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

BEFORE SHRI B.RAMAKOTAIAH, ACCOUNTANT MEMBER
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA.No.1292/Hyd/2011 – Assessment Year 2005-06
ITA.No.1293/Hyd/2011 – Assessment Year 2006-07
ITA.No.1649/Hyd/2010 – Assessment Year 2007-08
ITA.No.1294/Hyd/2011 – Assessment Year 2008-09
ITA.No.2226/Hyd/2011 – Assessment Year 2008-09
ITA.No.1274/Hyd/2012 – Assessment Year 2009-10

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| M/s. GFA Anlagenbau Gmbh, New Delhi<br>**( PAN - AAACG 8080 Q )**<br>(Appellant) | V/s. | Dy./Asstt. Director of Income-tax (International Taxation)-I, Hyderabad<br>(Respondent) |

Assessee by: Mr. F.V. Irani
Revenue by: Mr. P. Somasekhar Reddy,

Date of Hearing: 19.06.2014
Date of Pronouncement: 27.06.2014

**O R D E R**

**PER B. RAMAKOTAIAH, A.M.**

There are six appeals in this bunch. While ITA No.2226/Hyd/2011 is directed against the order of the Commissioner of Income-tax (Appeals)-V, Hyderabad dated 31.10.2011 for the assessment year 2008-09, the remaining five are directed against the orders of assessment passed by the Assessing Officer, viz. Assistant Director of Income-tax(International Taxation)-I, Hyderabad, in pursuance of the orders of Dispute Resolution Panel(DRP) Hyderabad, for the assessment years 2005-2006 to 2009-2010. Since common issues are involved, these appeals are being disposed of by this common order for the sake of convenience.

ITA No.1649/Hyd/10 -Assessment Year 2007-08
ITA No.1292/Hyd/11- Assessment year 2005-06
ITA No.1293/Hyd/11- Assessment year 2006-07
ITA No.1294/Hyd/11- Assessment year 2008-09
ITA No.1274/Hyd/12- Assessment year 2009-10

2. Facts of the case in brief are that the assessee is a foreign company incorporated in Germany. It is engaged in the activity of supervision, erection, commissioning of plant and machinery for steel and allied plants in India. Assessee filed the return of income for the assessment year 2005-06 reflecting gross receipts of Rs.8,19,32,566 on 27.10.2005. During the year under consideration, the assessee had received contractual receipts aggregating to Rs.8,19,32,526 from the M/s. Tata Iron & Steel Co. Limited, Bombay, M/s. SMS Demag Pvt. Ltd., New Delhi and M/s. Jindal Strips Ltd., Bhubaneshwar, Steel Authority of India for rendering technical and supervision services. It was also noticed that the assessee had rendered services to the above mentioned resident companies by engaging foreign technicians at the work-sites in India and the total stay of technicians deputed by the assessee-company on one project in the case of Jindal Strips Ltd had exceeded 183 days. ( 220 days). On the basis of these particulars of stay, Assessing Officer concluded that the assessee was having Permanent Establishment within the meaning of Article 5 of DTAA between India and Germany. AO was of the view that the income of the assessee was liable to be taxed under the head 'business profits' in terms of Article 7 of the DTAA between India and Germany. Accordingly, the Assessing Officer issued notice under S.148 to the assessee on 30.3.2010. No expenditure was allowed to assessee and entire receipts in respective years were taxed as business income at higher rate. Ultimately, as per the directions of the Disputes Resolution Panel in terms of S.144C of the Act contained in its order dated

12.4.2011, the Assessing Officer proceeded to assess the total contractual receipts of Rs.8,19,32,526, after allowing deduction at 50% from the gross receipts towards expenditure incurred in relation to the execution of contracts, determined the income at Rs.4,09,66,263, imposing tax applying a rate of 40% in addition to surcharge and education cess, as applicable under the provisions of S.44DA of the Act, i.e. treating the same as profits and gains of the business, vide assessment order dated 5th May, 2011 passed under S.143(3) read with S.144C of the Act.

3. Facts of the case are similar in all other years, except for the fact that the issue of reopening of assessment under S.148 was not there in the assessment year 2007-08, and for the difference in the amounts of gross receipts and the incomes determined thereupon.

4. Even though assessee has raised the issue of reopening under section 147 in assessment years 2005-06, 2006-07, 2008-09, the issue is to be decided on merits for A.Y. 2007-08. Therefore, since the issue is common in all the years, we intend to decide the issue on merits first. Facts of the case, as taken from the appeal for the assessment year 2007-08, are as follows-

5. The assessee company entered into agreement with the following purchasers for the assessment year 2007-08- -

(a) Tata Steel
(b) SMS Demag P. Ltd.
(c) SAIL
(d) Jindal Steel and Power Ltd.

Assessee company was awarded contract by the above purchasers for supervision, erection, ramp up, commissioning, demonstration of

performance, performance guarantee test, etc. of various 'plant and machinery' for their steel and allied plants. They engaged experienced foreign technicians at the work sites and other places in India and the receipts were categorised as in the nature of 'fees for technical services'. The assessee admitted for the assessment year 2007-08 that it accounted on receipt basis, stating that receipt by way of fees for technical services are chargeable to tax in India on receipt basis as per Double Taxation Avoidance Agreement (DTAA) between India and Germany. On going through the information furnished AO noticed that some of the contracts undertaken by the assessee in India have continued for a period exceeding six months. The assessing officer held that the DTAA between India and Germany deals with Permanent Establishment (PE) in Article 5 and held that since the assessee is found to be carrying on its activities in India through its employees for periods exceeding six months, to assess its income, the assessee is to be assessed under S.44D or S.44DA read with other applicable sections of the IT Act, and called for objections for the proposal. The assessing officer considered the objections raised by the assessee, but choose to treat it as having Permanent Establishment in India as per Article 5(2)(i) of DTAA between India and Germany and held that the assessee has PE in India since its activities continued for a period exceeding six months. AO observed that the assessee's contract with Jindal Steel and Power Limited continued for 220 days and the technicians of the assessee company stayed in India till the completion of the work, and their income-tax returns were also filed in India and hence, there is a permanent establishment in India, as per Article 5(1) read with Article 5(2) as per Indo-German DTAA. The assessing officer held that the activities of the assessee in India are in the nature of technical supervision for the execution of the project, assessee was earning its income by

providing technical services from its PE located in India which is in the nature of fee for technical services (FTS) under Article 12 of the DTAA. Further, as per Article 12(5), the earnings of FTS by the assessee is effectively connected with the PE of the assessee in India and accordingly, he held that provisions of Article 7(3) will be applicable. It was further concluded that as per Article 7 under 'business profits', the income of the assessee will be determined as per provisions of Clause 3 of Article 7, wherein it was stated that the allowance of expenditure would be governed as per domestic law of the contracting state in which the PE is situated. The assessing officer, therefore, determined the taxable income accordingly.

6. The assessee raised objections before the Disputes Resolution Panel, submitting that the assessee was not having any permanent establishment in India as it has no fixed place of business. In this context, reference was made to the provisions of S.44DA along with S.92F(iiia). The assessee also relied on the decision of Andhra Pradesh High Court in the case of CIT vs. Visakhapatnam Port Trust 144 ITR 146. The Disputes Resolution Panel held that the provisions of relevant contract agreement as well as the provisions of Article 5 of DTAA between India and Germany clearly establish that the assessee was having Permanent Establishment in India during the relevant period. Further with regard to the deduction of expenditure DRP held that the assessee was entitled to deduction of 50% of gross receipts from all projects towards expenditure. Thus, the DRP partly accepted the objections of the assessee and gave directions under S.144C(5) of the Act.

7. Still aggrieved, assessee is in appeal before us and the grounds of appeal, as taken by the assessee in ITA No.1649/Hyd/2010 for assessment year 2007-08, are as follows-

*"1. That the order of learned Asst. Director of Income-tax (International Taxation) I, Hyderabad (A.O) and the Dispute Resolution panel(DRP), Hyderabad are bad in law and on facts of the case.*

*2. That the learned A.O has erred in assessing income of the assessee for the relevant assessment year at Rs.8,15,25,440/- chargeable to tax @ 40% plus applicable surcharge and educational cess.*

*3. That the learned A.O. has erred in holding that the assessee had a 'Permanent Establishment' ('P.E.') in India and that all the amounts received under various contracts were chargeable to tax under Article 7 of Double Taxation Avoidance Agreement between India and Germany (DTAA) dealing with taxation of 'Business Profits'.*

*4. That the learned A.O./DRP has erred in rejecting the contention of the assessee that the amounts received by the assessee were chargeable to tax as 'Fees for Technical Services' under the provisions of section 9(1)(vii) Income-tax Act read with Article 12 of DTAA between India and Germany @ 10% of the gross amount.*

*5. That while rejecting the contention of the assessee as referred to Ground No.(4), the A.O/DRP erred in ignoring – i) the position as accepted by the Revenue in the preceding years on similar facts; ii)the decision of the jurisdictional High Court of Andhra Pradesh; and iii) the statutory legal provision of law.*

*6. That the ld A.O. has erred in doubly including an amount for Rs..8,26,229 in relation to the contract with Tata Steel Limited, on erroneous assumption and without proper consideration of the details and facts that the amount had been included' taxed in the assessment year 2006-07.*

*7. Without prejudice, the learned A.O. while computing income of the assessee as "Business Profits" had erred in restricting the deductibility of costs and expenditure , on arbitrary basis, at 50%*

*of the contractual receipts.*

*8. That the learned A.O., DRP has erred in rejecting the objections as raised by the assessee with respect to the jurisdiction of the learned A.O. and completion of the assessment, without providing adequate opportunity.*

*9. That the learned A.O. has erred i levying interest u/s.234A, 234B & 234C of the income-tax Act which sections are not applicable on facts and in law.*

*10. ....”*

For the other assessment years also, except in ITA No.2226/Hyd/2011 relating to assessment year 2008-09, corresponding grounds are similar.

8. Learned Counsel referring to the contentions made before the A.O. and DRP submitted that assessee was declaring incomes as fees for technical services and for the first time, A.O. treated the same as income from business invoking Article-5(2)(i) holding that assessee has permanent establishment just because assessee’s technical personnel deputed have exceeded six months period of their stay in India. He referred to provisions of Article 12 related to fees for technical services and also clause (5) of Article 12 to submit that under the clause assessee should carry on business in the other contracting state through a permanent establishment situated therein. Then only provisions of Article 7 can be invoked. Referring to the term permanent establishment as per Article 5, it was submitted that A.O. invoked 5(2)(i) to invoke Article 7. It was the contention that fixed place of business contemplated under the sub-clause should be owned by assessee and should not be a place where their supervisors attend to work provided by the contractee. He

referred to commentary of Klause-Vogel and also the decision of ACIT vs. Enron Global Exploration & Production Ltd., 120 TTJ (Del.) 774. It was further submitted that provision of mere accommodation to technicians cannot be considered as a fixed place of business for non-resident and relied on the decision of A.P. High Court in the case of Visakhapatnam Port Trust (supra). It was further submitted that the tests prescribed for establishing PE have not been fulfilled. Without prejudice to the above contentions, it was also submitted that Article 12(5) of DTAA prescribes that fees earned through the permanent establishment can only be considered under Article 7. In this case, out of many projects supervised by the assessee only in one such project, A.O. could identify that technicians have rendered services more than six months and so the other projects where PE was not established cannot be brought to tax under Article-7. He referred to the facts on record to submit that A.O. was wrong in considering the entire project receipts for assessing at higher rate even though only in one such project there was stay of technical persons above six months. He then referred to the domestic law, definition of permanent establishment, provisions of section 44DA, 115-A (b) and relied on the decision of the Hon'ble Supreme Court in the case of South Gujrat Roofing Tiles Manufacturers Association vs. State of Gujarat and others (1976) 4 SCC 601 for interpreting the statutes particularly the word 'includes' used in section 44DA. He also submitted alternately that in case the expenditure allowable to assessee was increased, the tax paid by assessee at gross level would be more than the tax payable on net income as determined by DRP. The learned counsel for the assessee strongly contended that mere supervisory activities performed by the assessee would not attract the definition of permanent establishment and business income hence, there is no permanent establishment for the assessee in India.

He submitted that the Special Bench decision of the Tribunal in the case of Motorola Inc vs. DCIT 96 TTJ (Del) (SB) 1 would squarely apply to the present case.

9. The learned Departmental Representative relied on the impugned order of the Disputes Resolution Panel.

10. We have heard both parties and perused the impugned orders of the authorities and other material on record, including the decisions cited by the parties before us. Ground Nos.1 and 2 are general in nature and do not call for independent adjudication.

11. Ground Nos.3-5 are on the short point whether the assessee's supervisory services are in the nature of Fees for Technical Services (FTS) taxable under S.9(1)(vii) / Article 12 of India-German DTAA or whether the services constitute a Permanent Establishment (PE) in India taxable under S.9(1)(i) / Article 7 read with Article 5 of the India-German DTAA.

12. Before we analyze whether the assessee has a PE by its supervisory activities, we note that the assessee has all along been assessed, accepting incomes as Fees for Technical Services (FTS) rendered to various parties in India. In assessment year 2007-08, there has been a scrutiny assessment i.e. 143(3) wherein the Assessing Officer has held that the assessee has a Permanent Establishment and should be taxable as business income. Furthermore, the expenses for this Permanent Establishment have been estimated on an ad-hoc by the Learned Dispute Resolution Panel.

12.1 As for the provisions of the Income Tax Act 1961, we find that in Clouth Gummiwerke Akrineqesellschaft vs. CIT 238 ITR 861 the jurisdictional Hon'ble A.P. High Court held as follows:

> *" **It is difficult to agree with the arguments of learned counsel for the assessee. The two supervisors were deputed only for the purpose of rendering technical services and nowhere is it disclosed that they were engaged for the purpose of constructing the plant. Therefore, the amounts of DM 33,000 and DM 32,542, respectively, are income under section 9 (1) (vii) of the Act and are taxable.***
> ...."

Hence as per the jurisdictional High Court supervisory activities are to be considered under the ambit of S.9(1)(vii) i.e., Fees for Technical Services. We believe this rationale would apply to the instant case too and hence the assessee's supervisory activities have been correctly offered to tax u/s.9 (1) (vii) read with sec 44D / Sec.115A

12.2. It is noted that under the Act, Permanent Establishment is defined in S.92F (iiia) "....*includes a fixed place of business through which the business of the enterprise is wholly or partly carried on".* The supervisory activities do not constitute a fixed place of business in as much as the assessee renders its services at the project sites of its clients and does not by itself own or operate such sites independently but rather provided under contract terms by its clients. The concept of "fixed place of business" in the Act is no different from the general provision of Article 5(1) found in the Model Conventions and the Indian Treaties and in that context we rely and find support from the findings of the Motorola Inc vs. DCIT 95 ITD 269 (Del.) (SB) discussed in more detail below.

12.3. Now coming to interpretation of the provisions of DTAA, we find in the case of CIT V/s. Vishakaptnam Port Trust (1983) 144 ITR 146 (AP), the Hon'ble A.P. High Court elaborately dealt with the definition of the term 'Permanent Establishment' and held as follows-

> *"The expression "Permanent establishment' used in the Double Taxation Avoidance Agreements postulates the existence of substantial element of an enduring or permanent nature of a foreign enterprise in another country which can be attributed to a fixed place of business in that country. It should be of such a nature that it would amount to a virtual projection of the foreign enterprise of one country into the soil of another country."*

The Hon'ble High Court in that case, proceeded to hold that mere supervisory activities will not form a Permanent Establishment.

12.4. Though rationale of A.P High Court can be adopted, it is worthwhile to note at this juncture, that the Indian-German DTAA at that time was different from the current Treaty, and the relevant provision of the present treaty reads as follows-

> *"ARTICLE 5 : Permanent establishment 1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.*
>
> *2. The term "permanent establishment" includes especially,—*
>
> *(a) a place of management ;*
> *(b) a branch ;*
> *(c) an office ;*
> *(d) a factory ;*
> *(e) a workshop ;*
> *(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources, including an installation or structure used for the exploration or exploitation ;*
> *(g) a warehouse or sales outlet ;*

*(h) a farm, plantation or other place where agricultural, forestry, plantation or related activities are carried on ; and*

*(i) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities continue for a period exceeding six months.*

*…."*

12.5. With respect to Article 5(1) i.e., whether the assessee's supervisory activities would constitute a Permanent Establishment being a "fixed place of business", we refer to the decision of Special Bench of the Tribunal in the case of *Motorola Inc. vs. DCIT 95 ITD 269 (Del.) (SB)* where in the Hon'ble Special Bench observed as follows:

*"127. We now turn to the provisions contained in Article 5 of the DTAA. Article 5.1 states that the term "Permanent Establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on. The thrust of the Assessing Officer's contention has been that since the employees of the assessee and / or LME came to India frequently and since the Indian company (ECI) provided facilities to these employees, the office of ECI constituted a fixed place of business for the assessee.* ***The OECD commentary on Double Taxation refers to a "fixed place" as a link between the place of business and a specific geographical point. It has to have a certain degree of permanency. It is emphasized that to constitute a "fixed place of business", the foreign enterprise must have at its disposal certain premises or a part thereof.*** *Phillip Baker in his. Commentary on Double Taxation Conventions and International Tax Law (3rd edition) states that the nature of the fixed place of business is very much that of a physical location, i.e. one must be able to point to a physical location at the disposal of the enterprise through which the business is carried on. On the other hand, possession of a mailing address in a state without an office, telephone listing or bank account - has been held not to constitute a permanent establishment.* ***Further, the fixed place of business need not be owned or leased by the foreign enterprise provided it is at the disposal of the enterprise in the sense of having some right to use the premises for the purposes of its business and not solely for the purposes of the project***

> ***undertaken on behalf of the owner of the premises.****""" (emphasis supplied)*

Here the assessee is clearly doing the supervision of project of the Indian company and has no fixed place of business. Only its technicians deputed to India in one project stayed in India for more than 180 days. Nothing was brought on record that the technicians are operating from a fixed place in the custody of assessee. As per the terms the stay and transportation are undertaken by Indian company. Applying the rationale of the Special Bench it cannot be said that the assessee has a fixed place of business for its supervisory activities. We also find support in the Tribunal decision of *Airlines Rotables Ltd vs. JDIT (131 TTJ Mumbai 385)* where providing spares and component support services for aircrafts by UK company to JAL India were not held to constitute a Permanent Establishment in India.

12.6. Now coming to the specific PE clause, namely Article 5(2)(i) invoked by AO /DRP, a literal reading of the Article leads to the conclusion that supervisory activities by themselves cannot constitute a PE; they are to be in connection with a building, construction or assembly activity of the non-resident which is not the case here as the assessee provides only supervisory activities. We find support in the internationally renowned book of famous Author Klaus Vogel (Third Edition), it has been stated at page 306, M.,N.74 as follows-

> *"According to paragraph 17 MC Comm.Art.59 (supra m.no.66), planning and supervision is included in the term 'building site or construction project' only if carried on by the building contractor himself (that is overlooked by OstBMF 2 SWI 288(1992); DTC Austria/Korea; correctly, OstBMF 4 SWI 6 (1994): DTA Austria/Germany; cf, also infra m.no.81). Planning and supervision proper carried on by a separate enterprise is not covered, according to MC Comm. An enterprise that did no more than plan and supervise building works could at most, MC Comm. continues, constitute a permanent establishment under*

> *the general rule of Article 5(q), but its fixed place of business could normally not be considered as 'permanent'."*

It is very clear that Article 5(2)(i), though it talks about supervisory activities, does not cover the instant case as assessee do not have any building site or construction site of its own. The activities being of a *technical* nature clearly fall under the Fees for Technical Service (FTS) i.e., Article 12 of the India-German DTAA and is taxable at the rates specified therein.

12.7 Furthermore, Article 12(5) cannot apply to remove the assessee from the Article 12 and jump to Article 7 r.w. Article 5. Article 12(5) reads as follows:

> *"Article 12 – Royalties and Fees for Technical Services*
> *....*
> *5. The provisions of paragraphs 1 and 2 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, or performs in that other State independent personal services from a fixed base 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 base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply."*

For Article 12(5) to apply, the condition precedent is for the assessee to have a Permanent Establishment through which its activities are carried out and as we have discussed above such a condition is not met in the instant case. Therefore Article 12(5) which takes the scope of services out of FTS (Article 12) and into Article 7 read with Article 5 does not apply to the assessee's case.

12.8. This can also be examined in a different angle. A.O. has not invoked the service PE concept while considering the permanent establishment of the assessee in India. Admittedly, the basis for A.O's invoking the provisions of Article-5 of DTAA is on the basis of the fact that three of the technicians deputed for supervising the activities in the case of M/s. Jindal Steel Power Ltd., has stayed in India exceeding 183 days and filed their returns with ITO (International Taxation), Mumbai. The technicians are (a) Schefer Rudiger Hermann (b) Zimmer Kinroad Ernst (c) Icha Franz Otto. Just because these three technicians stayed in India while supervising the work undertaken by the assessee in India, it cannot be considered that their place of stay can be 'fixed place of business' for the assessee. Had the A.O. examined the total period of deputing technicians to India and also examined whether establishment where assessee had any 'permanent place' to supervise the activities, then, issue could be examined in the light of service PE considerations. However, A.O. only undertook the issue of stay of technicians in India, which in our opinion cannot be considered for examining the 'permanent establishment' of assessee in its supervising work. On this reason also, we are of the opinion that A.O. has not made out any case for invoking Article-7 of DTAA.

12.9. As for contention that the period of supervisory activities did not exceed a period of six months in all projects and such projects of the assessee do not constitute 'Permanent Establishment' we do not find it necessary to adjudicate on this ground, as we have held that supervisory activities have to be in connection with the non-resident's "building site, construction or assembly project". Since we have held that the receipts of the assessee are in the nature of 'FTS' and do not fall under Article 7 read with Article 5, there is no need to adjudicate

this contention. Before parting with this aspect, we may note that even otherwise, we find it incorrect to aggregate all contracts of the foreign company in India and consider it as one. Unless otherwise linked with each other, contracts should be individually assessed with respect to the duration test. We are supported in this behalf by the decision of the Bombay Bench of the Tribunal in ADIT V/s. Valentine Maritime (Mauritius) Ltd. in ITA No.1532/Mum/05 dated 5th April, 2010, wherein this position has been lucidly explained.

12.10. In conclusion, in light of the facts and circumstances of the instant case, we are of the opinion that the assessee's supervisory activities do not constitute a Permanent Establishment in India under the provisions of the Indian Income Tax Act as well as Article 5 of the India-German Treaty. Assessee should be assessed for its supervisory activities under Article 12 of the India-Germany DTAA. Therefore, we hold Ground Nos. 3, 4 and 5 in favour of the assessee.

13. As for Ground No.6, it is about inclusion of Rs 8,26,229 as receipts from Tata steel project. There seems to be no reconciliation asked by AO and made addition on his enquiry. It was the submission before DRP that Invoice No 5121491 dt. 02.03.06 for Rs.12,24,129 included in receipts was in fact offered in AY 2006-07. Further AO has considered lower amount by 4925 Euros in another invoice which resulted in net addition. DRP did not deal with this objection at all. Therefore we direct the Assessing Officer to look into the matter afresh and reconcile the amounts relating to the contract of Tata Steel Limited with the assessee. This ground is accordingly allowed for statistical purposes.

14. There are other grounds raised by the assessee in the course of appeals. Ground Nos. 7 and 8, relating to allowability of deduction towards expenditure against the business income determined, become academic in light of our findings on grounds No.3 to 5 above and hence, we are not inclined to adjudicate upon the same. The same, being academic, are accordingly rejected.

15. Ground No.9 relates to levy of interest under S.234A, 234B and 234C of the Income-tax Act, 1961.

15.1. We heard both sides on this issue. As for interest under S.234A, the grievance of the assessee is that the same has been wrongly computed. In relation to this grievance, we direct that the Assessing Officer, while reframing the assessments for these years, to verify the claim of the assessee, and re-compute the interest correctly. As for interest under S.234B and 234C, we find that where tax is deductible at source, assessee's liability to interest under S.234B and 234C does not arise, in view of the decision of the Bombay High Court in the case of NGC Network Asia LLP(222 CTR 85)(Bom). We accordingly direct the Assessing Officer to re-compute the interest under S.234B and 234C in the light of the decision of the Bombay High Court referred to above. This ground, is thus partly allowed.

16. Having considered that on merits there is no case for treating the fees for technical services received by the assessee as business income, we now deal with other issue of reopening under section 148 for A.Ys. 2005-06, 2006-07 and 2008-09. Consequent to the findings in A.Y. 2007-08, the A.O. reopened the assessment in other years which were originally accepted under section 143(1).

16.1. Learned counsel for the assessee submitted that when the entire receipts are declared as income and tax was paid at a particular rate, there is no scope for alleging any escapement of income. Taking us through the provisions of section 147, learned counsel for the assessee contended that the main provisions of S.147 would not apply at all in this case as "no income chargeable to tax has escaped assessment". He also invited our specific attention to the Explanation 2 to of S.147, which reads as follows-

> *"S.147…….*
>
> *Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—*
>
> *(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;*
>
> *(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;*
>
> *(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;*
>
> *(c) where an assessment has been made, but—*
>
> *(i) income chargeable to tax has been under-assessed; or*
>
> *(ii) such income has been assessed at too low a rate ; or*
>
> *(iii) such income has been made the subject of excessive relief under this Act ; or*

*(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed;*

*(d) where a person is found to have any asset (including financial interest in any entity) located outside India."*

He submitted that neither clause (b) nor clause (c) of the above Explanation would apply, as the assessee had not understated the income or claimed any excessive loss or deduction or allowance or relief in the return, as stated in the said clause. He therefore, submitted that the reopening of the assessment is not valid.

16.2. The learned Departmental Representative on the other hand, relied on the orders of the authorities, taking us through the relevant portions of the detailed order of the Disputes Resolution Panel dated 12.4.2011 for the assessment year 2005-06.

16.3 We have considered the rival submissions on the issue of legality and validity of reopening of the assessment and perused the orders of the authorities and other material on record. The Disputes Resolution has considered the objections of the assessee to the reopening of the assessment and rejected the same. The Disputes Resolution Panel has held in para 4.3 as follows-

*"4.3 We also do not agree with the assessee's claim that assessee's case is not covered under clause (b) of explanation 2 of section 147 In order to examine this issue, the Explanation 2 to sec 147 [clause (b)] is reproduced as under*

*"Explanation 2.-For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:- .*

*(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or*

*relief in the return;*

*On going through the facts of the present case, the following facts are noticed*

*i) Return of income was filed by the assessee*

*ii) No assessment was made as processing under section 143(1)(a) cannot be considered as assessment in view of Hon'ble Supreme Court's decision in the case of ACIT vs Rajesh Javeri Stock Brokers (P) Ltd (291 ITR 500) . Therefore, there was no application of mind by the Assessing Officer at the processing stage of this case of the assessee, and thus there is no change of opinion by the Assessing Officer while issuing notice u/s 147 of the IT Act.*

*iii) During the course of proceedings in the case of the assessee for AY 2007-08, It was observed by the Assessing Officer that the assessee is having PE in India and hence in view of DTAA provisions. the amounts received by the assessee should have been taxed under the head business income while the assessee had offered the same under the head fee from technical services, i.e. the income should have taxed at the rate of 40% whereas the same has been taxed at the rate of 10%. Thus the assessee has claimed excess relief u/s 90 read with DT AA provisions.*

*In view of the above observations it can be concluded that the present case is squarely covered under clause (b) of explanation 2 of Section 147 of the IT Act and hence the assessee's claim that the proceedings U/s 147 are invalid and initiated without sanction of law is not tenable.*

16.4 We are of the considered opinion that DRP has erred in considering that the case is covered under clause(b) of Explanation-2 to section 147. As can be seen from the provision extracted above, Explanation 2(b) can only be invoked where assessee has 'understated the income or has claimed excessive loss or deduction, allowance or relief in the return'. This is not a case of 'understating the income' as the same income received by the assessee was brought to tax at a different rate. There is no difference between the

returned income and assessed income, up to the draft order stage. It is also not a case where assessee claimed excess loss or deduction or allowance. The issue was considered by the DRP as 'excess relief in return'. However, the word 'relief' cannot be used in the context of availing lesser rate of tax. If one compares the sub-clause-ii in clause (c) of Explanation-2, it specifically states that 'income has been assessed to a low rate' and sub-clause-iii specifically for a situation where such 'income has been made subject of excessive relief' under this Act. Therefore, under clause-(c) where assessment has been made, reopening can be done where income has been assessed to a low rate or excessive relief was allowed. However, such segregation was not made out in clause (b) where only 'relief' was mentioned and not 'at too low a rate' if at all, it can only be categorised as a case of assessing at 'too low a rate'. Assessee has offered the income under provisions of section 9(1)(vii) offering gross receipts to tax at 10% of the gross receipts whereas the A.O. considered the income at 42.23% on the net income. In fact, strictly speaking the DRP directions in allowing 50% of the amount as expenditure for earning income has resulted in total income being determined at 50% of the amount offered by the assessee as total income. In our considered opinion, the DRP has wrongly considered assessee's case as a case of claiming excess relief in the return which situation was not considered in clause (b) of the provisions of section 147. Therefore, assessee's contention that neither clause (b) nor clause (c) of the Explanation would apply is a valid contention. Moreover DRP also relied on a decision given in the context of Motor Vehicle Act where the provision refer to tax but not income as is the case under IT Act 1961. The decisions relied on by DRP also were considered out of context. In view of this, we are of the opinion that reopening of assessment on the facts of the case is not justifiable.

However, this entire discussion becomes academic in nature as we have already upheld the assessee's contention that the amount can only be brought to tax as fees for technical services and cannot be considered as business income. The respective grounds on this issue are considered allowed.

17. In the appeal for assessment year 2009-10, viz. ITA No.1274/Hyd/2012, there is one more ground raised by the assessee, wherein it has been alleged that proper credit for TDS amounting to Rs.24,13,136, has not been granted by the assessing officer. On careful consideration of the matter on this aspect, we direct the assessing officer to verify the claim of the assessee, and grant appropriate relief, if any, in accordance with law and after giving reasonable opportunity of hearing to the assessee.

18. The respective grounds raised in AY 2005-06, 2006-07,2007-08,2009-10 on the above issues are accordingly treated as allowed.

ITA.No.2226/Hyd/2011 :

19. Now turning to ITA No.2226/Hyd/2011 for assessment year 2008-09, grounds raised by the assessee read as follows-

> "1. That the order of ld CIT(A) is bad both in law and on facts of the case.
>
> 2. That the ld CIT(A) has erred in passing the order without providing sufficient opportunity of being heard.
>
> 3. Without prejudice, the ld CIT(A) has erred in dismissing the appeal erroneously and not deciding the issue as raised.

4. That the appeal is within time as the order of ld CIT(A) was received on05.11.2011.

5. ….."

20. We have considered the contentions of rival parties and perused the intimation placed on record. This appeal emanates from the intimation dated 26.12.2009 passed under section 143(1) of the Act for the A.Y. 2008-09 by the Dy. Director of Income Tax (Intl. Taxation). Ld. CIT(A) in the impugned order taken note of the regular assessment vide order dated 15.05.2011 and observed that intimation under section 143(1) has merged with the regular assessment consequentially, intimation under section 143(1) is no longer appellable. It was the contention that the Ld. CIT(A) did not adjudicate the levy of additional tax and also the argument that A.O. exceeded his jurisdiction in changing the rate of tax without any basis. It is to be noted that A.O. certainly exceeded the powers granted under the provisions of section 143(1) in raising the demand without making any adjustment of the total income. Under the provisions of section 143(1). A.O. is empowered to make the adjustment (i) any arithmetic error in the return or an incorrect claim if such incorrect claim is apparent from any information in the return. The case of the assessee does not fall under either of the above adjustments permitted under section 143(1). A.O. without any mention or note in the intimation simply taxed the amount under the head "Business" where as assessee has offered the income as fees for technical services. In view of this, the intimation passed by the A.O. has to be modified. We have already decided the issue of taxing the income in the above appeals. Therefore, to that extent, in the order under section 143(3) read with section 147 assessee got relief, but the demand in intimation raised was not modified by AO. Accordingly, A.O. is directed to reduce the demand by modifying the

rate of tax and accept the assessee's return as such. Appeal is considered as allowed.

21. To sum up, ITA No.1649/Hyd/2010, ITA Nos.1292 to 1294/Hyd/2011, 1274/Hyd/2012 and ITA No.2226/Hyd/2011 are allowed.

Order pronounced in the open court on 27.06.2014.

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|---|---|
| **Sd/-** | **Sd/-** |
| **(SAKTIJIT DEY)** | **(B.RAMAKOTAIAH)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Hyderabad, Dated 27th June, 2014

VBP/-

Copy to

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|---|---|
| 1. | M/s. GFA Anlagenbau Gmbh, C/o. Mohinder Puri & Co, CAs, 1 A-D Vandhna, 11, Tolstoy Marg, New Delhi |
| 2. | Dy./Asst. Director Income-tax, International Taxation I, Hyderabad |
| 3. | Dispute Resolution Panel, Commissioner of Income-tax(Appeals) II, Hyderabad |
| 4. | Commissioner of Income-tax(Appeals)-V Hyderabad<br>Commissioner of Income-tax IV, Hyderabad |
| 5. | D.R. ITAT 'A' Bench, Hyderabad. |