Ltd. 122 ITJ (Bang) 410. In this case of an employee of U.S. Company was seconded to the Indian Company under an secondment agreement" to provide managerial services in the business of the Indian Company. The seconded employee was reportable and responsible to the Indian Company and was required to devote the whole of his time, attention and skills to the duties required by the secondment agreement. The Indian company had the right to approve or reject the employee and if necessary to request the US company to replace the employee if such employee is found not qualified to meet the requirements of the seconded arrangements. The seconded employee was required to act and serve as 'officers', authorized signatories, nominees and in other lawful capacity on behalf of the Indian company etc. On these facts the ITAT has held as under;*
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> *"The next question is whether the amount can be considered as fees for technical services within the meaning of Expin. 2 below s.9(l)(vii) of the IT Act. Under this Explanation fees for technical services means any consideration including lump sum consideration for the rendering 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 ". It is not denied before us on behalf of the assessee that Dr. Sundarajan is a technical person. What is however submitted is that arts 11 and VI of the secondment agreement would be out of*

place in a contract for providing technical services. Article II as we have already seen contains eight clauses outlining the duties and obligations of the seconded employee. Article VI provides for indemnification which has also been earlier noticed by us. We are inclined to agree with the submission that these two articles are out of place in a contract for providing technical services. For example, Cls. (A) to (C) of art II make the seconded employee responsible and subservient to the assessee company which cannot be the case if the agreement is for providing technical services by IDS act as officer or authorized signatory or nominee or in any other lawful personal capacity for the assessee company, would also be out of place in the agreement for rendering technical services as it cannot be imagined that a technical person would also be required to act in non-technical capacities under an agreement for rendering technical services. Clause (H) on which considerable reliance was placed by the Department to contend that the agreement is one for rendering technical services, is merely a clause ensuring secrecy and confidentiality of the information accessed by the seconded employee in the course of his employment with the assessee company. Such confidentiality extends not only to technical information, which would be the case if the agreement is one for rendering technical services but also to financial or accounting information, price or cost data and any other proprietary or business related information. Article VI which provides for indemnity, that is to say, the liability of the assessee company to indemnify the US company from all claims, demands, etc., consequent to any actor omission by the seconded employee is also inconsistent with the claim of the Department that this is an agreement for rendering technical services. The article further provides that nothing in the agreement shall be construed as a warranty of the quality of the seconded employee. It is not usual to find a stipulation in an agreement for rendering technical services."

4.9 Similarly in case of Asstt. CIT v. Louis Berger International Inc. Hon'ble Hyderabad ITAT in a case of reimbursement of expenses for providing consultancy services has held that such reimbursement of expenses is not taxable under India USA treaty and also under the Act. In case of United Hotels Ltd. v. ITO [2005] 2 SOT 267 (Delhi), the Hon'ble ITAT, Mumbai has considered the scope of fees for technical services and payment of salary to the employees on deputation for rendering various professional services, such as accounting, engineering etc. and has held that payment of salary to the employees on deputation is not fees for technical services under section 9(1) (vii) of the Act.

4.10 Similar view has been taken by ITAT in other cases namely:

ADIT (IT) v. Bureau Veritas 131 TTJ (Mumbai) 29, ACIT v. Modicon Network (F) Ltd 14 SOT 204 (Del), Dy. DIT, (International Taxation) v. Tata Iron & Steel Co. Ltd. [2009] 34 SOT 83 (Mum.): also.

4.11 Hence following the judgment of Mahindra & Mahindra ITAT Spl. Bench, and other decisions as above the part reimbursement of expenses cannot be has income deemed to accrue or arise in India and taxable as income being "Fees for Technical Services" as per DTAA between India and U.K.1

13. It is clear from the order of the learned CIT(A) that it has followed the decision of Special Bench of this Tribunal in case of Mahindra & Mahindra Ltd. (supra) and held that the payment are not in the nature of Fees for Technical Services (FTS). Thus in the absence of make available technical knowledge, expertise, skill, know-how or process etc. it cannot be held that the payment is FTS as per article 13(4) of Indo UK DTAA. The term fee for technical service has been defined under par 4 of article 13 of Indo-UK DTAA as under:

'4. for the purposes of paragraphs 2 of this Article, and subject of paragraph 5 of this Article, the terms "fees for technical services" means payment of any king of any person in

consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which;

(a) are ancillary and subsidiary to the application of enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received ;or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3 (b) of this Article is received; or

(c) make available technical knowledge, experience, skill know-how or processes, or consist of the development and transfer of a technical plan or technical design1.

14. As per clause (e) of para 4 if the payment is a consideration for rendering of any technical or consultancy services which make available technical knowledge, experience, skill, know-how or process, or consist of development and transfer of technical plan or technical design shall be treated as fee for technical services. An identical issue has been considered by the Hon'ble Karnataka High court in case of De Beers India Minerals (P.) Ltd. (supra) in par 22 as under:

"22. What is the meaning of "make available'. The technical or consultancy service rendered should be of such a nature that it 'makes available to the recipient technical knowledge, know-how, and the like. The service should be aimed at and result in transmitting technical knowledge, etc, so that the prayer of the service could derive on enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology 'making available' the technical knowledge, skills, etc, must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skill of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered 'made available' when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc. Does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as 'fee for technical/included services' only if the twin test of rendering services and making technical knowledge available at the same time is satisfied."

15. Thus, merely providing the employees or assisting the assessee in the business and in the area of consultancy, management etc would not constitute make available of the services o£ any technical or consultancy in nature. The Hon'ble High Court has observed in para 13 that as per the definition for fee for technical services means payment of any kind to any person in consideration for service or services of technical nature if such services make available technical knowledge, experience, skill know-how or process which enables the person acquiring the services to apply technology contained therein. Thus, expatriation of employee under seconded agreement without transfer of technology would not fall under the term make available as per the article 13(4)(c) of Indo-UK DTAA. Accordingly, in view the decision of Hon'ble Karnataka High Couirt in case of De Beers India Minerals (P) Ltd. (supra) and Special Bench decision in case of Mahindra and

Mahindra Ltd. (supra), we hold that the payment in question does not fall under the term fee for technical services as per provisions of Indo-UK DTAA.

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18. There is no dispute about the facts as record by the CIT(A) that the assessee has made the payment towards part reimbursement of the salary expenditure which clearly shows that there is not element of profit in the said payment. This claim of the assessee is also supported by the various clauses of the agreement and seconded agreement as referred by us in the forgoing paras. Further the entire amount of salary received bv these personnel has been subjected to tax in India at the highest average rate of tax. Therefore, there is no question of any default on the part of the assessee. It is pertinent to mention that payment by the assessee is actually payment made to the employees deputed in India under seconded agreement but routed through Marks and Spencer PLC UK. Since the said payment to the employees is already subjected to tax in India, therefore, there is no question of treating the assessee in default for non-deduction of tax at source."

11. Similarly, the coordinate bench of Delhi Tribunal in regard to reimbursement of salary to personnel deputed with the AE has considered the issue in the case of *United Hotels Ltd.* v. *ITO* [2005] 2 SOT 0267 (Delhi) wherein it is held as under:

'7. So far as fees for technical services are concerned, there is another aspect to it also. The meaning assigned to the expression "fees for technical services" is the same as is given in Expln. 2 to Section 9(1)(vii) as we have noted earlier. The case of the Revenue is that the persons who were deputed were technically qualified to do the job they were performing and hence the amount which was reimbursed to IHC was nothing but fees for technical services. For a moment, if this argument of the Revenue is accepted, even then it cannot fall within the scope of "fees for technical services". This is because Expln. 2 clearly excludes consideration which would be income of the recipient chargeable under the head "salaries". In the present case, it is not in dispute that what is reimbursed by the assessee is the actual salary of the deputed personnel. Undoubtedly, for each deputed person, the amount received by it is income chargeable under the head "salary" and therefore, it cannot be termed as "fees for technical services'.

12. Similarly, the co-ordinate Bench of this tribunal in the case of *Mark & Spencer Reliance India (P.) Ltd.* (*supra*) has considered this issue on identical facts and held as under:-

'13. It is clear from the order of the learned CIT(A) that it has followed the decision of Special Bench of this Tribunal in case of Mahendra & Mahendra and held that the payment are not in the nature of Fees for Technical Services (FTS). Thus in the absence of make available technical knowledge, expertise, skill, know-how or process etc. it cannot be held that the payment is FTS as per article 13(4) of Indo UK DTAA. The term fee ITA No. 905/M/2012 Marks and Spencer Reliance India for technical service has been defined under par 4 of article 13 of Indo-UK DTAA as under:

"4. for the purposes of paragraphs 2 of this Article, and subject of paragraph 5 of this Article, the terms "fees for technical services" means payment of any king of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel) which;

(a) *are ancillary and subsidiary to the application of enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this article is received ;or*

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or

(c) make available technical knowledge, experience, skill know- how or processes, or consist of the development and transfer of a technical plan or technical design".

14. As per clause (e) of para 4 if the payment is a consideration for rendering of any technical or consultancy services which make available technical knowledge, experience, skill, know-how or process, or consist of development and transfer of technical plan or technical design shall be treated as fee for technical services. An identical issue has been considered by the Hon'ble Karnataka High court in case of CIT vs. De Beers India Minerals(P.) Ltd.(supra) in par 22 as under:

"22. What is the meaning of 'make available'. The technical or consultancy service rendered should be of such a nature that it 'makes available to the recipient technical knowledge, know- how, and the like. The service should be aimed at and result in transmitting technical knowledge, etc, so that the prayer of the service could derive on enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into the terminology 'making available' the technical knowledge, skills, etc, must remain with the person receiving the services even after the ITA No. 905/M/2012 Marks and Spencer Reliance India particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skill of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered 'made available' when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service that may require technical knowledge, skills, etc. Does not mean that technology is made available to the person purchasing the service, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, payment of consideration would be regarded as 'fee for technical/included services' only if the twin test of rendering services and making technical knowledge available at the same time is satisfied."

15. Thus, merely providing the employees or assisting the assessee in the business and in the area of consultancy, management etc. would not constitue make available of the services of any technical or consultancy in nature. The Hon'ble High Court has observed in para 13 that as per the definition for fee for technical services means payment of any kind to any person in consideration for service or services of technical nature if such services make available technical knowledge, experience, skill know-how or process which enables the person acquiring the services to apply technology contained therein. Thus, expatriation of employee under seconded agreement without transfer of technology would not fall under the term make available as per the article 13(4)(c) of Indo-UK DTAA.

Accordingly, in view the decision of Hon'ble Karnataka High Court in case of CIT vs. De Beers India Minerals (P.) Ltd. (supra) and Special Bench decision in case of Mahendra and Mahendra (supra), we hold that the ITA No. 905/M/2012 Marks and Spencer Reliance India payment in question does not fall under the term fee for technical services as per provisions of Indo-UK DTAA.'

13. In view of the above facts of the present case and considering the judicial precedence, we are of the view that the payment in question being reimbursement of salary is not fee for technical services in the light of relevant provisions of the Act and India-Singapore DTAA.

Further, there is no dispute that the assessee has made payment towards the reimbursement of salary expenditure, which clearly shows that there is no element of profit in the said payment. The agreement clearly supports this fact. Even otherwise, the entire amount of salary received by Shri Vineet Nagrani, has been subjected to tax in India and there is no dispute on this. Accordingly, we are of the view that it cannot be taxed in the hands of the assessee. Accordingly, this main issue is decided in favour of assessee. As regards to other alternative issues, we need not to adjudicate as we have decided the main issue in favour of assessee.

14. The facts and circumstances in ITA No. 8595/Mum/2010 for AY 2006-07 are exactly identical and hence taking a consistent view, we direct the AO to delete the addition.

15. In the result, the appeals of the assessee are party allowed.

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*In favour of assessee.