

IN THE INCOME TAX APPELLATE TRIBUNAL “I” BENCH, MUMBAI

**BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT AND
SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER**

ITA No.2071/Mum/2025
(Assessment Year: 2022-23)

Solvay S. A. 310B, Rue de Ransbeek, Brussels, Belgium-1120	Vs.	The Deputy Commissioner of Income-Tax, International Tax Circle-4(2)(2) Room No. 627, 6 th Floor, Kautilya Bhavan, C-41 to C-43, G Block, Bandra Kurla Complex, Bandra (E), Mumbai-400 051
PAN/GIR No. AASCS 7264 H		
(Appellant)	:	(Respondent)

Appellant by	:	Shri Vijay Mehta
Respondent by	:	Shri Satya Pal Kumar

Date of Hearing	:	30.09.2025
Date of Pronouncement	:	27.10.2025

ORDER

Per Saktijit Dey, Vice President:

Captioned is an appeal by the assessee, assailing the final assessment order dated 15.01.2021, passed u/s. 143(3) r.w.s. 144C(13) of Income Tax Act, 1961 (‘the Act’ for short) in pursuance to the directions of learned Dispute Resolution Panel (‘ld. DRP’ for short), pertaining to the assessment year (A.Y.) 2022-23.

2. At the outset, ld. Counsel appearing for the assessee, on instructions, submitted that the substantive issue, as raised in ground nos. 4, 5 & 6, may be taken up and decided while keeping open the other issues. The issue raised in ground nos. 4, 5 & 6 is whether an amount of Rs.109,72,75,428/- received by the assessee from two of its group entities in India would qualify as fees for technical services (‘FTS’ for short) under Article

12(3)(b) of India-Belgium Double Taxation Avoidance Agreement ('DTAA' for short) as also u/s. 9(1)(vii) of the Act.

3. Briefly, the facts relating to this issue are, the assessee, a non-resident corporate entity, is a tax resident of Belgium. As stated by the Assessing Officer ('A.O.' for short), the assessee is a chemical manufacturing company. It manufactures and distributes specialty polymers, essential chemicals and chemical materials amongst others. He has further stated that assessee serves customers operating in aeronautics and automotive, natural resources and environment, electrical and electronics, agro-chemical, food, consumer goods, building and construction, healthcare, industrial applications and other sectors. He has further stated that the assessee uses special chemicals made with eco-friendly materials to enhance product quality and performance. The assessee innovates and partners with customers worldwide in many diverse end markets. It has research and innovation centers and industrial sites in Europe, North America, Latin America and Asia. Whereas, its headquarter is in Brussels, Belgium.

4. For the assessment year under dispute, the assessee had filed its return of income on 29.11.2022, declaring income of Rs.3,24,78,169/-. The return of income so filed by the assessee was selected for scrutiny. In course of assessment proceedings, the A.O., while verifying the details, noticed that in the previous year relevant to the assessment year under dispute, the assessee had received an amount of Rs.109,72,75,428/- from provision of support services to two Indian group entities, namely, Solvay Specialties India Pvt. Ltd. ('SSIPL' for short) and Sunshine Chemical. However, the assessee has not offered such receipts to tax, claiming that since in course of rendition of such

services, it has not made available any technical know-how skill, etc. to the service recipient, in terms with the Most Favoured Nation (MFN) clause incorporated under the protocol to the India-Belgium DTAA, it will not qualify as FTS. While examining assessee's claim, the A.O. noticed that the assessee had entered into a Functional Service Agreement with the Indian group entities for providing business support services. After verifying the nature of services provided by the assessee, the A.O., at the outset, observed that the assessee cannot avail the benefit of MFN clause, as the protocol has not been notified by the Indian government. Having held so, the A.O. proceeded to examine the nature of receipt. While doing so, he did not accept assessee's plea that the receipts are in the nature of 'FTS'. Referring to section 9(1)(vii) of the Act and Explanation (2) thereunder, the A.O. observed that firstly, while rendering the services, the assessee had imparted information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property. Further, the assessee while rendering services also imparted information concerning technical, industrial, commercial or scientific knowledge, experience or skill. Therefore, the receipts would fall in the category of 'royalty' both u/s. 9(1)(vii) of the Act as well as under Article 12(3)(a) of the tax treaty. Accordingly, he framed the draft assessment order, treating the receipts as 'royalty income'.

5. Against the draft assessment order so framed, the assessee raised objections before the Id. DRP.

6. While considering the objections of the assessee, Id. DRP issued a show cause notice to the assessee to explain why the receipts should not be treated as 'FTS' in terms

with Article 12(3)(b) of the tax treaty as well as u/s. 9(1)(vii) of the Act, as the fees received by the assessee were towards provision of managerial, technical and consultancy services. In response to the show cause notice issued by Id. DRP, the assessee furnished a detailed submission stating that under the Functional Service Agreement, the assessee has provided centralized services and standard facilities, which do not fall in the category of managerial, technical and consultancy services. To substantiate its claim, the assessee furnished the details relating to the real nature of services provided and the amounts received for various functions. The Id. DRP, however, was not convinced with the submissions of the assessee. Ultimately, the panel held that the services provided by the assessee are in the nature of managerial, technical and consultancy services, hence, receipts would qualify as FTS, both under the treaty provisions as well as under the Act. Without prejudice, Id. DRP also agreed with the view expressed by the A.O. that the receipts can also qualify as 'royalty' u/s. 9(1)(vii) of the Act and Article 12(3)(a) of the tax treaty. In terms with the directions of Id. DRP, the A.O. finalized the assessment, which is under challenge before us.

7. Reiterating the stand taken before Id. DRP, Id. Counsel for the assessee drew our attention to the Functional Service Agreement between the assessee and the Indian entities and submitted that in terms with the agreement, the assessee provides routine standardized services to bring uniformity in function of the entire group to ensure efficiency and profitability. Thus, he submitted, there is an element of non-exclusivity in the services provided and they are in the nature of standard facility provided for smooth conduct of business. Drawing our attention to Article 12(3)(b) of the tax treaty, Id. Counsel for the assessee submitted, if the services provided are in the nature of

managerial, technical and consultancy services, then only the receipts would qualify as 'FTS'. Proceeding further, he submitted, the terms managerial, technical and consultancy services have not been defined under the provisions of the Act. Therefore, their meaning as understood in common parlance has to be adopted. He submitted, managerial services would require either whole or part control of the business. He submitted, technical services would require special skill or knowledge related to a technical field. In this context, he drew our attention to OECD Report on e-commerce dated 01.02.2001. He submitted, consultancy services would constitute provision for advice from someone who has professional expertise or has special qualifications and would require some amount of human intervention. He submitted, the Departmental Authorities have failed to establish on record that while rendering services, the assessee is controlling the business affairs of the Indian entities or in course of rendition of services there is any service involving special skills or knowledge relating to a technical knowledge such as applied industrial science to qualify as technical services. He submitted, even there is nothing on record to demonstrate that the assessee through any human interface has provided any services in a specialized field to treat it as consultancy services. Thus, he submitted, the fees received cannot be treated as FTS. He submitted, the agreement entered between the parties has to be read as a whole and cannot be divided into various compartments. He submitted, what is required to be looked into in an agreement is the pith and substance. He submitted, if the agreement is read as a whole, it can be seen that the intention was to provide routine standardized services to bring uniformity in functions. Finally, Id. Counsel for the assessee submitted, the Functional Service Agreement was entered between the parties on 26.03.2013. He submitted, prior

to the impugned assessment year, the Department has never raised any question with regard to the assessee's claim in respect of similar receipts. Though, of-course, the returns were processed u/s. 143(1) of the Act. However, he submitted, the department was not powerless in taking remedial measures to reopen those assessments had they been of the view that the receipts are in the nature of either royalty or FTS. Thus, he submitted, facts being identical, rule of consistency should be maintained. In support of his contention, Id. Counsel for the assessee relied upon the following decisions:

1. *ACIT vs. Avenet International Hong Kong Ltd.* (in ITA No.1283/Del/2023)
2. *UPS SCS (Aisa) Ltd. vs. ADIT* (in ITA No. 2426/Mum/2010)
3. *Springer Verlag GmbH vs. DCIT* (ITA Nos.434/Del/2019 and 3826/Del/2019)
4. *ITP Publishing India P. Ltd. vs. ACIT* (ITA no. 4407/Mum/2019)
5. *DCIT vs. Campus Eai India P. Ltd.* (in ITA No. 355/Del/2021)
6. *Adidas Sourcing Ltd. vs. ADIT* (150 TTJ 801)
7. *CIT vs. Kotak Securities Ltd.* (383 ITR 1)
8. *CIT vs. Lalitpur Power Generation Co. Ltd.* (296 Taxman 372)

8. Ld. Departmental Representative ('ld. DR' for short) strongly relied upon the observations of ld. DRP.

9. We have considered rival submissions in light of judicial precedents cited before us and perused the materials on record. Undoubtedly, though in course of assessment proceeding, relying upon the protocol under the tax treaty, the assessee had pleaded that due to non-fulfilment of the make available condition, receipts cannot be treated as 'FTS'. Apparently, the A.O. did not buy the aforesaid line of argument of the assessee. Looking at the nature of the services rendered, the A.O. was of the opinion that they would constitute royalty u/s. 9(1)(vi) of the Act as also under Article 12(3)(a) of the tax

treaty. Whereas, ld. DRP at the first instance held that the receipts would qualify as 'FTS', both u/s. 9(1)(vii) of the Act as also under Article 12(3)(b) of the tax treaty. Of-course, in the alternative, the panel also held that the receipts would qualify as 'royalty'. Since, ultimately, ld. DRP has directed the A.O. to treat the receipts as 'FTS', we deem it appropriate to determine whether the receipts are in the nature of 'FTS' under Article 12(3)(b) of India-Belgium DTAA. At this stage, it is necessary to look into Article 12(3)(b) of the tax treaty which reads as under:

Article 12

Royalties and Fees for Technical Services

1.
2.
3.

(b) The term "fees for technical services" as used in this Article means payments of any kind to any person, other payments to an employee of the person making the payments and to any individual for independent personal services mentioned in Article 14, in consideration for services of a managerial, technical or consultancy nature, including the provision of services of technical or other personnel.

10. As could be seen from the above, any consideration received for services of a managerial, technical and consultancy services nature, would qualify as 'FTS'. Keeping in perspective Article 12(3)(b) of the tax treaty, it is necessary to examine the Function Services Agreement, a copy of which has been placed in the paper book. On going through the recital of the agreement, it is evident, after acquisition of Rhodia Group, it was found necessary to reorganize and harmonise the functional departments of the enlarged Solvay Group and the services rendered including the pricing, invoicing and reporting of the same, with the objective of applying harmonised rule, conditions and procedure with respect to Function Services rendered and / or taken by Solvay Entities belonging to the former Solvay and Rhodia group. It further provides that the service provider under the Agreement is responsible for performing most of the Group Function Services and centralizes to a wide extent resources, technology, and expertise in order

to render these services for the benefit of the Solvay Entities on a global scale and for the benefit of the group entities in every region. The definition of Function Services under the agreement means the services as stipulated under Article 3 of the Agreement, excluding R & D and Engineering and Construction activities carried out by the Industrial Function and charged to projects on the basis of separate records kept in the respective departments. Thus, the function services do not include R & D and Engineering and Construction activities. Article 3 of the Function Services agreement encapsulates the scope of Function Services as under:

- i. Communications
- ii. Facility services
- iii. Finance
- iv. General Management
- v. Human Resources
- vi. Human Resources Operations
- vii. Services by Group's Shared Service Centers
- viii. Industrial
- ix. Legal & Compliance
- x. Purchasing
- xi. Information Technology Services

11. This Article further makes it clear that the service provider will raise invoice only in respect of the categories of services actually provided to the beneficiaries. Meaning thereby, in a particular year, it may not be necessary that all the aforesaid category of services have been provided to a particular group entity. Having taken note of the Function Services agreement, now it is necessary to look into the services provided by the assessee during the year to the two Indian group entities, which are as under:

<i>Sr. No.</i>	<i>Nature of Function</i>	<i>Description</i>	<i>Amount in INR</i>
<i>1</i>	<i>Information Technology function</i>	<i>This includes centralized function and standard facility related to IT applications and IT infrastructure including the following: 1) Software</i>	<i>418,478,091</i>

		Applications for difference work streams such as Logistics, HR, Finance, Legal, Facilities, customer supplier connections, CAD Applications, ERP, etc. 2) Global Hosting facility 3) IT Hardware facility Data connectivity networks, equipments, internet, etc 4) Global IT security protocols/guidelines implemented and controlled through access controls, etc.	
2	Procurement function	This includes centralized function and costs towards procurement assistance such as discussion for global and regional services / goods with key suppliers, liasioning, vendor coordination, etc resulting in lower purchase costs for a particular group entity. Centrally negotiated price and standard terms and conditions. The objective of the activities is standardization across the group entities and leverage on the centralized processes. These activities are performed outside India and provide benefit to group entity in India.	230,514,113
3	Shared Business Services function	This includes costs for services received pertaining to accounts receivable, accounts payable, global contact services, supply chain, cash collection, credit management, data purchasing, end user partner, global contact center purchase, travel and expenses etc.	73,098,801
4	Industrial function	This includes centralized function and costs for engineering & construction, ensuring compliance with Health, Safety & Environment (HSC), Industrial Regulations, process and technology, ensuring Solvay adhering to Safety standards.	54,505,477
5	Human Resource function	This function includes costs towards setting up corporate compensation and benefit services, corporate international mobility, AP zone management and industrial relations services. Due to cross-border movement, global policies need to be made applicable at country level. The objective in performance of these routine and standard activities is for group companies to leverage on the centralized policies developed outside India.	51,200,837
6	Communication function	This includes cost incurred at group level for communicating the activities being undertaken at the group level and communicating the policies and decisions being taken specifically for the entity and company as whole. This is a corporate level function and cannot be undertaken at an entity or country level being an MNC setup. The objective in performance of these routine and standard activities is for group companies to	42,275,434

		<i>leverage on the centralized communications developed outside India.</i>	
7	<i>General function</i>	<i>This function includes costs for head office corporate affairs, group executive committee services, government and public affairs, ECI services, multi business unit, sales network services and various other services</i>	32,793,928
8	<i>Finance function</i>	<i>This includes services related to corporate controlling. group accounting and reporting, reporting and audit services, treasury, tax and various other financial services. In an MNC setup, the head office needs to look into various areas relating to Finance to have a control on the entities. GAR (Group) Accounting & Reporting) looks after the consolidation, reporting, audit, tax and treasury persons. The team is comprised of experts from various fields and cannot be arranged at an entity or country level.</i>	28,145,583
9	<i>Facility Service function</i>	<i>This function includes costs towards Global facility committee that looks into the setup and maintenance of corporate offices in a specific country, certain established group norms are to be followed during the setup and regular working of such offices. The objective in performance of these routine and standard activities is for group companies to leverage on the centralized norms developed outside India.</i>	3,916,654
10	<i>Legal & Compliance function</i>	<i>This function includes costs for corporate legal compliances services performed outside India.</i>	1,905,179
11	<i>Sustainable development</i>	<i>It performs some intra-group activities such as guiding the Sustainable Development strategy, influencing and interacting with all key Group stakeholders and external audiences, and managing Solvay's Sustainability framework and guidance.</i>	5,544,367
12	<i>Excellence Center</i>	<i>The Corporate Function Excellence Center/Transformation Centre provides a variety of services that all fall within the scope of Excellence Center/Transformation Centre activities.</i>	34,504,317
13	<i>Miscellaneous</i>		103,621,487
	Total		1,080,504,268

11. After examining the nature of services provided in the year under consideration, Id. DRP has observed that Information Technology, Industrial, Group shared services and communication are technical services. Whereas, services relating to facility, general management, human resources, human resource operations are managerial services.

Services linked to finance, legal, purchasing, etc. are consultancy services. As could be seen from the actual nature of services described elsewhere in the order, Information Technology function includes centralized function and standard facility relating to information technology application and information technology infrastructure such as:

- a) Software applications for different work streams
- b) Global usage facility (cloud storage)
- c) IT Hardware facility such as different connectivity, network, equipment's, internet, etc.
- d) Global IT security protocols/guidelines implemented and controlled through access controls, etc.

13. Procurement function involves centralized functions relating to liasioning, vendor coordination, etc. to centrally negotiate price and standard terms and conditions for purchase of goods and services to make the procurement cost effective. Shared Business Service function involves services relating to accounts receivable, accounts payable, global contact services, supply chain, cash collection, credit management, data purchasing, end user partner, global contact center purchase, travel and expenses etc. Industrial function involves costs for engineering & construction, ensuring compliance with Health, Safety & Environment (HSC), Industrial Regulations, process and technology, ensuring adherence to Safety standards. Human Resource Function involves setting up of corporate compensation and benefit services, corporate international mobility, AP zone management and industrial relations services to evolve a global policies to be made applicable at country level on account of cross border movement. Communication function involves communicating the activities being undertaken at the

group level and communicating the policies and decisions being taken specifically for the entity and company as whole. These being a corporate level function has to be provided at the level of the head office in a Multi-National Company (MNC) set up. General function includes costs for head office, corporate affairs, group executive committee services, government and public affairs, ECI services, multi business unit, sales network services and various other services. Finance functions include services related to corporate controlling, group accounting and reporting, reporting and audit services, treasury, tax and various other financial services. As in an MNC setup, the head office has to look into various areas relating to Finance to have a control on the entities. Facility Service Function involves looking into the setup and maintenance of corporate offices in a specific country which has to be as per established group norms. Legal and Compliance functions involve services relating to corporate legal compliances services performed outside India. Sustainable development involves guiding the Sustainable Development strategy, influencing and interacting with all key Group stakeholders and external audiences to manage the credit sustainable framework and guidance.

14. Keeping in view the actual nature of services provided, it needs to be determined whether they fall within the ambit of managerial, technical or consultancy services. Ld. DRP referring to the decision of Hon'ble Supreme Court in the case of *GVK Industries Ltd.* [2015] 371 ITR 453 (SC) has observed that since the terms managerial, technical and consultancy are not defined in the Income Tax Act, the common and general meaning of these terms have to be taken into consideration. According to ld. DRP, managerial services in its ordinary meaning involve the application of knowledge, skill

or expertise in the control or administration of the conduct of a commercial enterprise or organization. If the management of all or a significant part of an enterprise is contracted out to persons other than the directors, officers or employees of the enterprise, payments made by the enterprise for those management services would be FTS.

15. According to Id. DRP, Consultancy services would mean the provision of advice or services of a specialized nature. Professionals usually provide advice or services that fit within the general meaning of consultancy services although they may also constitute management or technical services. The expression “Consultancy” involves giving of an advice/opinion/recommendation or counselling or advisory services by a professional. Expertise in a technology is not essential while providing consultancy services. However, an element of expertise or special knowledge on part of the advisor is essential. Advisory services which merely involve discussion and advice of a routine nature cannot be classified as consultancy services.

16. So far as, technical services are concerned, Id. DRP has held that “Technical” involves the application of specialized knowledge, skill or expertise with respect to a particular art, science, profession or occupation. Therefore, fees received for services provided by regulated professions such as law, accounting, architecture, medicine, engineering will qualify as FTS. The Id. DRP has further observed that ‘technical services’ takes within its sweep services which would require the expertise in technology or special skill or knowledge relating to the field of technology.

17. In the preceding paragraphs, we have discussed the nature of services provided by the assessee to the Indian group entities. By their very nature, it cannot be said that while providing the services, the assessee, in any manner, either wholly or partly was in overall control of the management of the Indian group entities. In this context, we may get some inputs from the OECD report on e-commerce, relied upon by the Id. Counsel. As per the said report, managerial services would involve functions related to how a business is run as opposed to functions involved in carrying on that business. The fact that the services related to functions involved in carrying on that business might itself require substantial technical skills is irrelevant as the service provided to the service recipient does not manage the service recipient's business.

18. Similarly, as per the OECD report referred to above, services are of technical nature when special skills or knowledge related to a technical field are required for the provision of such services. The fact that technology is used for providing a service is not indicative of whether the service is of technical nature. Similarly, the delivery of a service via technological means does not make the service technical. This is so because, the underlying technology is only a means and not the end. There may be instances where technology underlying the internet is often used to provide services which by themselves is not technical. Therefore, it is crucial to determine at what point the special skill or knowledge is useful. Where special skill or knowledge is used in developing or creating inputs for a service business, the fee received for provision of such service will not be a FTS, unless, that special skill or knowledge is required when the service is provided to the customer by the service recipient.

19. As far as consultancy services are concerned, the expression 'Consultancy' refers to services constituting advice by a professional who has acquired special knowledge and qualification to enable him to do so. Therefore, consultancy would require human interface as a machine cannot provide consultancy services. In this context, the following extracts from the order of the co-ordinate bench in case of *Springer Verlag GmbH vs. DCIT vs. DCIT* (supra) would throw some light on the issue:

12. *The Hon'ble Jurisdictional High Court in the case of Panalfa Autoelektrik Ltd 227 Taxman 351, in relation to "Managerial, technical and consultancy services", has observed as under:*

"14. The expressions "managerial, technical and consultancy services" have not been defined either under the Act or under the General Clauses Act, 1897. The said terms have to be read together with the word „services" to understand and appreciate their purport and meaning. We have to examine the general or common usage of these words or expressions, how they are interpreted and understood by the persons engaged in business and by the common man who is aware and understands the said terms. The expression "management services" was elucidated upon by this Court in J.K. (Bombay) Limited versus CBDT and Another, [1979] 118 ITR 312 in the following terms:-

"6. It may be asked whether management is not a technical service. According to an Article on "Management Sciences", in 14 Encyclopaedia Britannica 747, the management in organisations include at least the following: "(a) discovering, developing, defining and evaluating the goals of the organization and the alternative policies that will lead toward the goals,

(b) getting the organization to adopt the policies,

(c) scrutinizing the effectiveness of the policies that are adopted,

(d) initiating steps to change policies when they are judged to be less effective than they ought to be."

Management thus pervades all organisations. Traditionally administration was distinguished from management, but it is now recognised that management has a role even in civil services. According to the Fontana Dictionary of Modern Thought, page 366, management was traditionally identified with the running of business. Therefore, management as a process is practised throughout every organization from top management through middle management to operational management."

Recently this Court in CIT versus Bharti Cellular Limited and Others, [2009] 319 ITR 139 had observed:-

"The word "manager" has been defined, inter alia, as: "a person whose office it is to manage an organization, business establishment, or public institution, or part of one; a person with the primarily executive or supervisory function within an organization, etc., a person controlling the activities of a person or team in sports, entertainment, etc."

It is, therefore, clear that a managerial service would be one which pertains to or has the characteristic of a manager. It is obvious that the expression "manager" and consequently "managerial service" has a definite human element attached to it. To put it bluntly, a machine cannot be a manager."

Reference can be also made to the decision of the Authority for Advance Rulings in *In Re: Intertek Testing Services India Private Limited*, [2008] 307 ITR 418, wherein it was elucidated:-

"First, about the connotation of the term "managerial". The adjective "managerial" relates to manager or management. Manager is a person who manages an industry or business or who deals with administration or a person who organizes other people's activity [New Shorter Oxford Dictionary]. As pointed out by the Supreme Court in R. Dalmia v. CIT [1977] 106 ITR 895, "management" includes the act of managing by direction, or regulation or superintendence. Thus, managerial service essentially involves controlling, directing or administering the business."

15. The services rendered, the procurement of export orders, etc. cannot be treated as management services provided by the nonresident to the respondent-assessee. The non-resident was not acting as a manager or dealing with administration. It was not controlling the policies or scrutinising the effectiveness of the policies. It did not perform as a primary executor, any supervisory function whatsoever. This is clear from the facts as recorded by the Commissioner of Income Tax (Appeals), which have been affirmed by the Tribunal. The Commissioner of Income Tax (Appeals) has quoted excerpts of the agreement between the respondent-assessee, who has been described as „PAL“, and the non-resident, who has been described as „AGENTA“. The relevant portions thereof read as under:-

"2. Appointment (1) PAL hereby appoint AGENTA as its commission agent for sale of its products within the territory to the purchaser(s) during the terms of this agreement, subject to and in accordance with terms and conditions set out herein and AGENTA agrees to and accepts the same.

(2) It is agreed by and between the parties that AGENTA'S representations and acts on behalf and for PAL viz-a-viz any third party shall be legally binding on PAL only when the same are authorized by virtue of a written and signed authorisation executed by PAL in favour of AGENTA.

XXXXX

4. Commission

(a) PAL agrees and AGENTA accepts that the amount of commission payable to it shall be the difference between consideration which PAL receives in terms of the purchase contract/order form the purchaser(s) and the pre determined guaranteed consideration settled and agreed between the parties, as described in Annexure 1 annexed hereto; (b) The parties agree that all the taxes applicable and required to be deducted in India to the transaction contemplated herein at the date of execution of this agreement and at any time in future during the terms of this agreement shall be deducted from the commission (as described herein above) before the same is paid and transferred to the bank account of AGENTA (herein referred to as the commission payable)"

16. The non-resident, it is clear was appointed as a commission agent for sale of products within the territories specified and subject to and in accordance with the terms set out, which the non-resident accepted. The non-resident, therefore, was acting as an agent for procuring orders and not rendering managerial advice or management services. Further, the respondent-assessee was legally bound with the non-residents' representations and acts, only when there was a written and signed authorization issued by the respondent-assessee in favour of the non-resident. Thus, the respondent-assessee dictated and directed the non-resident. The Commissioner of Income Tax (Appeals) has

also dealt with quantification of the commission and as per clause 4, the commission payable was the difference between the price stipulated in the agreement and the consideration that the respondent-assessee received in terms of the purchase contract or order, in addition to a pre-determined guarantee consideration. Again, an indication contra to the contention that the non-resident was providing management service to the respondent-assessee.

17. The Revenue, which is the appellant before us, has not placed copy of the agreement to contend that the aforesaid clauses do not represent the true nature of the transaction. The Assessing Officer in his order had not bothered to refer and to examine the relevant clauses, which certainly was not the right way to deal with the issue and question.

18. It would be incongruous to hold that the non-resident was providing technical services. To quote from *Skycell Communications Ltd. and Anr. Vs. Deputy Commissioner of Income Tax and Ors.* (2001) 251 ITR 53 (Mad), the word „technical“ has been interpreted in the following manner:-

"Thus while stating that "technical service" would include managerial and consultancy service, the Legislature has not set out with precision as to what would constitute "technical" service to render it "technical service". The meaning of the word "technical" as given in the New Oxford Dictionary is adjective 1. of or relating to a particular subject, art or craft or its techniques: technical terms (especially of a book or article) requiring special knowledge to be understood: a technical report. 2. of involving, or concerned with applied and industrial sciences: an important technical achievement. 3. resulting from mechanical failure: a technical fault. 4. according to a strict application or interpretation of the law or the rules: the arrest was a technical violation of the treaty.

Having regard to the fact that the term is required to be understood in the context in which it is used, "fee for technical services" could only be meant to cover such things technical as are capable of being provided by way of service for a fee. The popular meaning associated with "technical" is "involving or concerning applied and industrial science".

19. The said term was also interpreted by this Court in case of *Bharti Cellular Limited and Others* (supra) where emphasis was laid on the element of human intervention, but we are not concerned with the said aspect in the present case. The non-resident had not undertaken or performed "technical services", where special skills or knowledge relating to a technical field were required. Technical field would mean applied sciences or craftsmanship involving special skills or knowledge but not fields such as arts or human sciences (see paragraph 24 below).

20. The moot question and issue is whether the non-resident was providing consultancy services. In other words, what do you mean by the term "consultancy services"? This Court in *Bharti Cellular Limited and Others* (supra) had referred to the term "consultancy services" in the following words:-

"14. Similarly, the word "consultancy" has been defined in the said Dictionary as "the work or position of a consultant; a department of consultants." "Consultant" itself has been defined, inter alia, as "a person who gives professional advice or services in a specialized field." It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the said Dictionary as "ask advice for, seek counsel or a professional opinion from; refer to (a source of information); seek permission or approval from for a proposed action". It is obvious that the service of consultancy also necessarily entails human intervention. The

consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant."

The AAR in the case of In Re: P.No. 28 of 1999, reported as [1999] 242 ITR 208 had observed:-

"By technical services, we mean in this context services requiring expertise in technology. By consultancy services, we mean in this context advisory services. The category of technical and consultancy services are to some extent overlapping because a consultancy service could also be technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it."

21. The word „consultant“ refers to a person, who is consulted and who advises or from whom information is sought. In Black“s Law Dictionary, Eighth Edition, the word „consultation“ has been defined as an act of asking the advice or opinion of someone (such as a lawyer). It may mean a meeting in which parties consult or confer. For consultation service under Explanation 2, there should be a provision of service by the non-resident, who undertakes to perform it, which the acquirer may use. The service must be rendered in the form of an advice or consultation given by the nonresident to the resident Indian payer.

22. In the present, case commission paid for arranging of export sales and recovery of payments cannot be regarded as consultancy service rendered by the non-resident. The non-resident had not rendered any consultation or advice to the respondent-assessee. The non-resident no doubt had acquired skill and expertise in the field of marketing and sale of automobile products, but in the facts, as notice by the Tribunal and the Commissioner of Income Tax (Appeals), the non-resident did not act as a consultant, who advised or rendered any counseling services. The skill, business acumen and knowledge acquired by the non-resident were for his own benefit and use. The non-resident procured orders on the basis of the said knowledge, information and expertise to secure "their" commission. It is a case of self-use and benefit, and not giving advice or consultation to the respondent-assessee on any field, including how to procure export orders, how to market their products, procure payments etc. The respondent-assessee upon receipt of export orders, manufactured the required articles/goods and then the goods produced were exported. There was no element of consultation or advice rendered by the nonresident to the respondent-assessee.

23. Decision in the case of M/s Wallace Pharmaceuticals Private Limited (supra) is clearly distinguishable as in the said case the non- resident consultant had to perform several services in the nature of attending meetings on mutually agreeable dates and providing advice and counseling, which were in the nature of consultancy services as they entailed support from a product team, compliance with all legal and administrative formalities, including registration and marketing strategy, creation of entry into new markets, development and distribution channels, etc. The work being rendered was in the nature of services as a consultant to the Indian assessee. It included an element of advice and was certainly recommendatory in nature.

24. The OECD Report on e-commerce titled, Tax Treaty Characterisation Issues arising from e-commerce: Report to Working Party No.1 of the OECD Committee on Fiscal Affairs dated 01st February 2001, has elucidated:- "Technical services

39. For the Group, services are of technical nature when special skills or knowledge related to a technical field are required for the provision of such services. Whilst techniques related to applied science or craftsmanship would generally correspond to

such special skills or knowledge, the provision of knowledge acquired in fields such as arts or human sciences would not. As an illustration, whilst the provisions of engineering services would be of a technical nature, the services of a psychologist would not.

40. The fact that technology is used in providing a service is not indicative of whether the service is of a technical nature. Similarly, the delivery of a service via technological means does not make the service technical. This is especially important in the e-commerce environment as the technology underlying the internet is often used to provide services that are not, themselves, technical (e.g. offering on-line gambling services through the internet).

41. In that respect, it is crucial to determine at what point the special skill or knowledge is used. Special skill or knowledge may be used in developing or creating inputs to a service business. The fee for the provision of a service will not be a technical fee, however, unless that special skill or knowledge is required when the service is provided to the customer. For example, special skill or knowledge will be required to develop software and data used in a computer game that would subsequently be used in carrying on the business of allowing consumers to play this game on the internet for a fee. Similarly, special skill or knowledge is used to create a troubleshooting database that customers will pay to access over the Internet. In these examples, however, the relevant special skill or knowledge is not used when providing the service for which the fee is paid, i.e. allowing the consumer to play the computer game or consult the troubleshooting database.

42. Many categories of e-commerce transactions similarly involve the provision of the use of, or access to, data and software (see, for example, categories 7, 8, 9, 11, 13, 15, 16, 20 and 21 in annex 2). The service of making such data and software, or functionality of that data or software, available for a fee is not, however, a service of a technical nature. The fact that the development of the necessary data and software might itself require substantial technical skills is irrelevant as the service provided to the client is not the development of that data and software (which may well be done by someone other than the supplier) but rather the service of making the data and software available to that client. For example, the mere provision of access to a troubleshooting database would not require more than having available such a database and the necessary software to access it. A payment relating to the provision of such access would not, therefore, relate to a service of a technical nature. Managerial services

43. The Group considers that services of a managerial nature are services rendered in performing management functions. The Group did not attempt to give a definition of management for that purpose but noted that this term should receive its normal business meaning. Thus, it would involve functions related to how a business is run as opposed to functions involved in carrying on that business. As an illustration, whilst the functions of hiring and training commercial agents would relate to management, the functions performed by these agents (i.e. selling) would not.

44. The comments in paragraphs 40 to 42 above are also relevant for the purposes of distinguishing managerial services from the service of making data and software (even if related to management), or functionality of that data or software, available for a fee. The fact that this data and software could be used by the customer in performing management functions or that the development of the necessary data and software, and the management of the business of providing it to customers, might itself require substantial management expertise is irrelevant as the service provided to the client is neither managing the client's business, managing the supplier's business nor developing that data and software (which may well be done by someone other than the

supplier) but rather making the software and data available to that client. The mere provision of access to such data and software does not require more than having available such a database and the necessary software. A payment relating to the provision of such access would not, therefore, relate to a service of a managerial nature. Consultancy services

45. For the Group, "consultancy services" refer to services constituting in the provision of advice by someone, such as a professional, who has special qualifications allowing him to do so. It was recognised that this type of services overlapped the categories of technical and managerial services to the extent that the latter types of services could well be provided by a consultant." We broadly agree with the aforesaid observations. However, in the case of selling agents, we add a note of caution that taxability would depend upon the nature of the character of services rendered and in a given factual matrix, the services rendered may possibly fall in the category of consultancy services. Paragraphs 41 and 42 do not emanate for consideration in the present case, and effect thereof can be examined in an appropriate case [However, see Commissioner of Income Tax vs. Estel Communication P. Ltd. (2009) 318 ITR 185 (Del) and Skycell Communications Ltd. (supra)].

25. Thus, the technical services consists of services of technical nature, when special skills or knowledge relating to technical field are required for their provision, managerial services are rendered for performing management functions and consultancy services relate to provision of advice by someone having special qualification that allow him to do so. In the present case, the aforesaid requisites and required necessities are not satisfied. Indeed, technical, managerial and consultancy services may overlap and it would not be proper to view them in water tight compartments, but in the present case this issue or differentiation is again not relevant."

13. Similarly, the Authority for Advance Rulings in Intertek Testing Services India [P] Ltd 307 ITR 418 has observed as under:

"As pointed out by the Supreme Court in R. Dalmia vs. CIT 1977 CTR (SC) 130 : (1977) 106 ITR 895 (SC), 'management' includes the act of managing by direction, or regulation or superintendence. Thus, managerial service essentially involves controlling, directing or administering the business. Seemingly, some services can be classified either under managerial or some other head. In such a situation, the test to be applied is whether they are predominantly managerial in nature. Whatever services are enumerated under the head "Administrative management" cannot automatically be brought within the purview of the managerial services. In fact, many of them may not appropriately fall under managerial services. To give some examples, the maintenance of trade marks register and arranging renewals, preparation and distribution of brochures and other promotional material, maintenance of central claims register or providing professional tax advice, are not predominantly managerial services. Yet, they were included under the head "Administrative management". To give few instances of managerial services, we may make mention of coordination of public relations issues and audit services and advice on global income-tax policies. Arrangement and coordination of global insurance can perhaps fall under this category, though in the absence of details, we do not want to express firm view. Another point we would like to clarify is that from the nomenclature used in the invoice i.e. 'management fee', it cannot be inferred that all the services under the agreement rendered to the applicant are managerial services. The label given in the invoice is not important, much less decisive. In fact, the expression 'management fee' is not found in the agreement. It is described in the agreement as service charge or fee and the same description is given in the application also. In the note, the applicant stated that management charges relate to

'support services'. Support services are not necessarily equivalent to services of managerial nature.

14.1 Keeping the above observations in view, the classification of services as managerial may have to be undertaken in an appropriate proceeding.

15. There are certain services which may not come under either technical or consultancy or managerial. At any rate, a doubt arises in regard to their classification in the absence of sufficient particulars. For instance, preparation and circulation of business sector reports, negotiation of discounts and best service levels in procurement policies especially income-tax hardware and services and coordination of audit services, fall within such doubtful category.

16. A contention has been raised by the counsel for the Revenue that the recipient of FTS shall be the beneficial owner of fees and if the non-resident entity which ostensibly receives the fee is a mere conduit for the other related companies and the amount received by it is simply made over to those companies, then no benefit can be sought from art.13 of the Treaty. If the beneficial owner is someone other than the immediate recipient of fee, the legal position has to be examined in light of the relevant Treaties governing the country of residence of the real and beneficial owner. It is argued that the ITM, UK acts as a coordinating or central point agency to requisition the services from various other Intertek groups subsidiaries and, therefore, the ITM, UK presumably passes on the amount charged to various other entities, while retaining at the most, the mark-up charge of 7.5 per cent. In the absence of the applicant furnishing any details of services actually rendered by ITM, UK, it is submitted that a conclusion cannot be drawn that the UK company is the real beneficial owner. It appears that the omission on the part of the applicant in spelling out the details of the actual services received by it from the payee of the fee i.e. ITM, UK has given scope for this argument. The argument is evidently based on certain assumptions. It is not proper to proceed on the assumption that the ITM, UK is incapable of rendering any technical or consultancy services and that its role is merely that of a conduit, in the absence of definite material leading to such inference. The omission on the part of the applicant in furnishing the details of actual services cannot be stretched too far. On the basis of the facts appearing on the record, it is not possible to arrive at a finding in this proceeding that the beneficial owner of fee is someone else.

17. In view of the foregoing discussion, the first question defies a precise answer-either in the affirmative or negative. Many of the services catalogued in the agreement and in the note are technical/consultancy services which do not 'make available' technical knowledge, experience etc. and therefore do not fall within the ambit of cl. (c) of art. 13.4. But, some of them satisfy the test of making available 'technical knowledge' etc. and therefore taxable as FTS under art. 13.4 of Treaty. There are also services which can be categorized as managerial. There are some which do not fall under either of the three categories. We have given sufficient indication of all such services, on a broad analysis.

17.1 It is made clear that nothing in this ruling shall preclude the concerned IT authorities to determine the cost of services etc. on arm's length basis by taking resort to the provisions of s. 92 of IT Act, 1961. 18. 2nd Question : As indicated earlier, while discussing question No. 1, it is not possible to hold, on the basis of the material placed before this Authority, that all the services rendered do not fall under FTS and that the entirety of service fee charged to the applicant does not constitute the income of ITM, UK under the Treaty. There is some grey area in respect of certain services, as pointed out in the course of discussion supra. However, we have interpreted art.13(4)(c) of the Treaty and laid down the principle. We have also indicated broadly whether in relation

to the listed services, the said provision is attracted. Further, we have attempted at the classification of various services by giving examples. It is for the applicant to approach the competent authority to determine the issue of TDS by filing an application under s. 195 of IT Act. It is settled law that any order passed under s. 195 is tentative and the rights of the payee or recipient are not thereby adversely affected [vide Transmission Corporation of AP Ltd. vs. CIT (1999) 155 CTR (SC) 489 : (1999) 239 ITR 587 (SC)]. To what extent and at what rate the tax deduction has to be made by the applicant will be determined by the appropriate authority expeditiously in the light of the principles laid down and observations made in this ruling."

14. *Similar view was taken by the co-ordinate bench at Mumbai in the case of Endemol South Africa [Proprietary] Ltd 67 ITR (T) 520. The relevant findings read as under:*

"16. We may herein observe, that a similar view had earlier been arrived at by the ITAT, Mumbai, in the case of Yashraj Film Pvt. Ltd. Vs. ITO (IT) (2012) 231 ITR (T) 125 (Mum.). On a perusal of the facts involved in the aforementioned case, it emerges that the Tribunal had observed that as the services rendered by the nonresident service providers for making logistic arrangements were in the nature of commercial services, thus, the same cannot be treated as managerial, technical or consultancy services within the meaning given in Explanation 2 to Sec. 9(1)(vii) of the Act. In the aforementioned case, the assessee had made payments to various overseas services providers belonging to U.K, Poland, Brazil, Canada & Australia for services availed in connection with the shooting of different films. The services rendered by the aforementioned nonresident service providers included arranging for extras, arranging for the security, arranging for locations, arranging for the accommodations for the cast and crew, arranging for necessary permissions from local authorities, arranging for makeup of the stars, arranging for insurance cover etc. The Tribunal after deliberating on the nature of the aforementioned services concluded, that as the same were purely commercial services falling in the category of logistic arrangement services, thus, the consideration received as regards rendering of such services would constitute business profits of the said overseas service providers. It was further observed, that as the said service providers had no Permanent Establishment (P.E) in India during the year under consideration, hence the business profits were not taxable in India in their hands as per Article 7 of the respective tax treaties between India and the abovementioned countries. We have deliberated at length on the facts involved in the case before us, and find that the nature of services rendered P a g e | 15 ITA No. 1732/Mum/2016 AY 2012-13 M/s Endemol South Africa Vs. DCIT (IT), Circle-2(2)(1) by the overseas service providers in the aforementioned case of Yashraj Films Pvt. Ltd.(supra) are somewhat similarly placed and rather overlapping to some extent, as in comparison to the services rendered by the assessee in the case before us. In terms of our aforesaid observations, we find that our view that the services rendered by the assessee are administrative services and not in the nature of managerial, technical or consultancy services, also stands fortified by the aforesaid order of the coordinate bench of the Tribunal. We thus, in the backdrop of our aforesaid deliberations, and finding ourselves to be in agreement with the view taken by the Tribunal in the aforesaid case viz. Yashraj Films Pvt. Ltd. (supra), herein conclude that the consideration received by the assessee for rendering of the services to Endemol India Pvt. Ltd. cannot be held as "FTS".

17. *Still further, we also find that the issue of taxability of amount received outside India for rendering Line production services to the assessee company viz. Endemol India Pvt. Ltd, had also been considered and decided by the Hon"ble Authority for Advance Ruling (for short „AAR"), vide its rulings rendered in the case of Endemol Argentina (Non-resident) [AAR No. 1082 of 2011; dated 13.12.2013] and Utopia Films (Non-resident) [AAR No. 1081 and 1082 of 2011; dated 19.02.2014]. In the aforementioned rulings, it was observed, that the consideration received outside India*

by the concerned overseas service providers by providing line production services to the assessee, viz. providing line producer, local crew, stunt services, transport etc. would not qualify as "FTS" under the Act. We find that in the present case, the A.O/DRP had declined to rely on the aforesaid rulings of the AAR, for the reasons viz. (i). that as per Sec. 245S, the advance ruling is pronounced on the basis of facts of a particular case and hence, it is binding on only the applicant in respect of the transactions in relation to which advance ruling was sought; and (ii). that the ruling was rendered by the Hon"ble AAR in context of different DTAA"s, as against that involved in the case of the assessee. We have deliberated at length on the aforesaid observations of the lower authorities and are unable to persuade ourselves to accept the same. We find that though it is an admitted fact that an *P a g e | 16* ITA No. 1732/Mum/2016 AY 2012-13 *M/s Endemol South Africa Vs. DCIT (IT), Circle-2(2)(1)* „advance rulings" having been rendered on the basis of the facts of a particular case, thus, would only be binding on the applicant, and that too in respect of the transactions in relation to which the same was obtained, however, such ruling would still have a persuasive value in respect of other parties as well and accordingly, may be relied upon by the authority itself or by the applicant/department. We find that our aforesaid view is fortified by the judgment of the Hon"ble Supreme Court in the case of *Columbia Sportswear Company Vs. DIT, Bangalore* (2012) 346 ITR 161 (SC). We are further of the considered view, that though the lower authorities had declined to take cognizance of the observations of the Hon"ble AAR on the ground that the „tax treaties" involved in the said case were different as against that involved in the present case, however, there is no mention of any such material fact which could persuade us to conclude that the definition of "FTS" in the said respective tax treaties would be absolutely unworkable, and hence could not be applied in the case before us. We thus, are of the considered view, that the lower authorities had erred in failing to appreciate that the ruling rendered by the Hon"ble AAR in the case of *Endemol Argentina and Utopia Films*, though was not binding, but did have a persuasive value while adjudicating the issue under consideration. Be that as it may, we are not impressed by the outright scrapping by the lower authorities of the aforesaid rulings rendered by the Hon"ble AAR in context of taxability of Line production services provided by the overseas service providers viz. (i). *Endemol Argentina (Nonresident)*; and (ii). *Utopia Films (Non-resident)* to the assessee company viz. *Endemol India Pvt. Ltd.* However, we are of the considered view, that as we have already observed that the services rendered by the assessee to *Endemol India Pvt. Ltd.* are not in the nature of a managerial, technical or consultancy services, therefore, we refrain from further adverting to and adjudicating upon the observations arrived at by the A.O/DRP in context of the rulings of the Hon"ble AAR.

15. In the aforementioned judgment, the co-ordinate bench has negated both, royalty and FTS.

16. Similarly, the co-ordinate bench at Mumbai in the case of *UPS SCS [Asia] Limited* ITA No. 2426/MUM/2010 order dated 22.02.2012 has held as under:

“7. First we will consider the ambit of ‘managerial services’ to test whether the instant services can qualify to be so called. Ordinarily the managerial services mean managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down. The managerial services contemplate not only execution but also the planning part of the activity to be done. If the overall planning aspect is missing and one has to follow a direction from the other for executing particular job in a particular manner, it cannot be said that the former is managing that affair. It would mean that the directions of the latter are executed simplicity without there being any planning part involved in the execution and also the evaluation of the performance. In the absence of any ITA No.2426/Mum/2010 *M/s. UPS SCS (Asia) Limited*. 6 specific definition of the phrase “managerial services” as used in section 9(1)(vii) defining the “fees for technical

services”, it needs to be considered in a commercial sense. It cannot be interpreted in a narrow sense to mean simply executing the directions of the other for doing a specific task. For instance, if goods are to be loaded and some worker is instructed to place the goods on a carrier in a particular manner, the act of the worker in placing the goods in the prescribed manner, cannot be described as managing the goods. It is a simple direction given to the worker who has to execute it in the way prescribed. It is quite natural that some sort of application of mind is required in each and every aspect of the work done. As in the above example when the worker will lift the goods, he is expected to be vigilant in picking up the goods moving towards the carrier and then placing them. This act of the worker cannot be described as managing the goods because he simply followed the direction given to him. On the other hand, ‘managing’ encompasses not only the simple execution of a work, but also certain other aspects, such as planning for the way in which the execution is to be done coupled with the overall responsibility in a larger sense. Thus it is manifest that the word ‘managing’ is wider in scope than the word ‘executing’. Rather the later is embedded in the former and not vice versa.

8. Adverting to the facts of the instant case it is observed that the assessee performed freight and logistics services outside India in respect of consignments originating from India undertaken to be delivered by Menlo India. The role of the assessee in the entire transaction was to perform only the destination services outside India by unloading and loading of consignment, custom clearance and transportation to the ultimate customer. In our considered opinion, it is too much to categorize such restricted services as managerial services. We, therefore, jettison this contention raised on behalf of the Revenue.”

17. A perusal of the aforementioned judgments of the Hon'ble High Court and co-ordinate benches show that managerial services entail the element of management of the business of the service recipient in a substantial manner. In our view, mere provision of support services cannot be labeled as managerial services. Hiring of outside parties to receive support in respect of the operational aspects of a business cannot qualify as managerial services unless the service provider lays down policies or executes such policies by managing the personnel of the service recipient.

18. In light of the afore-stated judgments, we do not find any merit in the findings of the Id. CIT(A) by treating the commission as ‘managerial service’ under the India Germany DTAA.

19. There is no dispute that the assessee has received commission as per the Commissionaire Agreement with SIPL which is nothing but export commission/sales commission, which has been treated as FTS.

20. Similar quarrel was considered by the Hon'ble Jurisdictional High Court of Delhi in the case of Hero Motocorp Ltd 394 ITR 403. The relevant findings read as under:

20. In this context, the Court concurs with the following findings of the ITAT: "Therefore, by export agreement, the assessee has not been transferred or permitted to use any patent, invention, model, design or secret formula. Similarly, HMCL, by way of export agreement, has not rendered any managerial, technical or consultancy services. In view of the above, we hold that export commission was neither royalty nor fee for technical services and, therefore, the assessee was not required to deduct tax at source on the payment of export fee. Once the assessee was not required to deduct the tax at source, it cannot be said that the assessee failed to deduct tax at source so as to apply Section 40(a)(ia)."

21. Similarly, the Hon'ble Madras High Court in the case of Farida Leather Company 238 Taxmann.com 473 has held as under:

“11. In the instant case, it is seen, admittedly that the non-resident agents were only procuring orders abroad and following up payments with buyers. No other services are rendered other than the above. Sourcing orders abroad, for which payments have been made directly to the non-residents abroad, does not involve any technical knowledge or assistance in technical operations or other support in respect of any other technical matters. It also does not require any contribution of technical knowledge, experience, expertise, skill or technical know-how of the processes involved or consist in the development and transfer of a technical plan or design. The parties merely source the prospective buyers for effecting sales by the assessee, and is analogous to a land or a house / real estate agent / broker, who will be involved in merely identifying the right property for the prospective buyer / seller and once he completes the deal, he gets the commission. Thus, by no stretch of imagination, it cannot be said that the transaction partakes the character of fees for technical services as explained in the context of Section 9 (1) (vii) of the Act.

12. As the non-residents were not providing any technical services to the assessee, as held above and as held by the Commissioner of Income Tax (Appeals), the commission payment made to them does not fall into the category of fees of technical services and therefore, explanation (2) to Section 9 (1) (vii) of the Act, as invoked by the Assessing Officer, has no application to the facts of the assessee's case.

13. In this case, the commission payments to the non-resident agents are not taxable in India, as the agents are remaining outside, services are rendered abroad and payments are also made abroad.

14. The contention of the learned counsel for the Revenue is that the Tribunal ought not to have relied upon the decision reported in G.E.India Technology's case, cited supra, in view of insertion of Explanation 4 to Section 9 (1) (i) of the Act with corresponding introduction of Explanation 2 to Section 195 (1) of the Act, both by the Finance Act, 2012, with retrospective effect from 01.04.1962.

15. The issue raised in this case has been the subject matter of the decision, in the recent case, reported in (2014) 369 I.T.R. 96 (Mad) (Commissioner of Income Tax v. Kikani Exports Pvt. Ltd.) wherein the contention of the Revenue has been rejected and assessee has been upheld and the relevant observation reads as under:-

... the services rendered by the non-resident agent could at best be called as a service for completion of the export commitment and would not fall within the definition of "fees for technical services" and, therefore, section 9 was not applicable and, consequently, section 195 did not come into play. Therefore, the disallowance made by the Assessing Officer towards export commission paid by the assessee to the non-resident was rightly deleted.

16. When the transaction does not attract the provisions of Section 9 of the Act, then there is no question of applying Explanation 4 to Section 9 of the Act. Therefore, the Revenue has no case and the Tax Case Appeal is liable to be dismissed.”

22. In light of the above, we set aside the findings of the ld. CIT(A) and direct the Assessing Officer to delete the impugned addition. Ground Nos. 1 to 5 in Assessment Year 2014-15 and Ground No. 1 to 3 in Assessment Year 2015-16 are allowed.

20. In case of *M/s. UPS SCS (Asia) Limited vs. The Asstt. Director of Income Tax (International Taxation)* (supra), the co-ordinate Bench has held as under:

7. First we will consider the ambit of 'managerial services' to test whether the instant services can qualify to be so called. Ordinarily the managerial services mean managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down. The managerial services contemplate not only execution but also the planning part of the activity to be done. If the overall planning aspect is missing and one has to follow a direction from the other for executing particular job in a particular manner, it cannot be said that the former is managing that affair. It would mean that the directions of the latter are executed simplicity without there being any planning part involved in the execution and also the evaluation of the performance. In the absence of any specific definition of the phrase "managerial services" as used in section 9(1)(vii) defining the "fees for technical services", it needs to be considered in a commercial sense. It cannot be interpreted in a narrow sense to mean simply executing the directions of the other for doing a specific task. For instance, if goods are to be loaded and some worker is instructed to place the goods on a carrier in a particular manner, the act of the worker in placing the goods in the prescribed manner, cannot be described as managing the goods. It is a simple direction given to the worker who has to execute it in the way prescribed. It is quite natural that some sort of application of mind is required in each and every aspect of the work done. As in the above example when the worker will lift the goods, he is expected to be vigilant in picking up the goods moving towards the carrier and then placing them. This act of the worker cannot be described as managing the goods because he simply followed the direction given to him. On the other hand, 'managing' encompasses not only the simple execution of a work, but also certain other aspects, such as planning for the way in which the execution is to be done coupled with the overall responsibility in a larger sense. Thus it is manifest that the word 'managing' is wider in scope than the word 'executing'. Rather the later is embedded in the former and not vice versa.

8. Adverting to the facts of the instant case it is observed that the assessee performed freight and logistics services outside India in respect of consignments originating from India undertaken to be delivered by Menlo India. The role of the assessee in the entire transaction was to perform only the destination services outside India by unloading and loading of consignment, custom clearance and transportation to the ultimate customer. In our considered opinion, it is too much to categorize such restricted services as managerial services. We, therefore, jettison this contention raised on behalf of the Revenue.

9. Now we take up the next component of the definition of "fees for technical services", being 'consultancy services', which has been pressed into service by the learned CIT(A) to fortify his view that the amount received by the assessee is covered within section 9(1)(vii). The word "consultancy" means giving some sort of consultation de hors the performance or the execution of any work. It is only when some consideration is given for rendering some advice or opinion etc., that the same falls within the scope of "consultancy services". The word 'consultancy' excludes actual 'execution'. The nature of services, being freight and logistics services provided by the assessee to Menlo India has not been disputed by the authorities below. There is nothing like giving any consultation worth the name. Rather such payment is wholly and exclusively for the execution in the shape of transport, procurement, customs clearance, delivery, warehousing and picking up services. That being the position, we opine that the payment in lieu of freight and logistics services cannot be ranked as consultancy services.

10. The only left over component of the definition of "fees for technical services" taken note of by the ld. CIT(A) is "technical services". He observed that the assessee's business structure is time bound service coupled with continuous real time transmission of information by using and also making available its technology in the form of sophisticated equipments and software etc. The learned CIT(A) has held that : "in order to ensure efficient and timely delivery and to provide continuous real time information, the Appellant is required to use sophisticated technology for which the Indian entity is also equally involved and to whom the appellant is committed to providing the requisite software and equipment". The learned CIT(A) has also accentuated on the clause 2 of the Agreement which reads as under:

“2. Contractor shall separately execute a Technology and Software license agreement for the provision of computer equipment and software supplied by SCS. Contractor shall separately execute a Trademark license agreement for the use of any marks or brands owned by United Parcel Service of America, Inc. The fee payable by Contractor under paragraph 3.1 will not include any royalty amount relating to the use of intangible property or information.”

11. On going through clause 2 of the Agreement, it is obvious that Menlo India shall ‘separately execute a technology and software license agreement’ for the provision of computer equipment and software supplied by the assessee. It is nobody’s case that the consideration in question relates to the supply of any computer equipment and software by the assessee to Menlo India. We fail to appreciate as to how this clause 2 makes the services provided by the assessee as “technical”. Rather clause 2 mandates to execute a separate Technology and Software license agreement for the provision of computer equipment and software. How is it that the consideration for the services can be attributed to a proposed agreement, which has yet to see the light of the day.

12. The learned CIT(A) has also harped on “transportation of time sensitive packages” with a view to bring the services provided by the assessee within the fold of “technical services”. In reaching this conclusion the learned CIT(A) also relied on the order passed by the Mumbai bench of the Tribunal in *Blue Dart Express Limited Vs. JCIT [(2000) 75 ITD 414 (Mum.)]*. Let us examine the facts of that case. The assessee there claimed deduction u/s 80-O in respect of its foreign exchange earnings for rendering technical / professional services to a US Multi International company. During the course of assessment proceedings, the A.O. required the assessee to furnish the nature of services rendered and also the calculation of deduction. The assessee did it. On being satisfied the A.O. granted deduction u/s 80-O. By exercising the power u/s 263, the learned CIT held the assessment order to be erroneous and prejudicial to the interest of the Revenue to the extent of granting deduction u/s 80-O. When the matter came up before the Tribunal, it was observed that the issue is debatable and hence outside the ambit of section 263. Apart from that, it was also observed that the assessee was engaged in integrated air and ground transportation of time sensitive packages to various destinations rendering commercial services. It was in this context that the assessee was held to be eligible for deduction u/s 80-O. At this juncture it will be useful to note that at the material time section 80-O provided for deduction on any ‘income by way of royalty, commission, fees or any similar payment received by the assessee from the Government of a foreign State or a foreign enterprise in consideration for the use outside India of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee, or in consideration of technical or professional services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee’. From the above quoted part of sec. 80-O, it can be seen that the deduction at that time was available not only in respect of income as a consideration for the use of ‘technical or professional services’ but also any ‘commercial....knowledge experience or skill’. These two sources are distinct from each other as can be seen from the employment of word ‘or’ between them. In order to qualify for deduction under this section, the income could have resulted from the rendering of ‘technical or professional services’ or commercial knowledge, experience or skill etc. When the tribunal in *Blue Dart Express Limited (supra)* held the assessee to be entitled to deduction, it was considering all the species of the services set out in section 80-O and not only ‘technical or professional services’. It was in the light of such language of the provision that the Tribunal held the assessee to be eligible for relief u/s 80-O.

We are currently dealing with section 9(1)(vii), being the ‘fees for technical services’ and the definition of such expression is restricted only to ‘managerial, technical or consultancy services’ and does not have any such elements as are there in section 80-O. The decision in the

case of *Blue Dart Express Limited* (supra) came up for consideration before the Mumbai bench of the tribunal in *Dampskibsselskabet AF 1912 Vs. Addl.DIT (International Taxation)* [(2011) 51 DTR 148] (to which one of us, namely, the ld. JM is party) in which it has been held that the ratio laid down in that case cannot be universally applied. Due to material difference in the language of sections 9(1)(vii) and 80-O as discussed above, we hold that the decision in *Blue Dart Express Limited* (supra), can not be held to be supporting the case of the Revenue.

13. The ld. CIT(A) in reaching the conclusion that the assessee rendered 'technical services' also observed that its 'business structure is time bound service coupled with continuous real time transmission of information by using and also making available advanced technology in the form of sophisticated equipment and software.' He was swayed by the contention of the assessee that the Manlo India or the ultimate customer could track the movement of cargo with the help of computers. We have noted supra that the consideration received by the assessee did not include any consideration for the supply of any equipment to Manlo India. Now we will examine as to whether the use of computer in any manner for knowing the location of the cargo at a particular time, can be held as technical service.

14. Explanation to section 9(1)(vii) defines the expression "fees for technical services" as consideration for rendering 'managerial, technical or consultancy services'. It is seen that there is no definition of the term "technical services" in the Act.

15. The principle of *noscitur a sociis* mandates that the meaning of a word is to be judged by the company of other words which it keeps. This rule is wider in scope than the rule of *ejusdem generis*. In order to discover the meaning of a word which has not been defined in the Act, the Hon'ble Supreme Court has applied the principle of *noscitur a sociis* in several cases including *Aravinda Paramila Works Vs. CIT* [(1999) 237 ITR 284 (SC)]. As noted above the word 'technical' has been sandwiched between the words 'managerial' and 'consultancy' in Explanation 2 to sec. 9(1)(vii) and no definition has been assigned to the 'technical' services in the relevant provision, we need to ascertain the meaning of the 'technical services' from the overall meaning of the words 'managerial' and 'consultancy' services by applying the principle of *noscitur a sociis*. It has been held above that the 'managerial services' and 'consultancy services' pre-suppose some sort of direct human involvement. These services cannot be conceived without the direct involvement of man. These services can be rendered with or without any equipment, but the human involvement is inevitable. Moving in the light of this rule, there remains no doubt whatsoever that the technical services cannot be contemplated without the direct involvement of human endeavor. Where simply an equipment or a standard facility albeit developed or manufactured with the use of technology is used, such a user cannot be characterized as using 'technical services'.

16. Coming back to the facts of the present case, even if we accept the learned first appellate authority's point of view that the computer could be used in tracing the movement of the goods, such use of computer, though indirect, remote and not necessary, can not bring the payment for freight and logistics services within the purview of "technical services". The essence of the consideration for the payment is rendering of services and not the use of computer. If incidentally computer is used at any stage, which is otherwise not necessary for rendering such services, the payment for freight and logistics will not partake of the character of fees of 'technical services'. We, therefore, repel this contention raised on behalf of the Revenue.

17. Thus it can be noticed that the payment made to the assessee in question is not a consideration for managerial or technical or consultancy services. That being the position, it cannot fall within the ambit of section 9(1)(vii).

21. Thus, applying the tests laid down in the judicial precedents referred to above to the nature of services provided by the assessee as discussed elsewhere in the order, it can be held that the services rendered do not fall in the category of managerial, technical and consultancy services. In fact, even applying the tests referred to by Id. DRP in pgs. 78 & 79 of the directions, the services rendered do not come within the ambit of managerial, technical and consultancy services. We are inclined to hold so because, in the first place, the A.O. has failed to examine the issue in the context of applicability of Article 13(3)(b) of the Act. Whereas, Id. DRP has reached its conclusion *qua* the nature of receipts as FTS without carefully examining the nature of services. We are constrained to hold so because most of the services as described in the preceding paragraphs do not satisfy the tests of managerial, technical or consultancy services. However, some of the services may satisfy the tests of technical and consultancy services. But, onus is on the Department to prove such fact on record through cogent material. In the facts of the present appeal, the Department has failed to do so.

22. Another fact which needs to be highlighted is, the Functional Services Agreement was executed between the assessee and the Indian group entities in the early part of the year 2013. The contention of the assessee that till the impugned assessment year, the Department has never treated such receipts as either 'FTS' or 'royalty', has not been controverted by the Department. This fact further strengthens assessee's case. We may further observe that though Id. DRP has ultimately directed the A.O. to treat the receipts as 'FTS', however, in the same breath they have held the receipts to be in the nature of 'royalty'. Therefore, in our view, the Departmental Authorities lacked clarity in their

decision-making process. The receipts cannot assume the character of both royalty and FTS at the same time.

23. For the aforesaid reasons, we hold that the receipts cannot be treated as 'FTS' under Article 12(3)(b) of the Treaty. However, we make it clear, the conclusion reached by us, as aforesaid, is strictly based on the peculiar facts of the present appeal. In view of our decision above, the legal issue raised in ground no. 1 is kept open. Ground no. 7 having become academic, does not require adjudication. Whereas, ground nos. 8 & 9, being consequential in nature, do not require adjudication.

24. In the result, the appeal is partly allowed.

Order pronounced in the open court on 27.10.2025

Sd/-
(N. K. Billaiya)
Accountant Member

Mumbai; Dated : 27.10.2025
Roshani, Sr. PS

Sd/-
(Saktijit Dey)
Vice President

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai