IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI

BEFORE SMT DIVA SINGH, JUDICIAL MEMBER
AND SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA No.-2187/Del/2016
(Assessment Year: 2005-06)

DCIT (International Taxation) Circle-Gurgaon, 307, HSIDC building, Udyog Vihar-V Gurgaon	vs	MSV International Inc. D-7, South City-1 Gurgaon-122002 PAN AADCM1304M

Revenue by	**Ms. Rinku Singh, Sr. (DR)**
Assessee by	**Shri Ved Jain, Advocate,** **Shri Ashish Goel, CA,** **Ms. Surbhi Goel, CA,** **Shri Kislaya Parashar, Advocate**

Date of Hearing	**03.01.2019**
Date of Pronouncement	**12.02.2019**

ORDER

The present appeal has been filed by the assessee assailing the correctness of the order dated 15.12.2015 of CIT(A) 43 New Delhi pertaining to 2005-06 assessment year on the following grounds :-

> *"Ground No. 1 : Whether on the facts and circumstances of the case and law, the Ld. CIT(A) was not justified in deleting the addition made by the AO on account of the receipts of the assessee from National Highway Authority of India by holding that the same do not qualify as fees for technical services, and not taxable under the provision of section 44D r.w.s. 115A of the Act?"*

2. Ld. AR inviting attention to the records submitted that the point at issue is fully covered in favour of the assessee. Since the appeal has been filed by the Revenue the Ld. AR sought permission to address the claim subject to no objection posed by the revenue. The Sr. DR stated that she has no objection if the Ld. AR wants to set out his claim first. In the said background the Ld. AR invited attention to the assessment order dated 2.5.2013 passed u/s 147 read with section 143(3) and 144C (3) of the Income Tax Act 1961. Referring to the same it was submitted that the case was reopened on the basis of reasons recorded relying on the decisions taken by the Revenue in 2006-07, 2007-08 and 2008-09 assessment years. Filing a copy of the reasons recorded. This

specific fact noticed in para 5 of the same was relied upon. The relevant extract referred to is extracted hereunder :-

> *"5. Earlier assessments for A.Y. 2006-07, 2007-08 & 2008-09 have been done taxing the income from consultancy services in respect of NH-45 on gross basis. For the A.Y. 2006-07 & 2008-09 the department has preferred appeal before ITAT and for A.Y. 2007-08 the assessee is in appeal before CIT(A). The decision regarding applicability of section 44D to receipts from NH-45 has not attained finality and is pending before various appellate authorities."*

3. Inviting attention to the impugned order it was submitted that the CIT(A) has granted relief relying upon the view taken by the CIT(A) in 2006-07, 2007-08 and 2008-09 assessment years. The said fact that the issue was pending in appeal before the ITAT had duly been noted. In the said background inviting attention to the consolidated order dated 12.2.2016 copy available at pages 67-79 for 2006-07 and 2008-09 assessment years it was submitted that on similar facts and circumstances the very basis of the departmental challenge stands dismissed in the similar appeals filed by the department. Similarly attention was invited to order dated 27.4.2016 in assessee's case 2007-08 and 2009-10 assessment year wherein the said position was further affirmed.

3.1 Since Ld. Sr. had sought an adjournment to ascertain the past position which stands addressed by the consistent orders of the ITAT accordingly a pass over was given in order to give time to the revenue to go through the record. In the second round the Ld. AR reiterated this submission. Sr. DR considering the material on record withdrew the request for time and relied upon the assessment order. However no contrary decision or fact or decision was cited.

4. We have heard the rival submissions and perused the material on record. For the sake of completeness the relevant facts and the background history as taken note of by the CIT(A) in the order under challenge is extracted hereunder which highlights the basis of reopening of the assessment resorted to by the Assessing Officer :

> *4.1 The appellant is a foreign company incorporated in USA.It was engaged in the business of providing services in connection with the construction of highways, transportation, water supply and waste management, etc. It had several project offices in India to carry out those activities. During the year under consideration, the appellant received income from consultancy and engineering services amounting to Rs 3,21,42,907/-. Against this, it claimed a deduction of Rs 2,84,75,905/-, being expenditure incurred during the year, and computed a profit of Rs 36,67,002/-. The receipts included an income of Rs 1,46,73,594/- in pursuance of an agreement entered into with National Highway Authority of India (NHAI)in respect of NH-45 (Tambararn-Tindivanam Section) on 20th March, 2002. This agreement was in respect of construction of roads from Km 28.00 to Km 67.00 and 4-laning from Km 67.00 to 121.00 including strengthening and up-gradation of existing 2-lanes [Tambaram-Tindivanam Section) of NH-45. As per the scope of work defined under the agreement, the appellant was required to provide services in implementation of the project, review and approve material, its design results and recommend special tests wherever required for materials, suggest substitutes of unsuitable materials, to assess adequacy of inputs such as materials and labour. The appellant was also required to supervise and check the setting out of the culverts, bridges, foundations, floor slabs, all other work required for the project, e.g., Grade stakes, dope stakes, flow lines of culverts, roadway layout, longitudinal section and cross section, thickness of pavement layers, especially of asphalt concrete payment, location and dimensions of bridges, box and pipe culverts etc. The Ld AO held that income derived by the appellant from NH-45 project was in the nature of [i] 'fee for technical services' in*

terms of Explanation 2 of section 9 (1) (vii)of the act and (ii) 'fee for included services' under Article 12 of the treaty. Since the appellant had a Permanent Establishment (PE) in India, the AO held that such services would be governed by Article 12 (6) of the treaty, i.e income shall be determined in accordance with provisions of Article 7 applicable of the treaty. The AO further held that as per Article 7 (3), the profit of a PE was to be computed in accordance with the provisions of and subject to the limitations of the taxation laws of that State, i.e., the Income tax Act, 1961. Accordingly, the Ld. AO taxed the income derived by the appellant from NH-45 project on gross basis at the rate of 20% applying the provisions of section 44D read with section 115A of the Act. The ld. AO also estimated expenses incurred in connection with the project on proportionate basis at Rs 1,52,20,371/- and disallowed such expenses on the ground that such expenses were deemed to have been allowed when income was taxed on gross basis.

4.2 On the other hand, the appellant claimed that its receipts from the project were in the nature of business income and offered the income to tax from such project on net basis. The appellant contented that it was engaged in the business of construction and, therefore, covered by exclusion provided in definition of 'fee for technical service' given in Explanation 2 of section 9(1)(vii)of the Act. The appellant placed reliance on the judgment of the Delhi Tribunal in case of Agland Investment Services Inc. VS. ITO (1985) 22 Taxman 9 (Del) and Circular No. 202 dated 5th .July, 1976 (para 16.3) of CBDT. The appellant also relied upon the judgment of the Calcutta Tribunal in the case of DCIT vs. Schlumberger Seaco Inc. 1995 Tax L.R 486 (ITAT-Cal.).The appellant,- therefore, claimed that its income being in the nature of business profits, was not chargeable to tax under section 44D of the Act in view of Article 7 of the Double Taxation Avoidance Agreement entered into with USA(the treaty).

4.3 It is pointed out that the subject assessment order for AY 2005-06 was passed on 02.05.2013, u/s 147 read with section 143(3) and 144C(3).The reasons for reopening assessment as per the appellant are:-

"I, The assessee is a foreign company incorporated in US'A and is engaged in business of providing consultancy services in the areas of highways, transportation, water supply, waste management etc. The assessee has set up several project offices in India to carry on its activities in India. The assessee has entered into contracts with. various parties mainly State Governments and has been providing them consultancy services as required under such agreement. These services are in the nature of FTS.

2. Assessee filed its return of income for AY 2005·-06 declaring an income of Rs 37,10,940/- on 31.10.2005. The return was processed under section 143{l).

3. The agreement entered with. the assessee with NHAI for the purpose of rendering consultancy services in respect of NH-45 {Tembaram-Tiniduanam section), was signed on 20th March, 2002. Since the agreement is signed before 31st March, 2003 section 44D is applicable instead of section 44DA Income from that contract is to be taxed at gross basis @ 20% instead of net basis and no expenses is to be allowed.

4. The assessee has calculated the taxability of its income on net basis including income from NH-45.

5. Earlier assessments for A Y 2006-07, 2007-08 and 2008-09 have been done taxing the income from consultancy services in respect of NH-45 on gross basis. For the AY 2006-07 and 2008-09 the department has preferred appeal before ITAT and AY 2007-08 the assessee is in appeal before CIT (A). The decision regarding applicability of' section 44D to receipts from NH-45 has not attained finality and is pending before various of appellate authorities.

6. Further, based on the facts and discussion made in the aforesaid paragraphs, it is concluded that the consideration received by the assessee under the agreement with NHAJ(NH-45) is in the nature of 'FTS'. As the said agreement has been entered on 20.03.2002, the taxability of the consideration from such agreement will be governed by the provisions of Section 44D r.w. section 115A, of IT Act, 1961.

7. In view of the above facts I have reason to believe that the receipts from NH- 45 have been undercharged and the assessee has not furnished its true and correct material facts relating to its income for the said AY 2005-06. This is a fit case for initiating proceedings u/ s 147/ 148.

8. Accordingly, it is proposed to issue notice u/ s 148 of the IT Act, 1961."

4.4 In assessment year 2007-08, similar issues presented in assessment order, where the matter went to Ld. CIT (A), who adjudicated the matter in appeal No. 174/10--11 vide order dated 01.12.2011. The grounds of appeal (except G. No. 6 which pertains to rectification u / s 154) in this year are similar to the grounds of appeal as were before my Ld. Predecessor in appeal for AY2007-08.

4.5 In that appeal order for AY 2008-09, made esteemed Predecessor had decided the issue in favor of the appellant/ assessee. Revenue is an appeal before the Horr'ble ITAT against said order

of Ld. CIT (A) As informed, the appeal has not been disposed off by the Hon'ble ITAT. While granting relief, my Ld. Predecessor had held in the operative portion of his order at Paras 7 and 8 as follows:-

"7. I have considered the submission of the, appellant and the relevant case laws. As per the A.O The appellant was providing technical services and as such covered by the provisions of Section 9(1)(vii) read with Explanation 2 Of the Act. In this regard it will be relevant to refer to the relevant provision of section 9(i)(vii)which reads as under:-
"9(1)(vii)income by way of fees for technical services payable by-
(a) the Government; or

(b) a person who is a resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India " or

(c) a person who is a non-resident, where the fees are payable in respect of services utilized in a business of professions carried on by such persons in India or for the purposes of making or earning any income from any source in India :

***Provided** that nothing contained in this clause shall apply in relation to any income by l.oay of fees for technical services payable in pursuance of an agreement made before the t= day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.*

Explanation l . - For the purposes of the foregoing proviso, an agreement made an or after the t= day of April, 1976, Shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.

Explanation 2. For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the 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".

7.1 As per the scope of work defined in the agreement} the appellant was required to provide its services for implementation of the project, review and approve material, its design result and recommend special tests wherever required for materials. Suggest substitutes for unsuitable materials} assess adequacy of inputs such as material and labour, supervise and check the setting our of the culvers, bridges, foundation, floor slabs} and all other work required for the project} e.g., Grade stakes, dope stakes} flow lines of culverts, roadway layout, longitudinal section and cross section, thickness of pavement layers especially of asphalt concrete pavement, location and dimensions of bridges} box and pipe culverts etc.

*7.2 In the case of **Agland Investment Services Inc. (Supra)** similar issue has come up. In that case, the appellant had entered in an agreement which provided for two activities, i.e., the expertise and technical assistance of consultants and technical assistance in connection with construction and assembly of hauling, drawing and processing factories and plants and also for managerial services thereof, the bid evaluation and engineering services connected with inviting tenders and for processing factory. The Court after analyzing these services has held that engineering and bid evaluation services were step-in-aid for construction of factories and hence outside the purview of section 9(1)(vii) read with explanation 2.*

*7. 3 The scope of work in the case of appellant was more closely linked to the day to day construction activity as compared to that in the case **Aagland (Supra)** i.e., the facts of case of appellant are on a stronger footing as compared to that 'in the case **Aagland(Supra)**. Section 9 of the act is complete code in itself regarding taxability of income of non-residents and the income of non-resident is to be characterized in accordance with the provisions of section 9 alone. Therefore, I am inclined to agree with the contention of the appellant that its case uias covered by exclusion provided in definition of 'fee for technical service' given in Explanation 2 of section 9(1){uii)of the act and its receipt from NHAI project was taxable as normal business profits. Questions no.(i) framed in para 4 is accordingly answered in negative and in favor of appellant. As a result, the question no.(ii)becomes inconsequential.*

7.4 However, let us examine the alternate plea of the appellant also regarding applicability of section 44D of the Act. Article 12(2) of the treaty provides that fee for included services provides that provisions of sub-article (2) shall not apply if the beneficial owner of fee for included services was a resident of contracting state and carries on the business in the other contracting State in Which the Fee for included services arises through a PE situated therein. In such a case, the provisions of Article 7 regarding computation of business profit shall apply. The implication of Article 12(6) are that the fee for included services shall not be taxed on gross basis at the rate given in the treaty and shall be taxable as business profit if there is a Permanent Establishment. Article 7(2) provide that where an enterprise carries on business in the other contracting State

through a Permanent Establishment situated therein, the profit attributable to that Permanent Establishment will be computed in a determination of the profit of a permanent establishment, deduction shall be allowed for expenses incurred for the purpose of the enterprise as a whole in accordance with provisions of and subject to the limitation of the taxation laws of that State. The Implication of the Article 7 read with sub-article (2) and sub-article (3) is that if a 10non-resident entity is providing services or carrying on a business in India through a PE then its income is to be computed after deducting all the expenses incurred by it in accordance with the domestic law. In this context, in my opinion, this limitation will apply to expenses, such as, rate of depreciation, various restrictions placed under section 36, proviso to section 37 regarding disallowance of unlawful expenses, limitation u/ s 40(a)(i) and 43B etc. The limitation referred in Article 7(3) does not mean that income is to be taxed under presumptive scheme of computation u/ s 44D. It would Practically mean going back to article 12(2) of the treaty and render provisions of article .12(6) redundant. This issue was examined by Mumbai Tribunal in the case of DCIT' vs. Boston Consulting Group Pvt. Ltd. Reported at 2005 94 ITD 31 Mum. in the context of the Indo-Singapore Tax Treaty. It was held as under:

"that non-deduction of expenses under Section 44D, which means that the taxability is on gross basis, is coupled with a special rate of tax for such income on gross basis under section 115A. A somewhat similar scheme of taxability of royalties and fees for technical services on gross basis, but a lower rate, also finds place in most of the tax treaties including India-Singapore tax treaty. Article 12 provides for taxation of fees for technical services in the source country on gross basis, but at a lower tax rate of 15 per cent, barring the case of fees for technical services which. are ancillary an subsidiary to the enjoyment of property for which royalties under para 12(3)(b), which are taxed at an even lower rate of 10 per cent.
Section 44D r/w Section l.15A and Indian IT Act, and Article 12 of the India-Singapore tax; Treaty are, therefore, similar in nature.These alternate paradigms, contained' in section 44D r/w section 115A and in article 12 of the ***India-Singapore*** *tax treaty, offer alternatives but similar models of taxation of income from royalties and fees from technical services. While these two sets or provisions dealing with taxability on gross basis may belong to the same genus of taxation. models, but, at the same time, these are two independent, mutually exclusive, and therefore, computing sets of provisions. Once it is clear that these are competing models of taxation of royalties and fees for technical services on gross basis, in the IT Act and in the India-Sinqapore Tax Treaty. It has to follow that the provisions of the IT Act, in preference over the provisions of the applicable tax Treaty, cannot be thrust upon an unwilling appellant. Therefore, the Provisions of the royalties and fees for technical services on gross basis under the tax Treaty on the technical services' for the purposes of the said Treaty. This situation is quite distinct and different from the situation that the receipts are in the nature of royalties and fees for technical services' for the purpose of treaty but are being taxed on the net basis because of the application of Article 12(6), i.e., on account of being attributable to the PE in the other Contracting State. IN other words, in case a receipt is held to be not taxable as 'royalties and fees for technical services" under the provisions of the India-Singapore tax Treaty, the same cannot also be subjected to tax under Section 44D r/ w Section 115A either. "*

7.5 Subsequently, the above judgment has been followed by the various courts, e.g., in the case of JCIT vs. Essar Oil Ltd. (2006) 7 SOT 216 and in the case of Cray Research India Ltd. Vs. JCIT 136 TTJ 1delivered on October, 2010. Similarly in the case of JCIT vs.Essar Oil Ltd. the court has examined similar issue. In this case, a U'K. Company entered into a contract with M/ s Essar Oil Ltd. For supervision of Construction and commissioning activities in India for the refinery complex being built at Jamnagar. The appellant company returned a loss Rs. 6620690/- after deducting all expenditure from the gross receipts. The main services provided by the appellant company were construction supervisory services of the project, supervision of start up and commissioning of the project and material and warehouse management of the project. As per the A.0. these services fell within the ambit of the fee for technical services and taxed the income of the appellant by invoking the provision of section 44D of the Act despite the fact that the receipt of the appellant company were assessable under Article 7 Of DTAA between India and U'K. The ITAT did not agree with the contention of the A. O. it was held that in case of receipts through permanent establishment in respect of which profits are to be deduction of expenses. The court further held that section 44D and for that matter explanation 2 to section 9(1)(vii)do not apply.

7.6 This controversy has now been laid to rest by insertion of new section 44DA in the act w.e.f 1.04.2004 by the Finance Act, 2003 where assessee has been given explicit option to compute its income on net basis if it has maintained books of account. The explanatory
memorandum to the finance act state that the section 44DA was inserted with a view to harmonize the scheme of taxation of royalty and fee for technical services under the act with the provisions of the treaty with various countries. IT means that even prior to the insertion of section 44DA, the fee for technical services provided through a PE in India was to be taxed on net basis under the provisions of the treaty, if there is existed such a clause in the treaty, i.e., similar to article 12(6) in the India-Singapore treaty etc. The relevant para of Explanatory Notes to the Finance Act, 2003, which. explains the intention behind the insertion of the new section, is extracted below:
«With a view to harmonize the provisions relating to the income from royalty or fees for technical services attributable to a fixed place of professions or a permanent establishment in India with similar provisions in the various Double Taxation Avoidance Agreement, the bill proposes to insert a new section 44DA to provide that the income by way of royalty or fees for technical

services received from government or the Indian concern in pursuance of an agreement made by a non resident (not being a company) or a foreign company with the Government or the Indian concern after the 31st day of March 2003, where such non-resident (not being a company) or a foreign company carries on business in India through a permanent establishment situated therein, or performs professional services from a fixed place of professions place of profession situated therein, and the right property or contact in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed place of professions, as the case may be, would be computed under the head "Profits and gains of business or profession" in accordance with the provisions of the Income Tax Act. However, it is provided that no deduction shall be allowed, in respect of any expenditure or allowance which is not wholly and exclusively incurred for the business of such permanent establishment or fixed place of professions in India; or in respect or amounts, if any, Paid (other than towards reimbursement of actual expenses) by the permanent establishment to its head office or to any of its other offices. "

7.7 It can be inferred from the explanatory notes above that legislature was of the view that deduction for the expenditure incurred in connection with such fee for technical services was allowable against the fee for technical services in terms of the provisions of the treaties where such clause existed, i.e., similar to article 12(6) in this case.

7. 8 In view of discussions above, I am in agreement with the contention of the appellant that the limitation provided in article 7(3) of the treaty is with reference to the expenditures, if any, such as depreciation, etc. Article 7(3) does not mean that the whole concept of determination of the profit by deducting expenditure incurred from the receipt is ignored and income is computed under presumptive scheme prescribed under section 44D. Under Article 12, two options have been provided. First, where fee for included services are being provided without a PE and in that case the income is to be computed by applying a fixed rate of tax on the gross receipt under Article .12(2) and secondly, where fee for included services is being provided by a permanent Establishment, in that case the income is -to be computed under article 12(6) which is turn refers to article 7, i.e., income is required to be computed after deducting all expenditure from the gross receipts. In view of above judgments and
the facts as analyzed above I am of the view that the A. O. was not justified in invoking the provision of section 44D read with section 115A of the act in respect of the above receipts from National Highway Authority Of India. The Income of the Appellant is to be computed as per the normal provisions and the addition made by the A. O. on this account is deleted. All the grounds of appeal are disposed off accordingly.

8. In the result, the appeal is allowed."

4.1 As has been argued on behalf of the assessee and which position of fact has not been controverted by the Revenue. It is seen that the said issue has come up for consideration before the ITAT and in 2006-07 and 2008-09 assessment years in ITA No. 1231/Del/2012 and 1346/Del/2012 the issue was decided by the Co-ordinate bench in the following manner :-

7. "We have carefully considered the rival contention as well as also perused the relevant documents relied up on by both the parties. The only issue that emerges in this appeal is that whether the amount received by the assessee from NH-45 project is chargeable to tax u/s 44D of the act or under the normal provision of taxation. If the amount is chargeable to tax as FTS u/s 44D then the assessee shall not be allowed any deduction for expenditure and the income shall be chargeable to tax @ 20 % u/s 44D rws 115A of the Act. According to the assessing officer it is chargeable to tax u/s 44D and according to assessee it s chargeable to tax under the normal provision of taxation as it is not fees for technical services as per section 9 (1) (vii) of the act. Further as the assessee is a non resident it is also claimed that it is entitled to the benefit of Indo US DTAA and therefore there is no presumptive tax there in provided for.
8. The following issue emerges for the consideration that whether the income received by the assessee on account of NH-45 is fees for technical services or not u/s 9 (1) (vii) of the Income tax Act. Assessing officer has merely gone on the presumption that as
a. The contracts receipts are for the consultancy services it is covered in the definition of Fees for Technical services.
b. He has also been lead by the classification of receipt in the TDS certificates where the deduction has been made u/s 194J of the act as consultancy fees.
c. Assessee itself says in return of income that it is engaged in the business of consultancy.
We are of the view that for the purposes of the characterization of the income of the assessee all the above criteria are not relevant for the reason that
1) The consultancy services are in general, "fees for technical services". But AO need to examine it with respect to explanation (2) of section 9(1) (vii) of the act which has also provided some exclusions. AO has failed to look in to those exceptions carved out in the right perspective.

2) The Section mentioned in TDS certificate and the disclosure in the return of income cannot determine whether the consultancy services are in the nature of Fees for technical services or otherwise. Therefore it is also not determinative of the nature of receipts.

9. For determining the nature of receipt , it is imperative to examine the scope of the work to be carried out by the assessee which is extracted by CIT (A) as under :-

"7.1 As per the scope of work defined in the agreement , the appellant was required to provide its services for implementation of the project , review and approve material, its design results and recommend special test wherever required for materials , suggest substitutes for unsuitable materials , assessee adequacy of inputs such as material and labour, supervise and check the settings out of the culverts, bridges foundations, floor slabs, and all other work required for the project , e.g. grade stakes dope stakes, flow lines of culverts, roadway layouts logintudinal section and cross section, thickness of pavement layers especially of asphalt concrete pavement , location and dimensions of bridges box and pipe culverts.

10. LD AO has held that assessee is only providing services in those contracts and is not carrying any business India. It is admitted fact that assessee is engaged in the consultancy services but that is also the business of the assessee being carried on in India. This facts is apparent that AO himself has taxed Rs 3629478/- as business income of the assessee. Act of providing services to the various clients in India is in fact the business of the assessee. This fact has also been admitted by Ld AO in Para no. 2 of the assessment order. Ld AO has made irrelevant analysis of disclosure in the return of income of the assessee as well as the nomenclature described in TDS certificate, when AO himself agrees that assessee is engaged in the business of Page 6 of 13 services wrt highways, transport etc. Therefore it cannot be said that assessee is not carrying any business in India.

11. LD AO producing the provision of Explanation 2 to section 9 (1) (vii) has held that the receipts of the assessee is Fees For Technical services. The provisions of explanation 2 to section 9 (1) (vii) defines the scope of "Fees For Technical services" as under :-

"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".

12. Therefore according to this any consideration which is for the rendering of any managerial technical or consultancy services is characterized as " fees for technical services" . However some exceptions are carved out if the such managerial technical or consultancy consideration is for any construction etc or like projects undertaken by the recipient. Ld AO has failed to consider this exceptions carved out in definition of FTS, Therefore the attempt made by ld AO is on incomplete reading of that explanation ignoring exceptions. Hence It is necessary to examine the nature of work carried out by the assessee. From the nature of work carried out by the assessee it is apparent that it has got the consultancy work related to laying down of roads etc which is for construction activity or like project.

13. Ld AO has held that as assessee is rendering services with respect to various projects and therefore all the services are rendered by the assessee are technical nature. Undenyingly the services rendered by the assessee are technical in nature but merely because the services are technical in nature they does not become fees for technical services in accordance with the provision of expl. 2 to section 9 (1) (vii) of the act. This technical service needs further examination whether they fall in the exception carved out therein or not. In our view the services do fall in the exceptions carved as construction activity and like projects.

14. Before AO assessee aptly relied up on the decision of coordinate bench in case of AGLAND INVESTMENT SERVICES INC.V. INCOME-TAX OFFICER 1985] 22 TAXMAN 9 (DELHI - TRIB.) wherein coordinate bench interpreting the word " construction" has held as under :-

"5. The assessee has placed before us extracts from various dictionaries (international editions) to prove that 'construction' implies and includes engineering and bid evaluation since it is a step-in-aid to construction. The assessee also contends that 'construction' is not a mere physical activity or laying bricks and mortars to include something more, viz., mental process of step-in-aid and it includes engineering and bid evaluation. He also contends that bid evaluation and engineering amounts to a formulation and 'construction' includes formulation among other activities like erection, fabrication, fashioning, shifting devising and creation also. The learned departmental representative, on the other hand, supports the stand of the revenue and contends likewise as has been reasoned in the impugned orders of the lower authorities.

6. In our opinion, on the facts and in the circumstances of the case, the assessee must succeed, since section 9(1)(vii), when read with Explanation 2attached thereto, makes it clear and postulates a situation where fee for technical services is taxable as income but any consideration for any construction, assembling, mining or like project undertaken by an assessee is excluded from the purview of the said assessment and construction, assembling, mining or like project does include a step-in-aid thereto. The assessee, as has been stated above, entered into an agreement with the corporation and it provided for two separate activities, viz., to give to the said corporation the expertise and technical assistance of consultants and technical assistance in connection with construction and assembly of hulling, drying and processing factories and plants and also for management services thereof. The bid evaluation and engineering services are said to be connected with inviting tenders and for other process but the ultimate aim for those tenders and process is the construction of the corporation processing factory and plant and in this view of the

matter, the step-in-aid included in these services, viz., engineering and bid evaluations, has to be held as a step-inaid for construction of factories and plants of the Corporation, hence, under section 9(1)(vii) read with Explanation 2 attached thereto the income is not taxable. We hold and direct accordingly. Rs. 84,456, as such, stands deleted from computation. The appeal succeeds and stands allowed."

15. Ld AO has rejected the contention of the assessee holding that the case of the assessee does not fall within the exception. Bereft of any reasoning that why the services rendered wrt construction of roads is not a construction activity or like projects. On reading the above decision we fully agree with the finding of CIT (A) that the case of this assessee stands on stronger footings than the case relied upon. Ld Dr could not point out any other judicial precedents against the assessee and also could not controvert the decision of coordinate bench in Agland Investment Inc V Ito the case of the assessee is not on stronger footing.

16. Provision of section 44D of the Income tax act provides special treatment of fees of technical services to be charged at gross presumptive rates and expenses incurred there on are not allowed as deduction. The provision are as under :-

"SPECIAL PROVISION FOR COMPUTING INCOME BY WAY OF ROYALTIES, ETC. IN THE CASE OF FOREIGN COMPANIES Notwithstanding anything to the contrary contained in sections 28 to 44C, in the case of an assessee, being a foreign company,--

(a) the deductions admissible under the said sections in computing the income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or with the Indian concern before the 1st day of April, 1976, shall not exceed in the aggregate twenty per cent. of the gross amount of such royalty or fees as reduced by so much of the gross amount of such royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process or trade mark or similar property;

(b) no deduction in respect of any expenditure or allowance shall be allowed under any of the said sections in computing the income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or with the Indian concern after the 31st day of March, 1976 but before the 1st day of April, 2003.

Explanation For the purposes of this section,--

(a) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9 ;

(b) "foreign company" shall have the same meaning as in section 80B ;

(c) "royalty" shall have the same meaning as in the Explanation 2 to clause (vi) of sub-section (1) of section 9 ;

(d) royalty received from Government or an Indian concern in pursuance of an agreement made by a foreign company with Government or with the Indian concern after the 31st day of March, 1976, shall be deemed to have been received in pursuance of an agreement made before the 1st day of April, 1976, if such agreement is deemed, for the purposes of the proviso to clause (vi) of sub-section (1) of section 9, to have been made before the 1st day of April, 1976.

It is clear for the above provision that for invoking it the fees for technical services should have the same meaning as per explanation 2 to section 9 (1) (vii) of the act. As we have already held that receipt of assessee is not „fees for Technical services as defined under above explanation as it relates to construction activity , we are of the view that accordingly that receipt is out of the purview of presumptive taxability u/s 44D of the Income tax Act.

17. Further LD AO has also analyzed the provision of article 12 (4) of the Indo US DTAA and has held that consultancy services provided by the assessee are made available to the clients in form of reports which are used by such clients in their projects. He relied up on the order of AAR in case of Intertek testing Services India Private Limited (AAR No 751 of 2007). We failed to understand that how in this consultancy work the technology is „made available" to NHAI would be able to utilize the knowledge or know how in future on his own without the aid of service provided. Assessee is providing the service sin relation to technical advice as set out in earlier paras. The averment of AO that it is " made available" to assessee is not correct and therefore we disregard the same. The term „Make available" has been explained by Hon Karnataka High court in case of CIT V De beers India P Ltd (346 ITR 467) (kar) on Indo Netherland DTAA as under :-

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

words, payment of consideration would be regarded as "fee for technical/included services" only if the twin tests of rendering services and making technical knowledge available at the same time is satisfied."
18. Therefore on reading of the above exposition of the term " make Available" it"s is not the case of the AO that there is imparting of technical skill which is absorbed by the receiver so that NHAI can deploy the similar technology in future without depending on the provider. In view of above we are of the view that these payments do not qualify under article 12 (4) of the DTAA as the conditions of " make Available" does not satisfy.

19. Regarding Reliance by Ld AO on the decision of AAR in Ericson Rulings 224 ITR 203 (AAR) is also half hearted. In that ruling it is held that it does not change the character of receipt but it is chargeable under the different mechanism. We are on the issue of deciding the mechanism under which the receipt would be taxable under Domestic tax laws read with the Indo US Treaty.
20. On the other aspects of applicability of DTAA CIT (A) has held as under :-
7.4 However, let us examine the alternate plea of the appellant also regarding applicability of section 44D of the act. Article 12 (2) of the treaty provides that fee for included services may also be taxed in the source State. However, sub-article (6) carves out an exclusion and provides that provisions of sub-article (2) shall not apply if the beneficial owner of fee for included services was a resident of contracting State and carries on the business in the other contracting State in which the fee for included services arises through a PE situated therein. In such a case, the provisions of Article 7 regarding computation of business profit shall apply. The implication of Article 12(6) are that the fee for included services shall not be taxed on gross basis at the rate given in the treaty and shall be taxable as business profit if there is a permanent establishment. Article 7(2) provide that where an enterprise carries on business in the other contracting State through a Permanent Establishment situated therein, the profit attributable to that Permanent Establishment will be computed in a manner as if it were a distinct and independent enterprise. In determination of the profit of a permanent establishment, deduction shall be allowed for expenses incurred for the purpose of the business of the permanent establishment including a reasonable allocation of executive and general administrative expenses, research and development expenses, interest and other expenses incurred for the purpose of the enterprise as a whole in accordance with the provisions of and subject to the limitation of the taxation laws of that State. The implication of the Article 7 read with sub-article (2) and sub-article (3) is that if a non-resident entity is providing services or carrying on a business in India through a PE then its income is to be computed after deducting all the expenses incurred by it in accordance with the domestic law. In this context, in my opinion, this limitation will apply to expenses, such as, rate of depreciation, various restrictions placed under section 36, proviso to section 37 regarding disallowance of unlawful expenses, limitation u/s 40(a)(i) and 43B etc .The limitation referred in Article 7(3) does not mean that income is to be taxed under presumptive scheme of computation u/s 44D. It would practically mean going back to article 12(2) of the treaty and render provisions of article 12(6) redundant. This issue was examined by Mumbai Tribunal in the case of DCIT vs. Boston Consulting Group Pte, Ltd. reported at 2005 94 ITD 31 Mum in the context of the Indo-Singapore Tax Treaty. It was held as under:

"that non-deduction of expenses under Section 44D, -which means that the taxability is on gross basis, is coupled with a special rate of tax for such income on gross basis under Section 115A. A somewhat similar scheme of taxability of royalties and fees for technical service on gross basis, but a lower rate, also finds place in most of the tax treaties including India-Singapore Tax Treaty. Article 12 provides for taxation of fees for technical services in the source country on gross basis, but at a lower tax rate of 15 per cent, barring the case of fees for technical services which are ancillary and subsidiary to the enjoyment of property for which royalties under para 12(3)(b), which are taxed at an even lower rate of 10 per cent. Section 44D r/w Section 1 ISA of the Indian IT Act, and Article 12 of the India-Singapore tax Treaty are, therefore, similar in nature. These alternate paradigms, contained in Section 44D r/w Section 115A and in Article 12 of the India-Singapore tax Treaty, offer alternative but similar models of taxation of income from royalties and fees Page 11 of 13 from technical services. While these two sets of provisions dealing with taxability on gross basis may belong to the same genus of taxation models, but, at the same time, these are two independent, mutually exclusive, and therefore, competing sets of provisions. Once it is clear that these are competing models of taxation of royalties and fees for technical services on gross basis, in the IT Act and in the India-Singapore tax Treaty, it has to follow that the provisions of the IT Act cannot come into play unless these are more beneficial to the appellant. That certainly it is not the case here. The law is trite that the provisions of taxability under the IT Act, in preference over the provisions of the applicable tax Treaty, cannot be thrust upon an unwilling appellant. Therefore, the provisions of Section 44D cannot be applied in a situation in which the Revenue 's case for taxing the royalties and fees for technical services on gross basis under the tax Treaty on the sole ground that receipts in question are not in the nature of 'royalties and fees for technical services for the purposes of the said Treaty. This situation is quite distinct and different from the situation that the receipts are in the nature of 'royalties and fees for technical services' for the purpose of Treaty but are being taxed on the net basis because of the application of Article 12(6), i.e., on account of being attributable to the PE in the other Contracting State. In other words, in case a receipt is held to be not taxable as 'royalties and fees for technical services' under the provisions of the India-Singapore tax Treaty, the same cannot also be subjected to tax under Section 44D r/w Section 115A either."

7.5 Subsequently, the above judgment has been followed by the various courts, e.g., in the case of JCIT vs. Essar Oil Ltd. (2006) 7 SOT 216 and in the case of Cray Research India Ltd. vs. JCIT 136 TTJ 1 delivered on October, 2010. Similarly in the case of JCIT vs. Essar Oil Ltd. the Court has examined similar issue. In this case, a U.K. company entered into a contract with M/s Essar Oil Ltd. for supervision of construction and commissioning activities in India for the refinery complex being built at Jamnagar. The appellant company returned a loss of Rs.66,20,690/- after deducting all expenditure from the gross receipts. The main services provided by the appellant company were construction supervisory services of the project supervision of start up and commissioning of the project and material and warehouse management of the project. As per the A.O., these services fell within the ambit of the fee for technical services and taxed the income of the appellant by invoking the provision of section 44D of the Act despite the fact that the receipt of the appellant company were assessable under Article 7 of DTAA between India and U.K. The ITAT did not agree with the contention of the A.O. It was held that in case of receipts through permanent establishment in respect of which profits are to be computed under article 12(3) of the DTAA, section 44D was not to be applied for the purpose of deduction of expenses. The court further held that section 44D and for that matter explanation 2 to section 9(l)(vii) do not apply.

7.6 This controversy has now been laid to rest by insertion of new section 44DA in the act w.e.f. 1.04.2004 by the Finance Act, 2003 where aseesee has been given explicit option to compute its income on net basis if it has maintained books of account. The explanatory memorandum to the finance act stated that the section 44DA was inserted with a view to harmonize the scheme of taxation of royalty and fee for technical services under the act with the provisions of the treaty with various countries. It means that even prior to the insertion of section 44DA, the fee for technical services provided through a PE in India was to be taxed on net basis under the provisions of the treaty, if there is existed such a clause in the treaty, i.e., similar to article 12(6) in the India-US treaty or India- Singapore treaty etc. The relevant para of Explanatory Notes to the Finance Act, 2003, which explains the intention behind the insertion of the new section, is extracted below;

"With a view to harmonize the provisions relating to the income from royalty or fees for technical services attributable to a fixed place of profession or a permanent establishment in India -with similar provisions in the various Double Taxation Avoidance Agreement, the Bill proposes to insert a new section 44DA to provide that the income by way of royalty or fees for technical services received from Government or an Indian concern in pursuance of an agreement made by a non-resident (not being a company) or a foreign company with Government or the Indian concern after the 31 day of March, 2003, where such nonresident (not being a company) or a foreign company carries on business in India through a permanent establishment situated therein, or performs professional services from a fixed place of profession 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 or fixed place of profession, as the case may be, would be computed under the head "Profits and gains of business or profession" in accordance with the provisions of the Income-tax Act. However, it is provided that no deduction shall be allowed, in respect of any expenditure or allowance which is not wholly and exclusively incurred for the business of such permanent establishment or fixed place of profession in India; or in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to its head office or to any of its other offices. "

7.7 It can be inferred from the explanatory notes above that legislature was of the view that deduction for the expenditure incurred in connection with such fee for technical services was allowable against the fee for technical services in terms of the provisions of the treaties where such clause existed, i.e., similar to article 12(6) in this case.
There is no infirmity pointed out by the lD DR in the findings of CIT appeal regarding applicability of article 7 of the DTAA regarding taxability of the sum and its consequent taxability u/s 44D of the Act.
21. It is also not controverted that assessee was carrying on similar activities in the preceding years as well, and the income earned form the said activities have been accepted by the Department as business income of the assessee and assessment made u/s 143(3) of the Act. Principle of consistency has been accepted by the courts in many judicial precedents and some of the landmark decisions in the cases are of Radhasoami Satsang v. CIT: (1992) 193 ITR 321 (SC), CIT v. Lagan Kala Upwan: (2003) 259 ITR 489 (Del), Saurashtra Cement & Chemical Industries v. CIT: (1980) 123 ITR 669 (Guj), Commissioner of Income Tax v. Paul Brothers: (1995) 216 ITR 548 (Bom) and Commissioner of Income Tax v. Modi Industries Limited: [2010] 327 ITR 570. Therefore on this ground too assessee deserves relief.

22. In view of above, we are of the view that according to the provision of section 44D rws 9 (1) (vii) of the act assessee"s receipt from NH -45 of Rs. 10354820/-is not Page 13 of 13 taxable as FTS under that section but under normal provision of income tax act as business income. On this count we confirm the order of CIT (A)."

5. It is seen that aforesaid issue again came for consideration before the ITAT as argued wherein the Coordinate Bench vide order dated 27/04/2016 in

and ITA No. 2842/Del/2014 decided the identical issue in favour of the assessee by holding as under :-

> *"6.1 Ld. AR submitted that the issue stands covered in favour of the assessee in assessee's own case for the Assessment Years 2006-07 and 2008-09 vide order dated 12.02.2016. The relevant para of the judgment of this Tribunal is para 7-22. This Tribunal in assessee's own case has held that according to the provision of Section 44D read with Section 9(1)(vii) the assessee's receipt is not taxable as FTS but is taxable under the normal provision of the I.T. Act, 1961 as business income. Respectfully following the judgment in assessee's own case, we are inclined to allow this ground of appeal for both the Assessment years. Accordingly, Ground No. 4 & 6 for Assessment Year 2007-08 and ground No. 4 for Assessment Year 2009-10 stand allowed."*

6. Accordingly, in the face of these consistent orders of the ITAT passed by the coordinate Benches on same set of facts and circumstances which have consistently confirmed the relief given by the Ld. CIT(A) wherein the relief denied by the Ld. CIT(A) has been reversed and the relief granted by the Ld. CIT(A) has been affirmed we find that in the absence of any infirmity having been pointed out either in law or fact we are of the view that there is no merit in the appeal filed by the revenue. Accordingly the ground is dismissed and the impugned order is upheld. Said order was pronounced in the open court at the time of hearing itself.

7. In the result appeal of the revenue is dismissed.

sd/-	sd/-
(R.K. PANDA)	**(DIVA SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 12 .02.2019
*Veena / AG(Chd)

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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ASSISTANT REGISTRAR
ITAT NEW DELHI

This order was directly dictated on Computer to the P.S.	03.01.2019
Draft dictated on	04.01.2019/05.02.2019/ 06.02.2019
Draft proposed & placed before the second member	
Draft discussed/approved by Second Member.	
Approved Draft comes to the Sr.PS/PS	
Kept for pronouncement on	
File sent to the Bench Clerk	
Date on which file goes to the AR	

Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	