“Your Obligation u/s. 195 – a run through”

List of Latest Case Laws

1. Training fee received by U.K Company from assessee Indian company for training latter’s technical and managerial staff which required high level of technical knowledge, experience, skill and know – how in relevant field, was ‘fees for technical services’ within meaning of article 13 of DTAA with UK, read with section 9(1)(vii) and hence taxable in India. [Assessment Years 2006-07 and 2007-08] [In favour of revenue].

Steel Authority of India Ltd. v. ITO [2009] 120TTJ (Delhi) 297

2. Where assessee – German – Copmany was engaged in business of rendering supervisory services in connection with erection, testing and commissioning of Indian equipment in accordance with designs and layouts of SAIL at its Rourkela Steel Plant, and assessee was also to render other technical services as part of work on an integrated basis and a clause of schedule further provided for training of SAIL’s personnall for operation and maintenance of plant and equipment supplied by the assessee, these were technical services rendered by assessee and these services fell under Explanation 2 below section 9(1)(vi)(b) but only profits attributable to role of assessee’s PE in India were liable tax in India [Assessment Year 1998-99] [In favour of assessee/ revenue].


3. Where assessee entered into a technical assistance agreement with an Austrian company for supply of designs and as per terms of agreement, in addition to fees for technical know- how asesse was required to reimburse expenditure towards air fare, accommodation and subsistence cost for personnal deputed by the Austrian firm to India, payment made by the assessee to reimburse such expenditure attracted provisions of section 195 [Assessment Year 2005-06] [In favour of assessee/ revenue].

Ashok Leyland Ltd. V Dy. CIT [2009] 120 TTJ 14/119 TTJ 716 [Chennai]

4. Contention of revenue was that person responsible can be treated as assessee – in – default even if there is no assessment on payee has no merit; question of deducting tax at source will arise only if sum payable to non-resident is chargeable to tax in India [Assessment Year 1998-99] [In favour of assessee].


5. Where applicant is a non-resident company incorporated in USA, maintains a ‘database’ which is located outside India and which contains financial and economic information including fundamental data of a large number of companies worldwide and under a license if grants a right to licensee to have access to copyright database rather than granting them any right in or over copyright as such, subscription fee received by applicant from customers (users of database not in nature of royalty either under provisions of clause (iv) of Explanation 2 to section 9(1)(vi) or under article 12 of DTAA between India and USA [In favour of applicant].


6. Where applicant proposed to enter into an agreement with another group company, i.e., C&W UK, to provide end-to-end international long distance telecommunication services to its Indian customers and under proposed agreement, applicant is to provide Indian leg of services by using its own network and equipment and network of other domestic operators and international leg of services will be provided by C&W UK by using its International infrastructure and equipments, fees paid by applicant to C&W, UK is neither fees for technical services nor royalty; it is in nature of business profits and in absence of there being any PE of C&W UKin India, such income is not all taxable.

Cable & Wireless Networks India (P.) Ltd., in re [2009] 182 taxman 76/315 ITR 72/224 CTR (AAR – New Delhi ) 46
7. Where under a secondment agreement entered into between Korean company HMFICL and applicant Indian company, services of a technical personnel, who was an employee of HMFICL at Korea, were kept at disposal of applicant for a Period of two years in order to assist applicant in matters relating to Korean insurance business and applicant reimbursed part of salary payable to such personnel to HMFICL, from mere fact that HMFICL did provide services of a technical person and received from applicant a substantial part of salary payable by said company, it services; hence no tax was laible to be deducted at source by applicant in respect of payments made or to be made to HMFICL under terms of secondment agreement.[in favour of applicant]

Cholamandalam Ms General Insuarance Co. Ltd., in re [2009] 178 taxman 100/ 221 CTR (AAR – New Delhi) 721

8. Where partners of assessee, a UK firm of Solicitors, were present in India during previous years for more than 90 days (as Provided in article 15 of DTAA and UK), section 9(1)(vii)(c) was applicable for taxability of fee received by it for rendered in India [assessment years 1996-97 and 1997-98] [in favour of assessee]

Clifford Chance.v. Dy.CIT [2009] 176 taxman 458/318 ITR 237/221 CTR (Bom.) 1

9. Where applicant, which is incorporated in energy and resources industries and it has its design centers in Australia from where design services are performed but, for the purpose of gathering input for preparation of designs and documents, its personal come to India for collecting data and information from ‘S’ and to explain deliverables to officers/engineers of ‘S’ and to help ‘S’ to test same applicant’s income is not covered by article 5.3(c) and 7 of DTAA as most work is done abroad and assessee has no PE in India; however since not only services rendered by applicant have been utilized in India for work done in India, and for benefit of a resident India but even a part of activities/services under contract are actually undertaken in India, it could be said that sufficient territorial nexus existed to subject royalty income tax in India [in favour of revenue]

Worley Parsons Services Pty.Ltd., in re [2009] 179 taxman 274/312 ITR 317/223 CTR (AAR – New Delhi ) 84

10. Where assessee – company entered into separate contracts with ‘REOL’, which was an American company, and its two subsidiary companies, for commissioning of power plant in India and remuneration to be payable to REOL under contract was under three categories, viz., for technical services, start-up services and overall responsibility in respect of ‘technical services’, rendering of technical services being purely offshore and outside India, remuneration paid towards those services and would attract tax liability, however; since in respect of Start-up services and overall responsibility, twin criteria of rendering of services in India and utilization of services in India became evidently noticeable, assessee was liable to pay tax on payments made to REOL towards those services [Assessment year 1997-98] [in favour of partly assessee/ partly revenue]


11. Where applicant, a company incorporated in USA, engaged in business of supplying advance technology for manufacture of radial tyres, entered into a technology transfer agreement with an Indian company CEAT under which it agreed to grant CEAT a perpetual irrevocable right to use know-how and to transfer ownership of tread and side wall designs/patterns [TSD] required for manufacture of radial tyers for a lump sum consideration and applicant has also to provide consultancy and assistance including training services to CEAT, consideration received by applicant from CAT towards technology transfer/technical know-how and services connected therewith is clearly liable to be taxed as royalty u/s 9(1)(vi) and also u/s 9(1)(vii), but since ownership in tread and side wall designs/patterns is transferred absolutely to CEAT, amount of consideration related thereto cannot be brought to tax as royalty in India either under article 12(5) of DTAA with USA or under section 9; further fee for consultancy and assistance services as defined in para 4 of article 12 of DTAA and, therefore consideration received for same is liable to be taxed in India as ‘fee for included services’ under Treaty and as ‘fee for technical services’ under Act.

12. Where HTIL was a Hutchison group company incorporated in Cayman Islands and controlling interest of HTIL in Indian company HEL was transferred to petitioner- Vodafone group company under an agreement, since transaction between parties covered within its sweep diverse rights and entitlements and essence of transaction was a change in controlling interest in HEL, an Indian company, which constituted a source of income in India, diverse agreements entered into ny petitioner had a nexus with the Indian jurisdiction; therefore , Petitioner was rightly held to be liable to deduct tax at source from consideration paid to HTIL [In favour of revenue].

**Vodafone International Holdings B. V. UOI [2010] 193 taxman 100/235 CTR 15 (Bom.)**

13. There is no merit in revenue's contention that unless payer has made an application to ITO ( TDS) under section 195 (2) and obtained a permission for non- deduction of tax deduction at source, it is not permissible for payer to contend that payment made to non- resident does not give rise to ‘income’ taxable in India and, therefore, there is no need to deduct any tax at source; obligation to deduct tax at source does not arise only when such remittance is made to a non – resident ;it arises only when such remittance is a sum chargeable under Act, i.e., chargeable under sections 4,5, and 9; section 195(2) gets attracted to cases where payment made is a composite payment in which certain portion of payment has an element of ‘ income chargeable to tax in India and payer seeks a determination of appropriate proportion of sum chargeable [Case remanded ]


14. Assessee was not liable to deduct tax at source from mobilization and demobilization costs reimbursed by it to non-resident company where IT authorities had accepted that non-resident recipient was not liable to pay any tax in India

**Van Oord ACZ India (p) Ltd. V.CIT [2010 189 taxman 232/323 ITR 130/230 CTR 365 ( Delhi )**

15. Where assessee had entered into an agreement with IITC, an educational institution situated at Chicago to impart distance education in India, and assessee – company had to provide infrastructure like collecting application forms and forwarding same to IITC, for purpose of admission and, after approval of admission, to collect tuition fees and remit same to IITC, USA and receive education materials from IITC, and in turn pass on same to students admitted by IITC in Bangalore, as foreign company was not earning any profit by conducting trade or business in India, assessee was not required to deduct tax at source from fee remitted to American company [ assessment Year 2000-01 ] [ In favour of assessee].

**CIT. v . Illinois Institute of Technology (India) (P.) Ltd., [2010] 321 ITR 49/ 231 CTR 449 (Kar.)**

16. Where High Court held that payment made by a resident payer to a non- resident in respect of any goods/ services supplied by non- resident, which resident payer is making use of in running of its business, etc., prima facie bears character of an income of recipient and, therefore, obligation for deduction of tax springs up, in such situation stay on recovery of alleged TDS was to be stayed.


17. Where assesse- foreign company, engaged in business of acquiring television programmes and motion pictures and exhibiting/ transmitting same on television from Singapore, had paid service fee to SET India for marketing of airtime on arm’s length basis, such payment extinguished tax liability of assessee in India vis-à-vis advertisement revenue and Assessing Offices was not justified in taxing advertisement revenue earned by assessee as a business income [ Assessment Year 2003-04] [ In favour of assessee]


18. Where assesse, an American company, had an arrangement with an Indian company to depute its personnel to said Indian company on a hire- out basis, and since personnel deputed to Indian company worked under control and supervision
of Indian company and assessee was only reimbursing salary of deputed employees. On income could be said to have arisen to assessee in India; moreover deputed persons could not be considered as constituting a PE of assessee in India [Assessment year 2003-04] [In favour of assessee]


19. Where assessee – non-resident company, merely sold raw materials/ CKD kits to an Indian company DCIL and it was DCIL which carried out further activity of assembling same and selling finished cars and there were no further activities carried out by assessee in India in this connection, DCIL could not be held to constitute assessee’s business connection, in India; assessee income from sale of raw materials /CKD kits to DCIL was not liable to tax in India under Provisions of Act; further, DCIL could neither be treated as PE nor dependent agent of assessee [Assessment Years 2001-02 & 2002-03] [In favour of assessee]

Dy.DIT (International Taxation) v Daimler Chrysler A.G. [2010] 39 SOT 418/ 133 TTX 766 (Mum.)

20. In order to constitute PE, Place of business need not be owned, rented or otherwise under possession or control of enterprises; only requirement is that place should be fixed in the context of nature of business being carried out.[Assessment years 2000-01 to 2005-06]

eFunds Corp., v. Asstt. DIT [2010] 42 SOT 165 (Delhi)

21. Utilization of services in India, and not necessarily rendered in India, is enough to attract their taxability in India[Assessment Year 2008-09] [In favour of revenue]

Ashapura Minichem Ltd. v. Asstt. DIT (International Taxation) [2011] 131 TTX 291/ 40 SOT 220(Mum.)

22. Where assessee entered into an agreement with US based copyright holder (TFI) for sale and distribution of cinematographic films on DVD and VCD royalty paid to CTFI did not fall within definition of ‘royalty’ under explanation 2 to section 9(1)(vi) as such payment was not made for any TV or radio broadcasting but was meant for rental, distribution and sale of DVD and VCD [Assessment Year 2003-04] [in favour of assessee]

Asiavision Home Entertainment (P)Ltd., v. Asstt. CIT [2010] 37 SOT 111/133 TTX 354(Mum.)

23. Where assessee, engaged in business of TV broadcasting and software development, hired transponders from non-resident company and paid hire charges for utilization of transponders and up linking services, since possession, rights and control over transponders were with that company, merely because satellite was owned by another company would not change color payment of hire charges which would remain as royalty.

Asianet Communications Ltd. v.Dy. CIT [2010] 38 SOT 158 (Chennai)

24. Mere passing of information concerning design of a machine which is tailored made to meet requirement of a buyer does not by itself amount to transfer of any right of exclusive user so as to term the payment made therefor as royalty.

ITO v. Patwa kinirawala electronics Ltd [2010] 40 SOT 148 (Ahd.)

25. Sale of ‘off-shelf shrink wrapped software’ in India is only sale of copies of copyrighted articles and as such income there from is not royalty under Income Tax Act or DTAA

Velankani Mauritius Ltd. v. Dy. CIT [IT] [2010] 40 SOT 33 (URO) (Bang.)
26. Where assessee was a tax resident of Singapore and activities of Assessee comprised dissemination of information with respect to various markets including equity market etc., subscription fees received by the assessee had to be assessed as business income as per the provisions of the DTAA and the same can not be treated as FTS or royalty for use of equipments.

**TIS two administration (Singapore) Pte Ltd. V. Dy. DIT (IT) [2010] 40 SOT 16 (Mum.) (URO)**

27. Payments made by the assessee company i.e., television channel to non-resident satellite companies for transmission of data and software through uplink and down link services, constitute royalty under section 9(1)(vi) and therefore payments so made are liable for TDS

**ITO (TDS). V. India Vision Satellite communications Ltd. [2010] 41 SOT 515 (Cochin)**

28. Where assessee, a non-resident company, entered into an agreement with NHAI to provide only consultancy services in formation of four lane road as per terms of agreement, assessee incurred certain expenditure on behalf of NHAI which was later on, reimbursed, reimbursable expenditure could not be treated as part of fees payable for technical services.


29. Where technical services received from foreign party were utilized by the aseesee in India, even if foreign party did not have a PE in India, payment of FTS was taxable in hands of foreign party as per deeming provisions of section 9(1)(vii) amnd hence TDS was deductible

**Indian summer.v. Assstt. CIT [2010] 4 ITR (Trib)181 (Del.)**

30. Payment towards reimbursement of expenses by assessee payer to non-resident payee would not be in the nature of income and resultantly would not be taxable in hands of payee and assessee would not be liable to deduct tax at source u/s.195

**Nathpa Jhakari Joint venture. V. Asstt. CIT [2010] 37 SOT 160**

31. No Deduction of tax was required from payments made by the assesse to its non-resident parent company in respect of expenditure incurred by latter in connection with business activity carried on by assesse in India, these payments were only reimbursement of Expenses


32. Where payment in question had been made by assesse to an individual resident in India in respect of purchase of land which belonged to non-resident but rights therein were assigned unequivocally to said resident as per power of attorney holder, such payment could not be regarded as payment to non-resident so as to require TDS u/s.195

**Rakesh Chauhan v. Dy. DIT (IT)[2010] 128 TTJ (chd.) 116**

33. If a payer has a bona fide belief that no part of payment has income character, then section 195(1) will not apply because section 195 will apply only if payment is chargeable to tax, either wholly or partly, it is payer who will first consider whether any payment or any part of it bears income character and if the answer is negative, it is not mandatory for him to undergo procedure of section 195(2) before making the payment

**ITO v Prasad Production Ltd.[2010] 125 ITD 263(Chennai)(SB)**

34. Provisions of section 195 indicate that payer has to demonstrate basis of his bona fide belief that no part of payment is chargeable to tax in hands of payee, that payer has to demonstrate his bona fide reason for non filing of application u/s.195(2) and if not established provisions of section 201(1) and 201(1A) will be attracted (Case remanded)
IOT . v Asiatic Color Chem Ltd [2010] 41 SOT 21 (Ahd) (URO)

35. Where entire activities of Assessee US company India were carried out by wholly owned Indian subsidiary as an agent and ultimate responsibility lay with assessee and further said Indian agent had not been remunerated at arm’s length price basis, it was to be held that assessee had PE in India in respect of its operations and services being carried out by its Indian subsidiary

eFunds Corp. V. Asstt DIT[ 2010] 42 SOT 165(Del.)

36. Where as per end user license agreement (EULA), end users had not purchased copy of software products on electronic media but a license was granted to them to use such software products, payments made by end users were for granting of license in copyright and other intellectual property rights in product and said payment would amount to royalty u/s.9(1)(vi)

Consideration received in respect of transfer of all or any rights (inc. granting of a license) in respect of computer programme will be in nature of royalty

Gracemac Corp. V. Asstt DIT [ 2010] 42 SOT 550 (Del.)

37. Where assessee company incorporated in UK had undertaken a work contract for operation and maintenance of power plant for its owner through a contract and got paid a price for producing power, income so received for executing work contract would neither fall within definition of FTS under the Act nor under the DTAA.

Rolls Royce Industrial Power Ltd. V. Asstt CIT [ 2010] 42 SOT 264 (Del.)