IT/ILT : Assessee leased three aircrafts from a German company under a lease agreement. Before lease agreement, assessee had entered into a technical support agreement. In addition another agreement for provision for flight deck crews was also entered. Tribunal held that technical services charges payable to foreign company in Germany constituted business profit of foreign company and that same may not be taxable in India in terms of article III of DTAA between India and Germany. However, in view of fact that there existed a 'Fees for Technical Services' clause in agreement, their taxability in terms of Article VIIIA not having been examined in proper perspective, matter was to be remanded back to Tribunal for adjudication afresh

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[2018] 93 taxmann.com 180 (Delhi)

HIGH COURT OF DELHI

Director of Income-tax (IT)

v.

Modiluft Ltd.

S. RAVINDRA BHAT AND A.K. CHAWLA, JJ.
IT APPEAL NOS.772 OF 2004 & 15 OF 2005 & OTHS.
MAY 8, 2018

Rahul Chaudhary and **Zoheb Hossain**, Sr. Standing Counsel, **Raghvendra Singh**, Adv. *for the Appellant.* **M.S. Syali**, Sr. Adv. **Satyen Sethi**, **A.T. Panda**, **Ms. Gargi Sethee**, **Vikrant. A. Maheshwari** and **Tarun Singh**, Advs. *for the Respondent.*

ORDER

S. Ravindra Bhat, J. - In these appeals, the following common question of law arises for consideration:

> "*Whether the Tribunal was justified in holding that technical service charges payable to the foreign company in Germany constitute business profit of the foreign company and that the same was not taxable in India.*"

2. Since the facts leading to the dispute are largely similar in all these appeals, the facts in ITA 772/2004 are set-out for reference. The assessee leased three aircrafts (hereafter, "the aircraft lease agreement") from Deutsche Lufthansa Aktiengesellschaft (hereafter "Lufthansa"). Before the lease agreement (of 18.03.1993), the assessee had, on 15.02.1993 entered into agreement for technical support (hereafter "the technical support agreement"). In addition, another agreement for provision for flight deck crews ("the flight deck agreement" hereafter) was also entered into on 05.08.1993. The aircraft lease agreement dated 18.03.1993 was approved by the Central Board of Direct Taxes (CBDT) under Section 10(15A) of the Income Tax Act, 1961 [hereafter "the IT Act"] by orders dated 08.10.1993, 15.09.1993 and 20.08.1993.

3. The assessee's request for withholding tax certificate in respect of crew lease payments for engineers was declined by the Assessing Officer (AO) who held that:

(*a*) crew lease payment was not covered under Section 10(15A) of the IT Act;

(*b*) technical support agreement dated 15.02.1993 for providing engineers on lease was not approved under Section 10(15A) of the IT Act;

(*c*) Under the DTAA between India and Germany, payments to a non-resident for providing technical personnel is fee for technical service (FTS) and the same is taxable in the country in which they arise.

4. The assessee argued, before all the authorities that the crew lease/provision of engineers is inextricably linked to the lease of aircrafts. It was emphasized that Lufthansa first entered into technical support agreement dated 15.02.1993 and only thereafter, the aircrafts were leased to the assessee by the agreement dated 18.03.1993. On appeal, the CIT (A) and the Income Tax Appellate Tribunal (ITAT) followed the ITAT's previous order dated 18.09.1998 in ITA 2648/Del/1998.

5. The order dated 18.09.1998 held that:

(*i*) Payments under technical support and crew lease agreements were not entitled to exemption under Section 10(15A) of the Act because no approval under Section 10(15A) was granted to these agreements.

(*ii*) Both the lease rent and the fee for technical services were business profits of Lufthansa, inasmuch as the lease of the aircrafts was with the operational staff.

(*iii*) Having held that lease rent and fee for technical services was business profits, the Tribunal relying upon *Tekniskil (Sendirian) Berhard* v. *Commissioner of Income Tax* 1996 (222) ITR 551 (AAR) held that payment made for provision for technical personnel was not taxable in India within the meaning of Article III of the DTAA between India and Germany [1985 (156) ITR (St) 90 @ 93]. These orders were followed in several assessment years. In the common order impugned before this Court the ITAT firstly condoned the delay in filing the appeal (preferred by the assessee) and held that in view of its previous findings, essentially relying on *Teknisil (Sendirian)* (*supra*), the payments to technical personnel was not taxable in India, under the Indo-German DTAA.

6. The Revenue relies on the order of the AO rejecting the assessee's contention that the payments made to Lufthansa were exempt under Section 10(15A) of the Act on the ground that under Section 10(15A) the Act, the agreement in terms of which payments are being made must be approved by the Central Board of Direct Taxes (CBDT) for claiming exemption under Section 10(15A) and only the agreement dated 18.03.1993 for lease of aircrafts has been approved by CBDT. Further, the benefit of Section 10(15A) of the Act is available only in respect of payment made to acquire an aircraft on lease and not to any other payments such as payments for provision of services (including technical personnel). Thus, AO held that the above payments were not exempt under Section 10(15A) and therefore, liable to tax as per the provisions of Act.

7. It is submitted that the AO rejected the alternative contention that the payments were not liable to tax as per provisions of DTAA as Lufthansa did not have permanent establishment in India. The AO held that the payments to be made to Lufthansa were liable to tax in India, as per the provisions of the Act as well as DTAA as the same were in the nature of 'Fee for Technical Services' chargeable to tax in India at the rate of 20% on gross basis as per Article VIIIA of the DTAA.

8. The AO also held that for the purpose of computing amount of tax to be deducted and deposited in terms of Section 195 of the Act, the provisions of grossing up contained in Section 195A of the Act would apply and, therefore, tax borne by Modiluft have to be added to the payments to be made to

Lufthansa. It is pointed out that the AO also held that the benefit of Section 44BBA of the Act, which were applicable to non-residents engaged in the business of operating aircrafts, was also not be available since Lufthansa did not have permission from Government of India to operate aircrafts in India and had merely leased aircrafts.

9. It is stated that the CIT(A), by a consolidated order dated 24.09.2004, dismissed the appeals *in limine* on the ground that the same were barred by limitation.

10. The Revenue points out that a reference application filed by it against the order dated 18.09.1998 passed by the Tribunal in ITA No. 2648/Del/1998 was dismissed by the Tribunal by its order dated 30.09.1999 in RA No. 598/Del/1998. However, the Revenue challenged the said order of the Tribunal, before this Court in ITC No. 16/2000. This Court by order dated 11.04.2001 had decided the issue in favour of the Revenue by holding as under:

> *"Heard.*
>
> *We direct the Tribunal to refer the following questions along with statement of the case:*
>
> *"Whether the Tribunal was justified in holding that technical services charges payable to the foreign company in Germany constitute business profits of the foreign company and that the same was not taxable in India? "*
>
> *ITC disposed of."*

11. In view of the above it is submitted that the order dated 18.09.1998 passed by the Tribunal in ITA No. 2648/Del/1998 on the basis of which relief was granted in favour of the assessee by the ITAT has been set aside.

12. It is also urged that the AO's finding that the payments to be made to Lufthansa are not exempt from tax in terms of Section 10(15A) of the Act has also attained finality. The ITAT had, by order dated 18.09.1998, passed in ITA No. 2648/Del/1998 held that the payments to be made to Lufthansa are not exempt under Section 10(15A) of the Act. That order was followed by the Tribunal in the impugned order. The assessee did not prefer any appeal on this issue before this Court.

13. It is argued that the payments made to Lufthansa were in the nature of 'Fee for technical services' liable to tax under Article VIIIA of DTAA. The term 'Fees for technical services' as defined in the said article means payments of any kind to any person (other than payments to an employee of the other person making payments), in consideration for services of managerial, technical or consultancy nature, including the provision of services of technical or other personnel. The payments were made to Lufthansa for provisions of technical services including provision of technical personnel and therefore, clearly fall within the ambit of term 'Fee for Technical Services' as defined in para 4 of Article VIIIA of the DTAA.

14. The revenue argues that the nature of services being technical was not in dispute before the AO. The contention raised by the Modiluft before the AO was that the technical services were being provided to Lufthansa for protecting the leased aircrafts, and not to Modiluft. Reliance in this regard is placed on para 2 of the Order dated 31.10.1995 passed by Assessing Officer being Annexure A to appeal at Page 40 of the appeal being ITA No. 832 of 2006 which read as under:

> "2. ** ** **
>
> *In your letter dated 27.10.1995, which has reiterated this position, you have further stated that the engineers leased from Lufthansa do not provide any technical service to your company, but provide service to M/s Lufthansa as they protect the leased assets, i.e., the aircrafts owned by the German Company thus the payments on account of crew lease are in respect of the leased aircrafts, and are*

therefore, exempt u/s 10(15A) of the Income Tax Act, 1961" (emphasis supplied)"

15. Arguing that from the above it is clear that Lufthansa was providing to Modiluft technical services including technical personnel, the Revenue underlines that payments to Lufthansa were covered by the definition of 'Fees for Technical Services' as contained in Paragraph 4 of Article VIIIA of DTAA. As the payments were made by an Indian company, the same are deemed to accrue or arise in India in terms of Para 6 of Article VIIIA of the DTAA and therefore, such payments are liable to tax in India in terms of Para 1 of Article VIIIA of the DTAA at the beneficial rate of 20% on gross basis (after applying grossing up principle as specified in section 195A of the Act).

16. The Revenue submits that the contention that payments to be made to Lufthansa are covered by Article III of the DTAA is without any merit; it relies on paragraph 7 of Article 3 of the DTAA clearly provided as under:

> *"7. Where profits include items of income which are dealt with separately in other articles of this agreement, then the provisions of those articles shall not be affected by the provisions of this article."*

It is argued that the provision in paragraph 7 of Article III of the DTAA excludes from its ambit income dealt with separately by other Articles of DTAA. Therefore, it was submitted that 'Fee for Technical Services' being an item of income separately dealt with in Article VIIIA of DTAA would, therefore, fall outside the ambit of scope of Article III of DTAA. It was further submitted that the payments made to Lufthansa are in the nature of 'Fee for Technical Services' and would, therefore, be liable to tax in terms of Article VIIIA of the DTAA at the beneficial rate of 20% on gross basis (after applying grossing up principle as specified in section 195A of the Act).

17. The Revenue argues importantly that the ruling rendered by the Authority For Advance Ruling ('AAR') in the case of *Tekniskil (Sendirian)*(*supra*) relied on by ITAT in its order in ITA 2648/Del/1998 is distinguishable on facts as in that case the relevant Double Taxation Avoidance Agreement between India and Malaysia as applicable at the relevant time did not contain the clause for 'Fee for Technical Services,' and it was in that context it was held by the AAR that the fee for technical services arising out of supply of skilled labour were not liable to tax in India in terms of Article 7 as 'business profits' on the ground that the assessee did not have a permanent establishment in India in terms of Article 5 of the Double Taxation Avoidance Agreement. However, in the facts of the present case in terms of the DTAA, payments made to Lufthansa would not be liable to tax in India in terms of Article III of DTAA, but would still be liable to tax as in terms of Article VIIIA of the DTAA, as there exists a 'Fee for Technical Services' clause in the Agreement. It is therefore, urged that payments made to Lufthansa are in the nature of 'Fee for Technical Services' and would, therefore, be liable to tax in terms of Article VIIIA of DTAA at the beneficial rate of 20% on gross basis (after applying grossing up principle as specified in Section 195A of the Act).

18. The assessee argues, in these appeals that the decision of the Advance Ruling Authority in *Tekniskil (Sendirian) Berhard* (*supra*), rendered in the context of DTAA with Malaysia is inapplicable to the facts of this case, and at the relevant time, DTAA with Malaysia had no provision relating to fee for technical services. It is submitted that the order of the Tribunal be set aside and remitted back to it, to decide whether payment under consideration was inextricably linked to the lease of the aircrafts constituted *"fee for technical services"* within the meaning of Article VIII of the DTAA with Germany.

19. Mr. Syali, learned senior counsel for the assessee argued that the ITAT found that the present case was not one of mere provision of technical personnel, rather, such personnel were provided to operate the leased aircrafts. Though the agreements were separate, the fact of prior technical support agreement provides sufficient nexus between the provision of personnel and the lease of aircrafts. The nature of the

transaction does not change only because the agreements were separate. What matters is the substance and not the form. Therefore, the issue whether on a correct interpretation of the relevant clause of the DTAA, provision of technical personnel was FTS, requires adjudication by the Tribunal, more so, because there is no precedent on this nascent issue, which is purely legal.

20. It is furthermore argued that for the exception to business profits being taxable only in Germany to apply, the finding that what is received is fee for technical service (FTS), is essential. The contention of the Revenue that the payment was FTS, is in the absence of any finding of the appellate authorities. The finding of the AO also is inconclusive. It is submitted that the question framed, i.e.,whether the ITAT was justified in holding that technical service charges payable to the foreign company in Germany constitute business profit of the foreign company and that the same was not taxable in India has not been addressed squarely by the lower appellate authorities. Therefore, a remand on the question is called for.

Analysis and Conclusions

21. Before analyzing the rival contentions, it would be appropriate to extract the relevant parts of the Indo German DTAA, which is applicable to the facts of this case. They are extracted as below (incorporating the amending protocol, which had come into force by the time of the assessment years involved in this case):

"ARTICLE V

Article III of the Agreement shall be deleted and replaced by the following text :

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

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

(3) *In the determination of the profits of a permanent establishment, there shall be allowed as deductions, expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere, and according to the domestic law of the Contracting State in which the permanent establishment is situated.*

(4) *In so far as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph (2) shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result*

shall be in accordance with the principles contained in this Article.

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

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

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

ARTICLE IX

After Article VIII of the Agreement, a new Article VIIIA shall be inserted with the following text:

"(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 State. But in so far as the fees for technical services are concerned, the tax so charged shall not exceed 20 per cent of the gross amount of such fees.*

(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 any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial, or scientific equipment, or for information concerning industrial, commercial or scientific experience.*

(4) *The term fees for technical services' as used in this Article means payments of any kind to any person, other than payments to an employee of the person making the payments, in consideration for services of a managerial, technical or consultancy nature, including the provision of services of technical or other personnel.*

(5) *The provisions of paragraphs (1) and (2) of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment. In such a case, the provisions of Article III shall apply.*

(6) *Royalties and fees for technical services shall be deemed to arise in a Contracting State where the payer is that State itself, a land, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the obligation to make the*

payments was incurred and the payments are borne by that permanent establishment, then the royalties or fees for technical services shall be deemed to arise in the Contracting State in which the permanent establishment is situated.

(7) *Where, owing to a special relationship between the payer and some other person, the amount of the royalties or fees for technical services paid exceeds for whatever reason the amount which would have been paid in the absence of such relationship, the provisions of this Article shall apply only to the last mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Agreement. "*

22. The main reasoning of ITAT in its earliest decision (dated 15th September, 1998) which ultimately rejected the Revenue's argument with regard to taxability, is as follows:

> *"We have carefully considered the rival submissions in the light of the materials on records. The facts as brought out by the AO and CIT are not disputed. On these facts, we, at the outset, may straightaway reject the claim of the assessee for exemption u/s 10(15A) of the IT Act, 1961 for the simple reason that the agreements for technical assistance entered into by the assessee with the foreign company vide agreement dated 15.2.1993 and 5.8.1993 have not got approval of the Govt. of India in terms of section 10(15A). We hold accordingly.*
>
> *With regard to the claim of the assessee for exemption under the Indo German DTAA, it is seen that the assessee and the foreign company entered into an agremeent for lease of three aircrafts. The assessee also separately entered into an agreement for provision of technical services as indicated above. Both the lease rent and the fees for technical services form part of the business profit of the foreign company. Section 10(15A) before its substitution by the Finance Act, 1995 w.e.f 1.4.1996 did not make any bifurcation of the payment for acquiring an aircraft on lease from government of the foreign State or a foreign enterprise. Therefore, if the assessee in this case make a composite agreement for lease of aircraft with operational staff, then the provisions of Section 10(15A) of the Act will fully cover the case. However, the assessee in this case entered into a separate agreement and such agreement for provision of technical services having not been approved, we have already rejected the claim of exemption u/s 10(15A) of the Act.*
>
> *The denial of the exemption u/s 10(15A) of the Act in so far as fees for technical services are concerned, does not change the character of the receipt in the hands of the foreign company. Both the lease rent and the fees for technical services are profits of an enterprise of the foreign company for the lease of the aircrafts alongwith operational. staff. It is also not denied that, the foreign company is not having a permanent establishment in India. In such a situation, such profit wouldcame for consideration under Article III of the Indo German DTAA. However para (7) of Article III makes anexception that where such profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article. In other words a specific provision will override the general provisions made under Article III of the Agreement.*
>
> *This brings us to Article VIIIA which provides (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 State. XXXXXXXXX (not legible) for technical services are concerned, the tax so charged shall not exceed 20% of the gross amount of such fees."*

The AO in this case applied the second provision and assessed the income at 20% of the gross amount of such. fees. It is, however, the claim of the assessee that the first provision will apply and the same will not be taxable in India and, therefore, there is no question of any deduction of tax at source. This controversy has been set at rest by the decision of the Authority for Advance Rulings in the case of Tehniskil (Sendirian) Rerhard v. C.I.T.(1996) 222 ITR 551. In that case Tekniskil (Sendirian) Berhard referred to as TSB entered into a contract with 'Hyundai Heavy Industries Co. Ltd. referred to as HHI, having its registered office in Korea. The Agreement recited that HHI had been awarded certain contracts in the Neelam Process Complex and .NOP Process Complex in the territory of Bombay High by the Oil and Natural Gas Commission of India. It had to execute these projects involving offshore installation works from the end of September, 1993.For carrying out the above.work, HHI needed the services of skilled labour and requested TSB to supply the skilled labour necessary to carry out the above works. Under the agreement, TSB had to supply in time necessary labour force duly qualified to carry out the projects in question. The workmen were to function under the directions and the -supervision of TWIT which could disqualify and demobilize any of the workers in the event of. their-services nut being satisfactory on certain grounds stated in the contract. TSB was to pay salary, insurance premium, charges for mobilitation to Bombay and demobilization from Bombay, all taxes, medical treatment etc. The work under the contract which commenced on October 8, 1993, came to a conclusion in Apri1,1994. In an application before the Authority for Advance Rulings, TSB claimed complete exemption on the basis of the provisions of DTAA between India and Malaysia which was entered into with retrospective effect from April 1,1973. TSB claimed that the fees derived by it from Hill arose out of a business in the supply of skilled labour carried on by it; that the taxability of this amount of income is governed by Article 7 of the DTAA which is equivocal with the income, cannot be taxed in. India unless the applicant is found to have a permanent establishment in India and the profits arc attributable to such permanent establishment; that Article 5(1) which defines a permanent establishment for the purpose of DTAA envisaged a fixed place of business in which the business of the enterprise iswholly carried on. According to the assessee, it had no place of business at all in India much less a fixed place of business. The Authority for Advance Ruling considered the provisions of Article 7 of the DTAA between India and Malaysia in that case which corresponds to Article III of the DTAA of India with Federal Republic of Germany and it was held an follows:

"The fact that the remuneration paid to the assessee may be in the nature of technical fee within the scope of Section 9(1)(vii) does not make a difference. Fees of this nature can be earned in business or otherwise. If earned in the course of business, they constitute income from business. There is no incompatibility between recognising the receipts as royalties or technical fees and also looking upon them as the profits of a business. Judicial decisions have recognised the principle in regard to other types of receipts such as dividends and interest. That being so, when technical fees are received in the course of business, one cannot deny them the treatment envisaged by article 7, specially intended for application to business income. That apart, an pointed out earlier, there are several DTAA which prescribe different modes of taxation for business and for royalties and fees for technical services but they are clear that the provisions of the "business- clause of the treaty (article 7 here) will govern where such technical fees are earned in the course of a business with a permanent establishment in the State (article 11(4)), Canada (article XIII(SC)) or U.S.A. (article 12(6)). These indicate that even where royalties and fees for technical services receive separate treatment under a DTAA, it is the article relating to computation or business income that would apply where such royalties or fees arise in the course of a business carried on by the recipient. For these reasons, the payments received by TSB in this case from HHI have to be taxed under article 7 of the DTAA"

Since the facts of the case of the assessee are entirely the same and the provisions of the DTAA

between India and Federal Republic of Germany and India with Malaysia are the same, we have no hesitation in following the ratio laid down therein. While contending that the provisions of Article 7 will govern where such technical fees are earned in the course of business with a permanent establishment in the State in question, the Authority for Advance Ruling referred to DTAAs between India and Australia (article 11(4), which reads as follows:

" (4) The provisions of paragraphs (1) and (2) shall not: apply if the person beneficially entitled to the interest:, being a resident of one of the Contracting States, carries on business in the other Contracting State, in which the interest arises, through a permanent establishment situated therein, or performs in that other Start independent personal services from a fixed base situated therein, and the indebtedness in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such a cave, the provisions of Article 7 or Article 14, as the ease may be, shall apply."

Similar is the provision the Agreement between India and Federal Republic of Germany as contained in Article VIIIA(S) as under:

-(5) The provisions of paragraphs (1) and (2) of this Article shall not apply if the beneficial owner of the royalties or fees for technical. services being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment. In such a case, the provisions of Article III shall apply.-

The Authority for Advance Ruling held that these provisions indicate that even where royalties and fees for technical services received separate treatment under a DTAA, it is the Article relating to computation of business income; that would apply where such royaltiesor fees arise in the course of business carried on by the recipient. For these reasons, the payment received by TSB in this case from HHI have to be taxed ed under Article 7 of the DTAA which corresponds to Article III of the DTAA between India and Federal Republic of Germany. Since TSB in that case did not have any permanent establishment, it was held that. the amounts received by the TSB were not taxable in India. Since in this case also, the foreign company did not have any permanent establishment in India, the fees for technical services cannot be taxed in India in the light of the ruling given above by the Authority for Advance Rulings. We hold accordingly."

23. During the hearing of the appeals, great emphasis was laid on the fact that the ITAT had recorded independent findings with regard to the non-taxability –as FTS and under the DTAA, of the assessee's payments and the finding that Lufthansa had no PE in India. The fact that the findings of the ITAT, as is evident, were influenced by the decision of the AAR in *Tehniskil (Sendirian)*(*supra*) which were rendered in an entirely different context, and in that case the relevant Double Taxation Avoidance Agreement between India and Malaysia as applicable at the relevant time did not contain the clause for 'Fee for Technical Services'. In that context it was held by the AAR, that the fee for technical services arising out of supply of skilled labour were not liable to tax in India in terms of Article 7 as 'business profits' on the ground that the assessee did not have a permanent establishment in India in terms of Article 5 of the Double Taxation Avoidance Agreement. In the facts of the present case in terms of the DTAA, payments made to Lufthansa may not be liable to tax in India in terms of Article III of the DTAA, yet their taxability in terms of Article VIIIA of the DTAA, as there exists a 'Fee for Technical Services' clause in the Agreement, was not examined in proper perspective.

24. In the present case, the issue of technical fee has to be examined from the point of view of Article VIIIA introduced by the amending protocol, which to the extent it is relevant, states (by clause(4)) that:"*'fees for technical services' as used in this Article means payments of any kind to any person, other*

than payments to an employee of the person making the payments, in consideration for services of a managerial, technical or consultancy nature, including the provision of services of technical or other personnel." The facts of this case also reveal that only one agreement, i.e., the lease agreement, was approved under Section 10 (15A). The other two agreements, i.e., the crew lease and technical support agreements were not approved. There is no discussion in the orders of the ITAT whether the payments made under the technical support agreement or the crew lease agreements were not payment for technical services, apart from an *a priori* assumption that the question of taxation does not arise if there is no PE. With respect to payment for services of personnel under the crew lease agreement, both the statute (Explanation 2 to Section 9 (1) (vii) of the Income Tax Act) and the DTAA talk of taxability of payments for services that are managerial, technical or consultative in nature *"including provision of services of technical or other personnel."*

25. In the absence of the agreements and a fuller discussion by the ITAT which seems to have decided only on the applicability of the AAR's ruling, this Court is of opinion that the appeals need to be reconsidered and specific findings rendered in the context of Section 9 (1) (vii) and provisions of the DTAA.

26. For the above reasons, the appeals are allowed to the extent that the impugned orders are set aside; the issue is restored to the file of the ITAT which shall now proceed to hear the cases and render its findings in the light of the provisions of DTAA and the other provisions of the Act, in accordance with law. The ITAT's final order shall be made within six months. The questions of law are answered accordingly.

■■