IT/ILT : Where payment made by assessee to UK based company was for services which were simply in nature of consultancy services which did not make available any technical knowledge, skill or knowhow, consideration for such services could not have been taxed under Article 13(4) of Indo UK DTAA. Merely because consultancy services has technical inputs, these services do not become technical services and simply because the recipient of a technical consultancy services learns something with each consultancy, there is no transfer of technology in the sense that recipient of service is enabled to provide the same service without recourse to the service provider

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IN THE ITAT AHMEDABAD BENCH 'D'

Deputy Commissioner of Income-tax

v.

Bio Tech Vision Care (P.) Ltd.

PRAMOD KUMAR, ACCOUNTANT MEMBER
AND S.S. GODARA, JUDICIAL MEMBER
IT APPEAL NOS. 1388, 2766 & 3154 (AHD.) OF 2014
[ASSESSMENT YEARS 2009-10, 2010-11 AND 2011-12]
APRIL 18, 2018

Mudit Nagpal *for the Appellant.* **Bandish Soparkar** *for the Respondent.*

ORDER

Pramod Kumar, Accountant Member - These three appeals and two cross objections pertain to the same assessee, involve some common issues and were heard together. As a matter of convenience, therefore, all the three appeals and two cross objections are being disposed of by this consolidated order.

2. We will first take up the assessment year 2009-10.

3. The appeal filed by the Assessing Officer, as also cross objection filed by the assessee, call into question correctness of the order dated 12th March 2014 passed by the learned CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2009-10.

4. In the first ground of appeal, the assessee is aggrieved that the learned CIT(A) erred in deleting the disallowance of Rs 3,10,195 on the ground that these expenses pertained to a period prior to the relevant previous year.

5. The relevant material facts are like this. During the course of scrutiny assessment proceedings, the Assessing Officer noted that the assessee has claimed the deduction for expenses pertaining to a period prior to the relevant previous year. The assessee's explanation, justifying deductibility of these expenses, that the liability to pay for these expenses "crystallized during the *(relevant previous)* year" was rejected by the Assessing Officer on the ground that "these expenses are to be disallowed since they donot pertain to the current year and the matching principle does not get fulfilled" and that "here the expenditure incurred is not matching with the year of earning revenue". He also observed that the "accounts are generally finalized after sufficiently long period of time so as to make adequate provision

for expenses". As for the income of the prior year also being offered to tax, the Assessing Officer observed that "as the assessee has itself included the income of the earlier year in the taxable income, no dispute remains about the same". It was in this backdrop that the disallowance of Rs 3,10,195 was made. Aggrieved, assessee carried the matter in appeal before the CIT(A) who deleted the disallowance mainly on the ground that the prior period income booked by the assessee was much more than prior period expenses, and that, in the light of this Tribunal's decision in the case of *Advani Exports Ltd* v. *DCIT*, what can at best be disallowed is the prior period expenses, as reduced by the prior period expenses. The disallowance was thus deleted. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. Learned counsel for the assessee has invited our attention to Hon'ble jurisdictional High Court's judgment dated 20th July 2016, in the case of *PCIT* v *Adani Enterprises Ltd* (Tax Appeal No. 566 of 2016) wherein Their Lordships have upheld the decision and reasoning of the Tribunal, as relied upon by the CIT(A), and have also observed that "even the Revenue does not dispute that the company would be taxed at the same rate in the present assessment year as in the earlier year". When Their Lordships are of such an opinion and taking a broad view of the matter in this wholly tax neutral situation, it was futile for the Assessing Officer to take a pedantic view of the matter as he did. Whether the amount is deductible in year x or year y, as long as delayed claim is not malafide, nothing much really turns on the same, That apart, even on the first principles and under the mercantile method of accounting, the expenses are deductible in the year in which the liability to pay crystallizes-particularly when expenses are of very small amounts having regard to the scale of operations and in view of the accounting concept of materiality. Learned Departmental Representative very fairly accepts that it is neither a case of double deduction of same expenses nor there is an issue about bonafides of these expenses which were admittedly not claimed in any of the earlier years as well. In view of these discussions, as also bearing in mind entirety of the case, we are of the considered view that hyper technical and pedantic view adopted by the Assessing Officer has rightly been reversed by the CIT(A). The relief granted by the CIT(A) was, therefore, quite justified. We approve the same and decline to interfere in the matter.

8. Ground no. 1 is thus dismissed.

9. In ground no. 2, the Assessing Officer is aggrieved that the CIT(A) erred in deleting the disallowance of Rs 30,85,947 despite the fact that the assessee did not deduct tax at source from the related payments to non-residents. In a connected ground no. 2 in the cross objection filed by the assessee, the grievance of the assessee is that learned CIT(A) erred in upholding, to the extent of Rs 4,09,927, disallowance under section 40(a)(i) in respect of payments to non-residents.

10. The relevant material facts are as follows. During the course of scrutiny assessment proceedings, the Assessing Officer noted that the assessee has made payments, aggregating Rs 34,95,874, to various non-residents but has not deducted any tax at source from the same. The explanation of the assessee, as noted by the Assessing Officer, was that out of these four payments, two payments- namely to M E Shreiff and Paul Jenser, were on account of salaries and, in terms of the related tax treaty provisions, these payments did not have any tax liability in India. As regards the payment made to O&O MDC Ltd UK, the case of the assessee was that since the recipient did not have any permanent establishment in India, and since these payments could not be brought to tax in India, in the absence of the PE, the assessee was not required to deduct ant tax at source. With these explanations, the assessee urged the Assessing Officer not to disallow these expenses under section 40(a)(i). The Assessing Officer, however, did not agree. The payment made to O&O was, according to the AO, taxable as 'fees for technical services' under article 13 of the Indo UK Double Taxation Avoidance Agreement, and that

there was no evidence on record to suggest that M E Shreiff and Paul Jenser were employees of the assessee. He also noted that there was absolutely no explanation with respect to payment made to Pharma Action. He thus disallowed entire payments of Rs 34,95,874 under section 40(a)(i). Aggrieved, assessee carried the matter in appeal before the CIT(A). The copies of agreements, employment letters and invoices raised by the recipients were duly furnished to the CIT(A). While CIT(A) agreed that the services rendered by O&O Mdc Ltd are simply in the nature of 'consultancy services', which donot make available any technical knowledge, skill or knowhow- as is the condition precedent for invoking taxability under article 13 of Indo UK DTAA, the CIT(A) declined to admit evidences in support of non taxability of payments made to Pharma Action France. To that extent, i.e. Rs 4,09,927, the disallowance was upheld. As regards the payments for salaries to M E Shreiff and Paul Jenser, learned CIT(A) accepted the contentions of the assessee and, holding that these amounts were not taxable in India anyway, related disallowances under section 40(a)(i) were deleted. None of the parties is satisfied. While the Assessing Officer is aggrieved of the relief of Rs 30,85,947 granted by the CIT(A), the assessee is aggrieved of the learned CIT(A) upholding disallowance to the extent of Rs 4,09,927 on a hyper technical ground regarding inadmissibility of additional evidence filed before the CIT(A). Both the parties are in appeal before us.

11. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

12. We have noted that the assessee has duly furnished requisite details, about the nature of these payments, before the CIT(A), and copies of these details were also filed before us at pages 90 to 95 of the paper-book as well. As regards the payment to O&O, a UK based company, there is no dispute that the payments are in the nature of payments for consultancy services. As the consultancy agreement stipulates, the O&O's obligation is "to provide technical advices on phone/fax/ email as and when required" and to provide for "consultancy services" in the specified areas. As to the question whether consideration for such services can be taxed under article 13 of Indo UK DTAA, we find guidance from the Third Member decision of this Tribunal, in the case of *CESC Ltd* v. *DCIT* [(2003) 87 ITD TM 653 (Kol)] wherein one of us, i.e. the Accountant Member, articulating the majority views, had observed as follows:

> 9. Let us first take a look at the scope of expression 'fees for technical services' so far as applicable India UK Double Taxation Avoidance Agreement is concerned.
>
> 10. Article 13(4) of the India UK DTAA defines "fees for technical services" as payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provisions of services of technical or other personnel) which :
>
> (*a*) are ancillary and subsidiary to the application or 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 the 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.
>
> 11. As far as services covered by 13(4)(*a*) and (*b*) are concerned, the provisions are self explanatory and there is no controversy about scope of these two categories. The controversy, however, arises about the scope of services covered by 13(4)(*c*) and in particular by the scope of expression 'make available' used therein. We may also mention that, according to the learned Commissioner, the

services rendered by the MEP are covered by the scope of Article 13(4)(*c*) of the DTAA.

12. The provisions of Article 13(4)(*c*) clearly depart from the normal definition of 'fees for technical services' in DTAAs that India has entered into with foreign countries which is somewhat on the lines of definition given in *Explanation* 2 to section 9(1)(*vii*) of the Income Tax Act. The key difference, in our considered view, is that as against reference to 'rendering of' technical services in the statute and most of the DTAAs, the stress here is on 'making available' technical knowledge, experience, skill, know-how or processes etc. This paradigm shift in the definition of 'technical services' is noticed in the Indo USA Double Taxation Avoidance Agreement dated 12th September, 1989. The provisions of Article 13(4)(*c*) of the Indo UK DTAA are in *pari materia* with the definition of 'fees for included services' under Article 12(4)(*b*) of Indo US DTAA which is as follows :

"(4) For the purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services.

** ** **

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

13. In the protocol note attached to and forming part of the aforesaid DTAA, Government of India has confirmed that memorandum of understanding between the India and USA with regard to interpretation of Article 12 (Royalties and Fees for Included Services) also represents the view of the Indian Government. This memorandum *inter alia* provides as follows :

"Paragraph 4(*b*) of Article 12 refers, to technical or consultancy services that make available to the person acquiring the service technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design to such person. (For this purpose, the person acquiring the service shall be deemed to include an agent, nominee, . . . or transferee of such person.) This category is narrower. . . because it excludes any service that does not make technology available to the person acquiring the service. Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provisions of the service may require technical input by the person providing the service does not *per se* means that technical knowledge, skills, etc., are made available to the person purchasing the service, within the meaning of paragraph 4(*b*)."

14. We have no reasons to believe that Government of India had any other views for identical provisions in India UK DTAA. When provisions are in *pari materia,* there cannot be different meanings assigned to the provisions, unless there is anything repugnant in the context. We find nothing to support any deviation from the interpretation canvassed in the memorandum of understanding, attached to and forming part of Indo US DTAA, extracts from which have been reproduced above. As stated by Lord Mansfield, "where there are different statutes in *pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken together, as one system and as explanatory of each other". *R.* v. *Loxdale* 97 ER 394 at page 395. In our considered view, principle of interpretation of statutes should also govern the interpretation of DTAAs, particularly when those DTAAs deal with the same thing and are identical in material respects. We may also refer to the observations of Griffith, CJ. in the case of *Webb* v. *Outrim* AC 81 PC, at page 89 that, "When a particular form of legislative enactment, which has received authoritative interpretation whether by judicial decision or by a long course of practice, is adopted in framing a later statute, it is a sound rule of construction to hold that the words so adopted by the

Legislature to bear the meaning which has been so put on them." A *fortiorari*, when a particular DTAA clause has received an authoritative interpretation, from an authority no less than the Government of India itself, and identical clause is adopted in framing a later DTAA, it is to be held that the clause so adopted in the later DTAA will also normally have the same meaning as assigned to that clause.

15. We, therefore, find that it is a fairly settled position that consideration for rendering of technical services, as is the thrust of *Explanation 2* to section 9(1)(*vii*) of the Act and definition of 'fees for technical services' as adopted in most of the DTAAs that India has entered into with various countries, is materially distinct from 'consideration for technical or consultancy services that make available to the person acquiring the service technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design to such person' as is the expression used in India UK and India USA DTAAs.

16. We may also mention that this paradigm shift in definition of the 'fees for technical services', so far as Article 13(4)(*c*) of India UK DTAA is concerned, is a conscious departure from the traditional model which represented broadly by the definition of technical services as given in the Indian Income-tax Act. Even after India entered into DTAA with United States on 12-9-1989, wherein this departure from traditional definition was made for the first (*sic*) entered into several DTAAs wherein traditional definition, on the lines of definition in Indian Income-tax Act, 1961, continues to find the place, such as in India Australia DTAA dated 25-7-1991, India Belgium DTAA dated 26-4-1993, India France DTAA dated 29-9-1992, India Germany DTAA and India Israel DTAA dated 29-1-1996. On the other hand, there are several DTAAs wherein the narrower definition of 'technical services', as in the case before us, has been adopted *e.g.*, in India Switzerland DTAA dated 2-11-1994 and, of course, India UK DTAA dated 25-1-1993. The choice of narrower definition for the expression 'fees for technical services' in India UK DTAA, therefore, is clearly a conscious departure from, what can be termed as, traditional definition of 'fees for technical services'. In this view of the matter, we get no assistance from the construction the expression 'fees for technical services' has received, in the context of traditional definition of that expression. The question then arises as to what is the precise scope of definition of technical services referred to in Article 13(4)(*c*) of the India UK DTAA.

17. In our considered view, in order to be covered by the provisions of Article 13(4)(*c*) of the India UK DTAA, not only the services should be of technical in nature but such as to result in making the technology available to the person receiving the technical services. We also agree that merely because the provision of the service may require technical input by the person providing the service, it cannot be said that technical knowledge, skills, etc., are made available to the person purchasing the service. As to what are the connotations of 'making the technology available to the recipient of technical services', as is appropriately summed up in protocol to Indo US DTAA, "generally speaking, technology will be considered 'made available' when the person acquiring the service is enabled to apply the technology." We are in considered agreement with the views so expressed in the protocol to Indo USA DTAA which, as we have mentioned earlier, also represents views of the Government of India on this subject.

18. It takes us to the key question whether, on the facts of the case before us, it could be said that payment to MEP was in consideration for the rendering of any technical or consultancy services which "made available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design."

13. The views so expressed by the Tribunal now have the approval of at least two non-jurisdictional High Court decisions, namely Hon'ble Delhi High Court in the case of *DIT* v. *Guy Carpenter & Co Ltd*.

[2012] 207 Taxman 121/ 20 taxmann.com 807 and Hon'ble Karnataka High Court in the case of *CIT* v. *De Beers India Minerals (P.) Ltd*. [2012] 21 taxmann.com 214, and there is no contrary decision by Hon'ble jurisdictional High Court or by Hon'ble Supreme Court. We, therefore, hold that unless there is a transfer of technology in the sense that recipient of service is enabled to provide the same service on his own, without recourse to the original service provider, the 'make available' clause is not satisfied and, accordingly, the consideration for such services cannot be taxed under Article 13 (4) of Indo UK DTAA.

14. The question then arises whether rendition of consultancy services makes available any technical knowledge, skill, know how so as the recipient of services can render the same services without recourse to the service provider. The answer is clearly in negative. Merely because consultancy services has technical inputs, these services do not become technical services and simply because the recipient of a technical consultancy services learns something with each consultancy, there is no transfer of technology in the sense that recipient of service is enabled to provide the same service without recourse to the service provider. Our careful perusal of the consultancy services agreement does not help us find any provision for transfer of technology either. In view of these discussions, as also bearing in mind entirety of the case, we uphold the relief granted by the CIT(A) with respect to payments made to O&O, particularly as it is not even revenue's case that O&O had any PE in India. On this point, the conclusions arrived at by the CIT(A) are confirmed.

15. As regards the payments made to M E Shreiff, Egypt, and Paul Jenser, Philippines, we find that the appointment letters are on record, that there is no dispute that the services are rendered in the related jurisdictions, and that, in terms of the then applicable India Egypt DTAA (Article 16) and India Philippines DTAA (Article 16), the services so rendered by these gentlemen did not lead to any tax implications in India. When the income embedded in the payments did not have any tax implications in India, there was no question of any tax withholdings, and, accordingly, disallowance under section 40(a)(i) could not have come into play. We, therefore, uphold the relief granted by the CIT(A) on this point as well.

16. As for the payment made to Pharma Action, we find that the details placed on record are not really sufficient to form any opinion one way or the other. Prima facie these details show that the payment is made to a French resident for consultancy services but having regard to the fact that al that the assessee has furnished is a copy of invoice without any further details on facts, we deem it fit and proper to remit the matter to the file of the Assessing Officer for fresh adjudication on merits after giving yet another opportunity of hearing to the assessee, in accordance with the law and after taking into account, on merits, all such material that the assessee is able to furnish. To this extent, the matter stands restored to the file of the Assessing Officer.

17. Ground no. 2 in revenue's appeal is thus dismissed, and ground no. 2 in assessee's cross objection is thus allowed for statistical purposes.

18. In ground no. 3, the Assessing Officer is aggrieved that the CIT(A) has erred in law and on facts in deleting the disallowance to the extent of Rs 44.75 lakhs despite the fact that the assessee has claimed interest expenses to the tune of Rs 56.28 lakhs and has also given interest free loans. In a connected grievance raised by the assessee in ground no. 3 in the cross objection, the assessee is aggrieved that the CIT(A) has erred in sustaining the interest disallowance to the extent of Rs 4,18,139 (out of Rs 48,93,930) made by the Assessing Officer, even though, as against the interest free advance of Rs 4.08 crores, the assessee had interest free funds aggregating to over Rs 34 crores.

19. It is sufficient to take note of the fact that law on this issue is very well settled inasmuch as in a case in which the interest free advances granted by the assessee are less than interest free funds available to the assessee, the presumption to be normally drawn is that no portion of interest on borrowings could be disallowed on the ground that the assessee has granted interest free loans and borrowings, to that extent,

have been diverted. In the case of CIT Vs Raghvir Synthetics Ltd [(2013) 354 ITR 222 (Guj)], Hon'ble jurisdictional High Court has observed as follows:

> 5. As can be noted from the order of the Tribunal, the Assessing Officer disallowed the interest solely on the ground that the assessee had given interest-free loans to the associate concerns, viz., R. R. Family Trust and Sagar Textile Mills and this disallowance, in appeal the Commissioner of Income-tax (Appeals) deleted by holding that the amount advanced to both R. R. Family Trust and Sagar Textiles Mils were not given during the year under consideration, but the same was given in the earlier years. The Commissioner of Income-tax (Appeals) had also taken note of the fact that there was sufficient funds available with the assessee-respondent on which there was no interest liability that had been incurred. In such circumstances, relying on the case of *Torrent Financiers* (*supra*), it found that the disallowance was not justifiable.
>
> 6. The Tribunal on noting these details, in terms held that there was nothing contrary that could be brought on record by the Department. The assessee's equity share capital Rs. 3.85 cores and reserve and surplus of Rs. 5.52 crores also were noted by the Tribunal. It found that the interest-free funds available with the assessee was far greater than the loan advanced to the sister concerns and as a corollary to that, it concluded that the borrowed money was not utilized for the purpose of advance to the sister concerns, as had been noted by the Assessing Officer. What had weighed with the Tribunal is the fact that the entire interest-free funds included owner's own capital and accumulated profits and other interest-free credits and loans and if the total interest-free advances including the debit balance of the partners did not exceed the total interest-free funds available with the assessee, interest was not disallowable merely on account of the utilization of the funds for non-business purposes.
>
> 7. Thus, as can be seen the Tribunal actually relied on the findings given in case of *Torrent Financiers* (*supra*) and furthermore there was nothing contrary that could be brought on record by the Department for it to hold otherwise. Factually, it found huge funds were available without any interest liability with the assessee and that there was no evidence to hold that the borrowed money was utilized for the purpose of advance to the sister concerns. All these aspects cumulatively led the Tribunal to hold that the disallowance made only on the ground that advances were given out of the borrowed funds, holding the assessee ineligible for allowance of interest by the Assessing Officer of the sum of Rs. 18.66 lakhs was not sustainable.
>
> 8. The Tribunal has correctly approached the issue which has been proposed in the present tax appeal. When there was no evidence brought on record by the Department for the Tribunal to hold otherwise than what has been concluded by way of any material, we hold that the issue is appropriately concluded in favour of the assessee and against the Revenue.
>
> 9. We may refer to the judgment of the apex court at this stage given in case of *S. A. Builders Ltd.* v. *CIT* [2007] 288 ITR 1/158 Taxman 74 (SC) where the question was whether interest on funds borrowed by the assessee to give an interest-free loan to sister concern should be allowed as deduction and the apex court ruled thus (pages 7 and 8) :
>
> "We have considered the submission of the respective parties. The question involved in this case is only about the allowability of the interest on borrowed funds and, hence, we are dealing only with that question. In our opinion, the approach of the High Court as well as the authorities below on the aforesaid question was not correct. . . .
>
> In our opinion, the High Court in the impugned judgment, as well as the Tribunal and the income-tax authorities have approached the matter from an erroneous angle. In the present case, the assessee borrowed the fund from the bank and lent some of it to its sister concern (a subsidiary) on

interest-free loan. The test, in our opinion, in such a case is really whether this was done as a measure of commercial expediency. . .

The expression 'commercial expediency' is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency....

We agree with the view taken by the Delhi High Court in *CIT* v. *Dalmia Cement (B.) Ltd*. [2002] 254 ITR 377 (Delhi), that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. The income-tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits."

10. Accordingly, the question is answered in favour of the assessee by the apex court. In this tax appeal it is to be specified here that considering the material on record and keeping in view substantial interest-free funds and business expediency that the Commissioner of Income-tax (Appeals) and the Tribunal held the issue in favour of the assessee.

11. There is absolutely no perversity in such findings. On the contrary, they are conforming to the well laid down guiding principle on the subject. In the premise, the question of law needs to be answered in favour of assessee and against the Revenue.

20. We, therefore, uphold the plea of the assessee in principle and remit the matter back to the file of the Assessing Officer for the limited verification to the effect that interest free loans granted by the assessee are less than interest free funds available to him or not. If the factual elements embedded in the plea of the assessee are indeed correct, entire disallowance will have to be deleted. We, therefore, remit the matter back to the file of the Assessing Officer for fresh adjudication, as directed above, in accordance with the law and after giving a fair opportunity of hearing to the assessee on this point.

21. Ground nos. 3 of the appeal by the Assessing Officer and ground no. 3 of the cross objection filed by the assessee are thus allowed for statistical purposes.

22. Ground no. 1 of the cross objection by the assessee was not pressed, and is dismissed as such.

23. In the result, the appeal filed by the Assessing Officer, as also cross objection filed by the assessee, for the assessment year 2009-10 are thus partly allowed in the terms indicated above.

24. We now take up appeal of the Assessing Officer for the assessment year 2010-11.

25. In the first ground of appeal, the Assessing Officer is aggrieved of the CIT(A) deleting the disallowance of Rs 1,38,757 on equipment not included in para 3 of the New Appendix I.

26. The disallowance of depreciation @ 5% was made by the Assessing Officer on the ground that the assessee has claimed depreciation @15% whereas, going by the stand of the Assessing Officer, the assessee is eligible for depreciation @10% as the assets are not covered by the specific items set out under 'plant and machinery' and are in the nature of office equipment. The short case of the assessee, which has been accepted by the CIT(A), is that functionality test needs to be applied in this context and

when equipment is relatable to plant and machinery, depreciation at the rate admissible for plant and machinery needs to be applied. In coming to this conclusion, learned CITI(A) has followed Hon'ble Bombay High Court's judgment in the case of *CIT* v. *Park Davis India Ltd* (214 ITR 587). The Assessing Officer is aggrieved of the relief so granted and is in appeal before us.

27. Having heard the rival contentions and having perused the material on record, we are not inclined to disturb well reasoned findings of the learned CIT(A). We have also noted that the amount involved in the appeal on this issue is also very small. We confirm and approve the stand of the CIT(A) and decline to interfere in the matter .

28. Ground no. 1 is thus dismissed.

29. In ground no. 2, the Assessing Officer has raised grievance against learned CIT(A)'s deleting the disallowance of Rs 15.38 lakhs under section 40(a)(i) on account of non deduction at source from certain payments made to non-resident, namely Moataz El Sherif, in respect of his salaries.

30. Learned representatives fairly agree that whatever we decide for the assessment year 2009-10 will apply mutatis mutandis for this assessment year as well, as all the relevant material facts are the same. Vide our discussions earlier in this order, dealing with the assessment year 2009-10, we have upheld similar relief granted by the CIT(A) for the assessment year 2009-10. We see no reasons to take any other view of the matter for this assessment year. Following our order for 2009-10, we reject the grievance of the Assessing Officer and confirm the relief granted by the CIT(A) on this point.

31. Ground no. 2 is thus dismissed.

32. In ground no. 3, the Assessing Officer is aggrieved of the CIT(A) deleting the disallowance of Rs 47.74 lakhs on account of interest relatable to interest free advances granted by the assessee.

33. Vide our order for the assessment year 2009-10 on this issue, we have remitted the matter to the file of the Assessing Officer for limited verification as to whether the interest free funds available to the assessee are more than interest free loans granted by the assessee, and, if so, the deletion of disallowance will stand confirmed for this short reason alone. These observations will apply mutatis mutandis for this assessment year as well.

34. Ground no. 3 thus stands allowed for statistical purposes.

35. In ground no. 4, the Assessing Officer is aggrieved that the CIT(A) erred in deleting the disallowance of R 12,81,593 on account of additional depreciation even though the product has not undergone any transformation and no new distinctive article has come into existence.

36. The grievance of the Assessing Officer is ill conceived inasmuch as undisputedly what the assessee does is that it manufacture intra ocular lenses out of the acrylic sheets. The output and input are of different use, character and trade description. In the case of India Cine Agencies Vs CIT (308 ITR 98), Hon'ble Supreme Court has, inter alia, observed as follows:

> 4. Manufacture implies a change but every change is not manufacture, yet every change of an article is the result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. But it is only when the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a

new and distinct article that a manufacture can be said to take place. Process in manufacture or in relation to manufacture implies not only the production but also various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to that the manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture. (See Collector of Central Excise v. Rajasthan State Chemical Works [1991] 4 SCC 473).

5. 'Manufacture' is a transformation of an article, which is commercially different from the one, which is converted. The essence of manufacture is the change of one object to another for the purpose of making it marketable. The essential point thus is that, in manufacture something is brought into existence, which is different from that, which originally existed in the sense that the thing produced is by itself a commercially different commodity whereas in the case of processing it is not necessary to produce a commercially different article. (See *Saraswati Sugar Mills* v. *Haryana State Board* [1992] 1 SCC 418).

6. The prevalent and generally accepted test to ascertain that there is 'manufacture' is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognized as a distinct and new article that has emerged as a result of the process. There might be borderline cases where either conclusion with equal justification can be reached. Insistence on any sharp or intrinsic distinction between "processing and manufacture', results in an oversimplification of both and tends to blur their interdependence. (See *Ujagar Prints* v. *Union of India* [1989] 3 SCC 488).

7. To put it differently, the test to determine whether a particular activity amounts to "manufacture' or not is: Does a new and different good emerge having distinctive name, use and character. The moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whether be it the result of one process or several processes 'manufacture' takes place and liability to duty is attracted. Etymologically the word 'manufacture' properly construed would doubtless cover the transformation. It is the transformation of a matter into something else and that something else is a question of degree, whether that something else is a different commercial commodity having its distinct character, use and name and commercially known as such from that point of view, is a question depending upon the facts and circumstances of the case. (See Empire Industries Ltd. v. Union of India [1985] 3 SCC 314).

8. The aforesaid aspects were highlighted in *Kores India Ltd.* v. *CCE* [2005] 1 SCC 385 in the background of Central Excise Act, 1944 (in short the 'Excise Act') and Central Excise Rules, 1944 (in short the 'Excise Rules') and Central Excise Tariff Act, 1985 (in short the 'Tariff Act'). The stand of the revenue was that it amounted to "manufacture", contrary to what has been pleaded in these cases. This Court held that it amounted to manufacture.

9. The matter can be looked at from another angle. In *CIT* v. *Sesa Goa Ltd*. [2004] 271 ITR 331, this Court considered the meaning of word 'production'. The issue in that case was whether the extraction and processing of iron ore amounted to manufacture or not in view of the various processes involved and the various processes would involve production within the meaning of section 32A of the Act. It was inter alia observed as under:

"...There is no dispute that the plant in respect of which the assessee claimed deduction was owned

by it and was installed after 31-3-1976, in the assessee's industrial undertaking for excavating, mining and processing mineral ore. Mineral ore is not excluded by the Eleventh Schedule. The only question is whether such business is one of manufacture or production of ore. The issue had arisen before different High Courts over a period of time. The High Courts have held that the activity amounted to 'production' and answered the issue in question in favour of the assessee. The High Court of Andhra Pradesh did so in *CIT* v. *Singareni Collieries Co. Ltd*. [1996] 221 ITR 48, the Calcutta High Court in *Khalsa Brothers* v. *CIT* [1996] 217 ITR 185 and *CIT* v. *Mercantile Construction Co*. [1994] 74 Taxman 41 (Cal.) and the Delhi High Court in CIT v. Univmine (P.) Ltd. [1993] 202 ITR 825. The Revenue has not questioned any of these decisions, at least not successfully, and the position of law, therefore, was taken as settled.

The reasoning given by the High Court, in the decisions noted by us earlier, is, in our opinion, unimpeachable. This Court had, as early as in 1961, in *Chrestian Mica Industries Ltd.* v. *State of Bihar* [1961] 12 STC 150, defined the word 'production', albeit, in connection with the Bihar Sales Tax Act, 1947. The definition was adopted from the meaning ascribed to the word in the Oxford English Dictionary as meaning 'amongst other things that which is produced; a thing that results from any action, process or effort, a product; a product of human activity or effort'. From the wide definition of the word 'production', it has to follow that mining activity for the purpose of production of mineral ores would come within the ambit of the word 'production' since ore is 'a thing', which is the result of human activity or effort. It has also been held by this Court in *CIT* v. *N.C. Budharaja & Co.* [1993] 204 ITR 412 that the word 'production' is much wider than the word 'manufacture'. It was said (page 423):

'The word 'production' has a wider connotation than the word 'manufacture'. While every manufacture can be characterised as production, every production need not amount to manufacture....

The word 'production' or 'produce' when used in juxtaposition with the word 'manufacture' takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and resider

37. Viewed thus, conversion of acrylic sheets into intra ocular lens is clearly manufacture of new product and the grievance of the Assessing Officer does not merit acceptance. We reject the same.

38. Ground no. 4 is thus dismissed.

39. In the result, the appeal of the Assessing Officer for the assessment year 2010-11 is partly allowed for statistical purposes.

40. We now take up the appeal of the Assessing Officer, as also cross objection of the assessee, for the assessment year 2011-12.

41. In the first ground of appeal, the Assessing Officer is aggrieved of the CIT(A) deleting the disallowance of Rs. 1,37,427 on equipment not included in para 3 of the New Appendix I.

42. In the impugned order, learned CIT(A) has merely followed his order for the assessment year 2010-11, but, in our discussions earlier in this consolidated order, we have confirmed and approved the same. Respectfully following the views so formed by us for the assessment year 2010-11, we confirm this order of the CIT(A) as well and decline to interfere in the matter.

43. Ground no. 1 is thus dismissed.

44. In the second ground of appeal, the Assessing Officer is aggrieved of learned CIT(A) deleting the disallowance of Rs. 28,23,909, under section 40(a)(i), in respect of commission paid to Kuntal Joshi, a

US based individual.

45. Learned representatives fairly agree that this issue is covered, in favour of the assessee, by a coordinate bench decision in the case of *DCIT* v *Welspun Corp Ltd* [(2017) 55 ITR (Trib) 405 (Ahd)]. Learned DR, however, relied upon the stand of the Assessing Officer. In the said order, the coordinate bench has, inter alia, observed as follows:

> 31. The scheme of taxability in India, so far as the non-residents, are concerned, is like this. Section 5 (2), which deals with the taxability of income in the hands of a non-resident, provides that "the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which— (a) is received or is deemed to be received in India in such year by or on behalf of such person; or (b) accrues or arises or is deemed to accrue or arise to him in India during such year". There is no dispute that since no part of the operations of the recipient non-residents is carried out in India, no income accrues to these non-residents in India. The case of the revenue hinges on income which is "deemed to accrue or arise in India". Coming to the deeming provisions, which are set out in Section 9, we find that the following statutory provisions are relevant in this context:
>
> 'Section 9- Incomes deemed to accrue or arise in India
>
> (1) The following incomes will 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,
>
> Explanation: For the purpose of this clause [i.e. 9(1)(i)],
>
> (*a*) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;
>
> (*b*), (*c*), (*d*)** ** **"
>
> (*vii*) income by way of fees for technical services payable by-
>
> (*a*)** ** **"
>
> (*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*)** ** **"
>
> *
>
> Explanation 1-.** ** *
>
> "
>
> 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".'
>
> * Not relevant for our purposes

32. So far as deeming fiction under section 9(1)(i) is concerned, it cannot be invoked in the present case since no part of the operations of the recipient's business, as commission agent, was carried out in India. Even though deeming fiction under section 9(1)(i) is triggered on the facts of this case, on account of commission agent's business connection in India, it has no impact on taxability in the hands of commission agent because admittedly no business operations were carried out in India, and, therefore, Explanation 1 to Section 9(1)(i) comes into play.

33. There are a couple of rulings by the Authority for Advance Ruling, which support taxability of commission paid to non-residents under section 9(1)(i), but, neither these rulings are binding precedents for us nor are we persuaded by the line of reasoning adopted in these rulings. As for the AAR ruling in the case of *SKF Boilers & Driers (P.) Ltd. In re* [2012] 343 ITR 385/206 Taxman 19/18 taxmann.com 325 (AAR - New Delhi), we find that this decision merely follows the earlier ruling in the case of *Rajiv Malhotra, In re* [2006] 284 ITR 564/155 Taxman 101 (AAR - New Delhi) which, in our considered view, does not take into account the impact of Explanation 1 to Section 9(1)(i) properly. That was a case in which the non-resident commission agent worked for procuring participation by other non-resident entities in a food and wine show in India, and the claim of the assessee was that since the agent has not carried out any business operations in India, the commission agent was not chargeable to tax in India, and, accordingly, the assessee had no obligation to deduct tax at source from such commission payments to the non-resident agent. On these facts, the Authority for Advance Ruling, inter alia, opined that "no doubt the agent renders services abroad and pursues and solicits exhibitors there in the territory allotted to him, but the right to receive the commission arises in India only when exhibitor participates in the India International Food & Wine Show (to be held in India), and makes full and final payment to the applicant in India" and that "the commission income would, therefore, be taxable under section 5(2)(b) read with section 9(1)(i) of the Act". The Authority for Advance Ruling also held that "the fact that the agent renders services abroad in the form of pursuing and soliciting participants and that the commission is remitted to him abroad are wholly irrelevant for the purpose of determining situs of his income". We do not consider this approach to be correct. When no operations of the business of commission agent is carried on in India, the Explanation 1 to Section 9(1)(i) takes the entire commission income from outside the ambit of deeming fiction under section 9(1)(i), and, in effect, outside the ambit of income 'deemed to accrue or arise in India' for the purpose of Section 5(2)(b). The point of time when commission agent's right to receive the commission fructifies is irrelevant to decide the scope of Explanation 1 to Section 9(1)(i), which is what is material in the context of the situation that we are in seisin of. The revenue's case before us hinges on the applicability of Section 9(1)(i) and, it is, therefore. important to ascertain as to what extent would the rigour of Section 9(1)(i) be relaxed by Explanation 1 to Section 9(1)(i). When we examine things from this perspective, the inevitable conclusion is that since no part of the operations of the business of the commission agent is carried out in India, no part of the income of the commission agent can be brought to tax in India. In this view of the matter, views expressed by the Hon'ble AAR, which do not fetter our independent opinion anyway in view of its limited binding force under s. 245S of the Act, do not impress us, and we decline to be guided by the same. The stand of the revenue, however, is that these rulings, being from such a high quasi-judicial forum, even if not binding, cannot simply be brushed aside either, and that these rulings at least have persuasive value. We have no quarrel with this proposition. We have, with utmost care and deepest respect, perused the above rulings rendered by the Hon'ble Authority for Advance Ruling. With greatest respect, but without slightest hesitation, we humbly come to the conclusion that we are not persuaded by these rulings.

34. Coming to Section 9(1)(vii)(b), this deeming fiction- which is foundational basis for the action of the Assessing Officer, inter alia, provides that the income by way of technical services payable

by a person resident in India, except in certain situations-which are not attracted in the present case anyway, are deemed to be income accruing or arising in India. Explanation 2 to Section 9(1)(vii) defines 'fees for technical services' as any consideration (including any lumpsum consideration) for the rendering of any managerial, technical or consultancy services (including the provisions of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'Salaries' [Relevant portion highlighted by underlining]".

35. In the light of the above legal position, what we need to decide at the outset is whether the amounts paid by the assessee to the non-resident agents could be termed as "consideration for the rendering of any managerial, technical and consultancy services". As we do so, it is useful to bear in mind the fact that even going by the stand of the Assessing Officer, at best services rendered by the non-resident to the agent included technical services but it is for this reason that the amounts paid to these agents, on account of commission on exports, should be treated as fees for technical services. Even proceeding on the assumption that these non-resident agents did render the technical services, which, as we will see a little later, an incorrect assumption anyway, what is important to appreciate is that the amounts paid by the assessee to these agents constituted consideration for the orders secured by the agents and not the services alleged rendered by the agents. The event triggering crystallization of liability of the assessee, under the commission agency agreement, is the event of securing orders and not the rendition of alleged technical services. In a situation in which the agent does not render any of the services but secures the business anyway, the agent is entitled to his commission which is computed in terms of a percentage of the value of the order. In a reverse situation, in which an agent renders all the alleged technical services but does not secure any order for the principal i.e. the assessee, the agent is not entitled to any commission. Clearly, therefore, the event triggering the earnings by the agent is securing the business and not rendition of any services. In this view of the matter, in our considered view, the amounts paid by the assessee to its non-resident agents, even in the event of holding that the agents did indeed render technical services, cannot be said to be consideration for rendering of any managerial, technical or consultancy services (Emphasis by underlining supplied by us)". The services rendered by the agents, even if these services are held to be in the nature of technical services, may be technical services, but the amounts paid by the assessee are not for the rendition of these technical services nor the quantification of these amounts have any relation with the quantum of these technical services. The key to taxability of an amount under section 9(1)(vii) is that it should constitute "consideration" for rendition of technical services. The case of the revenue fails on this short test, as in the present case the amounts paid by the assessee are "consideration" for orders secured by the assessee irrespective of how and whether or not the agents have performed the so called technical services.

36. Let us sum up our discussions on this part of the scheme of Section 9, so far as tax implications on commission agency business carried out by non-residents for Indian principals is concerned. It does not need much of a cerebral exercise to find out whether the income from the business carried on by a non-resident assessee, as a commission agent and to the extent it can be said to directly or indirectly accruing through or from any business connection in India, is required to be taxed under section 9(1)(i) or under section 9(1)(vii), of the Income Tax Act, 1961. The answer is obvious. Deeming fiction under section 9(1)(i) read with proviso thereto, as we have seen in the earlier discussions, holds the key, and lays down that only to the extent that which the operations of such a business is carried out in India, the income from such a business is taxable in India. When no operations of the business are carried on India, there is no taxability of the profits of such a business in India either. The question then arises whether in a situation in which, in the course of carrying on

such business, the assessee has to necessarily render certain services, which are of such a nature as covered by Explanation 2 to Section 9(1)(vii), and even though the assessee is not paid any fees for such services per se, any part of the business profits of the assessee can be treated as 'fees for technical services' and taxed as such under section 9(1)(vii). This question does not pose much difficulty either. In the light of the discussions in the foregoing paragraph, unless there is a specific and identifiable consideration for the rendition of technical services, taxability under section 9(1)(vii) does not get triggered. Therefore, irrespective of whether any technical services are rendered during the course of carrying on such agency commission business on behalf of Indian principal, the consideration for securing business cannot be taxed under section 9(1)(vii) at all. This profits of such a business can have taxability in India only to the extent such profits relate to the business operations in India, but then, as are the admitted facts of this case, no part of operations of business were carried out in India. The commission agents employed by the assessee, therefore, did not have any tax liability in India in respect of the commission agency business so carried out.

46. We see no reasons to take any other view of the matter than the view so taken by us in Welspun's case (supra). Respectfully following the aforesaid order, we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.

47. Ground no. 2 is thus dismissed.

48. Ground no. 3 of the appeal as also ground no 3 of the cross objection deal with the interest disallowance in respect of interest free advances made by the assessee. While the Assessing Officer is aggrieved of the learned CIT(A) deleting the disallowance of Rs. 35,96,180, the assessee is aggrieved of learned CIT(A) sustaining the disallowance to the extent of Rs. 73,917.

49. Vide our order for the assessment year 2009-10 on this issue, we have remitted the matter to the file of the Assessing Officer for limited verification as to whether the interest free funds available to the assessee are more than interest free loans granted by the assessee, and, if so, the deletion of disallowance will stand confirmed for this short reason alone, and the disallowance sustained by the CIT(A) will also stand deleted for the same reason. These observations will apply mutatis mutandis for this assessment year as well. The matter is, accordingly, remitted to the file of the Assessing Officer for this assessment year as well.

50. Ground no. 3 of the appeal as also ground no. 3 of the cross objection thus stands allowed for statistical purposes.

51. In ground no. 4, the Assessing Officer is aggrieved of the learned CIT(A) deleting the disallowance of Rs 30,64,273 on account of additional depreciation, even though, according to the Assessing Officer, end product has not undergone any transformation and no new or distinctive article has come into existence.

52. In the impugned order, learned CIT(A) has merely followed his order for the assessment year 2010-11, but, in our detailed discussions earlier in this consolidated order, we have confirmed and approved the same. Respectfully following the views so formed by us for the assessment year 2010-11, we confirm this order of the CIT(A) as well and decline to interfere in the matter.

53. Ground no. 4 is thus dismissed.

54. Let us now turn to remaining grievances in the cross objection as well.

55. Ground no. 1 in the cross objection filed by the assessee is not pressed, and is, accordingly, dismissed for want of prosecution.

56. In ground no. 2 in the cross objection filed by the assessee, the assessee is aggrieved of the learned

CIT(A) sustaining the disallowance of Rs 6,50,559 under section 40(a)(ia) on the ground that the assessee did not deduct tax at source from the related payment of conference charges.

57. Learned representatives fairly agree that, in accordance with the law laid down by Hon'ble Delhi High Court in the case of *CIT* v. *Ansal Landmark Township Pvt Ltd* (377 ITR 635) with the direction that in case the recipient has discharged his tax liability in respect of income embedded in these payments, the disallowance under section 40(a)(ia) will stand deleted. We, therefore, remit the matter to the file of the Assessing Officer in the terms indicated above.

58. Ground no. 2 is thus allowed for statistical purposes.

59. Ground no. 3 is already discussed earlier, alongwith appeal of the Assessing Officer on that issue, and is allowed for statistical purposes in the terms indicated above.

60. The appeal filed by the Assessing Officer, as also cross objection filed by the assessee, for the assessment year 2011-12 are also partly allowed in the terms indicated above.

61. In the result, all the appeals and cross objections are partly allowed in the terms indicated above.

■■