

# CTR ENCYCLOPAEDIA ON INDIAN TAX LAWS

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## **GUY CARPENTER & CO. LTD. vs. ADDITIONAL DIRECTOR OF INCOME TAX**

ITAT, DELHI 'C' BENCH

C.L. Sethi, J.M. & K.G. Bansal, A.M.

ITA No. 2443/Del/2011; Asst. yr. 2006-07

30th September, 2011

(2011) 48 SOT 463 (Del)

### Legislation referred to

Section 9(1)(vii), DTAA between India & UK, art. 13,

### Case pertains to

Asst. Year 2006-07

### Decision in favour of

Assessee

**Double Tax Avoidance Agreement between India and UK—Fees for technical services—Assessee non-resident company incorporated in the UK operates as a recognized insurance broker in the UK, receiving commission from Indian insurance companies—AO treated the reinsurance commission receipts as taxable in India @ 15 per cent being "fees for technical services" vide para (4) of art. 13 of the tax treaty between India and UK as well as Explan. 2 to s. 9(1)(vii)—Payment of consideration would be regarded as fees for technical services only if the twin test of rendering services and making technical knowledge available at the same time is satisfied—In the present case, the New India Insurance Co. or other insurance company in India, who avails the services of the assessee as a broker in the process of the reinsurance of the risk is left with no technical knowledge, experience, skill, know-how or processes so as to bring the services rendered by the assessee within the ambit of art. 13(4)(c) of the treaty—Impugned sum is not taxable in India as "fees for technical services"—Addition to be deleted**

### Held :

It is an admitted position that the assessee is a tax resident of the UK and therefore, eligible to claim shelter under DTAA between India and UK to the extent more beneficial than the corresponding provisions of the IT Act, 1961, as so well-settled by decisions of various Courts.

(Para 24)

On going through the definition of "Fees for technical services" given in the DTAA between India and UK so as to find out whether the services rendered by the present assessee would fall under the purview of "Fees for technical services" as enumerated in art. 13(4) of DTAA between India and

UK, it is clear that Art. 13(4) emphasis on rendering any technical or consultancy services, which are ancillary and subsidiary to the application for enjoyment of any right, property or information for which a payment is received, or made available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of technical plan or technical design. In the present case, one is concerned with the scope of meaning of art. 13(4)(c) of Indo-UK Treaty, which emphasizes a rendering of any technical or consultancy services (including provisions of services of technical or other personnel), which made available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of technical plan or technical design.

(Para 28)

From the nature of services rendered by the present assessee as noted above, the services do not fit into either of the categories defined in art. 13, since the services rendered by the assessee do not involved technical expertise, nor did the assessee made available any technical know-how, experience, skill etc. What was being done by the assessee was basically acting as an intermediary in the process of finalization of reinsurer suggesting various options to the Indian insurance co. for their consideration and acceptance. From the agreement of services entered into by the assessee with Indian company for acting as an intermediary, it is clear that what was made available by the assessee to the Indian Insurance co. was advisory services and opinion for selection of re-insurer in the international market. It has been mentioned by the AO that the services provided by the assessee were consultancy in nature as it provides a host of financial analysis related consultancy services, rating agency advisory services, risk based capital analysis etc. on the basis of some observations found mentioned in the assessee's website but the AO has not been able to point out any material or evidence on the basis of which, it could be said that the consideration received by the assessee during the year under consideration is towards any financial analysis related consultancy services, rating agency advisory services, risk based capital analysis etc.

(Para 28.1)

The normal, plain and grammatical meaning of the language employed in the said art. 13(4)(c) is that a mere rendering of services is not roped in unless the person utilizing the services is able to make use of the technical knowledge, experience, skills, know-how or processes by himself in his business or for his own benefit and without recourse to the performer of the services in future. The technical knowledge, experience, skill, know-how or processes must remain with the person utilizing the services even after the rendering of the services has come to an end. A transmission of the technical knowledge, experience, skills, know-how or processes from the person rendering the services to the person utilizing the same is contemplated by the art. 13(4)(c) of the Indo-UK Treaty. Some sort of durability or permanency of the result of the "rendering of services" is envisaged which will remain at the disposal of the person utilizing the services. The fruits of the services should remain available to the person utilizing the services in some concrete shape such as technical knowledge, experience, skills, know-how or processes.

(Para 29)

By making available the technical skills or know-how and the like, the recipient of the service will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider. In other words, to fit into terminology "make available", the technical knowledge, skills, know-how or processes must remain with the person receiving the services even after the particular contract comes to an end. It is, thus, fairly clear that mere provision of technical services is not enough to attract art. 13(4)(c) of the Indo-UK Treaty. It additionally requires that the service provider should also make his technical knowledge, experience, skill, know-how etc. known to the recipient of the service so as to equip him to independently perform the technical function himself in future, without the help of the service provider. In other words, payment of consideration would be regarded as fees for technical services only if the twin test of

rendering services and making technical knowledge available at the same time is satisfied.—  
Raymond Ltd. vs. Dy. CIT (2003) 80 TTJ (Mumbai) 120 : (2003) 86 ITD 791 (Mumbai) **applied.**

(Para 29.1)

In the present case, the New India Insurance Co. or other insurance company in India, who avails the services of the assessee as a broker in the process of the re-insurance of the risk is left with no technical knowledge, experience, skill, know-how or processes so as to bring the services rendered by the assessee within the ambit of art. 13(4)(c) of the Treaty. As already observed above, the nature of services rendered by the assessee are also not in the nature of any technical or consultancy services which make available technical knowledge, experience, skill, know-how or processes to the user. We, therefore, hold that the payment received by the assessee in consideration for rendering intermediary or advisory services in the process of selecting re-insurer, cannot be qualified to be in the nature of fees for technical services as contemplated under art. 13(4)(c) of the DTAA between India and UK. Since the DTAA between India and UK applies to the present case and the benefit of the provisions contained in DTAA with UK are available to the assessee as so well settled, and since the payment received by the assessee is not qualified to be in the nature of fees for technical services within the meaning of art. 13(4)(c) of the treaty, we hold that the payment received by the assessee from the insurance co. in India, cannot be brought to tax in India as fees for technical services.—Invensys Systems Inc., In re (2009) (2009) 225 CTR (AAR) 113 : (2009) 27 DTR (AAR) 26 : (2009) 317 ITR 438 (AAR), Intertek Testing Services India (P) Ltd., In re (2008) 220 CTR (AAR) 540 : (2008) 16 DTR (AAR) 93 : (2008) 307 ITR 418 (AAR), R.R. Donnelley India Outsource (P) Ltd., In re (2011) 241 CTR (AAR) 305 : (2011) 56 DTR (AAR) 1 : (2011) 335 ITR 122 (AAR) and Asstt. CIT vs. Viceroy Hotel Ltd. (2011) 60 DTR (Hyd)(Trib) 1 **relied on.**

(Para 31)

In the light of the discussion made above, it is , therefore, held that the payment received by the assessee from Indian Insurance Co. in the process of reinsurance risk placed by Indian Insurance Co. with international reinsurance companies is not taxable in India as "fees for technical services". Therefore, the addition confirmed by the CIT(A) is deleted by setting aside the orders of the authorities below and allowing this appeal filed by the assessee.

(Para 33)

#### Conclusion :

Payments received by the UK resident assessee from Indian insurance companies by assessee, as a broker, is not engaged in the business of providing managerial and technical consultancy but said sums were received in the process of reinsurance risk placed by Indian insurance companies with international reinsurance companies, are not taxable in India as "fees for technical services" in terms of art. 13(4)(c) of the DTAA between India and UK.

#### In favour of :

Assessee

#### Case referred to

Real Resourcing Ltd., In re (2010) 230 CTR (AAR) 120 : (2010) 36 DTR (AAR) 132 : (2010) 322 ITR 558 (AAR)

#### Circular referred to

Circular No. 786, dt. 7th Feb., 2000

Counsel appeared :

Pavan Kumar & Amit Aggarwal, **for the Appellant** : Ashwani Kumar Mahajan, **for the Respondent**

## **ORDER**

**C.L. SETHI, J.M. :**

The assessee, namely, **Guy Carpenter** & Co. Ltd., a company incorporated in London, is in appeal against the order dt. 18th Feb., 2011 passed by the Commissioner of Income-tax (Appeal) [CIT(A)] in the matter of an assessment made by the AO under s. 143(3) of the IT Act, 1961, for the asst. yr. 2006-07.

**2.** The grounds of appeal raised by the assessee are as under :

1. "That on the facts and in the circumstances of the case and in law, the learned CIT(A)-XI [Learned CIT(A)] has erred in upholding the order of the learned AO treating the receipts which are in the nature of reinsurance brokerage/commission of the appellant amounting to Rs. 20,078,715, as fees for technical services and in holding that the same is taxable in India @ 15 per cent as per Art. 13 of the India United Kingdom (U.K) Double Tax Avoidance Agreement (DTAA).

2. That on the facts and circumstances of the case and in the law, the learned CIT(A) has erred in fact and in law by confirming the view of the learned AO that

2.1 The services provided by the assessee are consultancy in nature and the payments fall within the definition of fees for technical services within the meaning of s. 9(1)(vii) of the Act.

2.2 The consideration received by the appellant make available experience, skill of the appellant to the Indian Insurance Companies, accordingly, the payment is also covered by the definition of FTS available in para 4(c) of Art. 13 of the India U.K. DTAA.

3. That while upholding so, the learned CIT(A) failed to appreciate the contention of the appellate that

3.1 The receipts are in the nature of a 'transaction fee' not involving any technical or managerial service.

3.2 Without prejudice to the above, if the amount is treated as fee for technical services under s. 9 (1)(vii) of the Act, the same is not liable to tax in India under para 4(c) of Art. 13 of the India U.K. DTAA since it does not make available any technical knowledge, experience, skill, know-how or processes or consist of development and transfer of a technical plan or technical design.

4. Without prejudice to the above, whether on the facts and law, the learned CIT(A) erred in not deleting the levy of interest under s. 234B of the Act ignoring the provisions of s. 234B of the Act r/w ss. 191, 208 & 209 of the Act which does not provide for charge under s. 234B of the Act where the entire income is subject to deduction of tax at source.

That the appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of this appeal."

**3.** The grounds of appeal raised by the assessee revolve around the question as to whether nature of reinsurance brokerage/commission which assessable as fees for technical services within the meaning of s. 9(1)(vii) of the Act and/or Art. 13 of the India United Kingdom (U.K) Double Tax Avoidance Agreement (DTAA).

**4.** In this case, the assessee company filed its return of income in October, 2006 showing taxable income at Rs. nil. The case was selected for scrutiny and notice under s. 143(2) of the Act was issued on 26th Oct., 2007 and served upon the assessee. Assessee's Authorized Representative appeared before the AO and furnished the information as discussed in the assessment order.

**5.** In the computation of income, the assessee annexed a note stating that assessee company incorporated in the UK operates as a recognized insurance broker in the UK, and it is licensed to intermediate insurance business by the Financial Services Authority (FSA) of the UK.

**6.** It was noticed by the AO that, during the year, the assessee had received commission from the following persons :

S. No.	Name of the Payer	Amount (in GBP)
1.	New India Assurance Co. Ltd.	101,556
2.	Tata AIG General Ins. Co. Ltd.	32,328
3.	General Insurance Corp. of India	105,688
4.	Agriculture Ins. Co. of India Ltd.	974
5.	HDFC CHUBB General Ins. Co. Ltd.	3,985
6.	IFFCO Tokio General Ins. Co. Ltd.	10,569
7.	Oriental Insurance Co. Ltd.	638
8.	Others (Net)	-879
		254,859

**7.** As required by the AO, the assessee company had submitted a copy of agreement with New India Assurance Co. Ltd., Mumbai. This agreement was entered in conjunction with J.B. Boda Reinsurance Brokers (P) Ltd. and M.B. Boda and Alsford Page and Gems Ltd. The type of insurance is catastrophic excess of loss. In the case of New India Assurance Co. Ltd., the reinsurers are Hannover Ruckversicherung AG, CCR, Lloyd's Underwriter Syndicate, Swiss Re and Wurttembergische London.

**8.** In the course of assessment proceedings, the AO asked the assessee to explain the process of selecting the clients, and on what basis the clients are selected and furnished copy of correspondence with the clients and Indian intermediaries. The assessee submitted the required information which are extracted by the AO in his order, as under :

#### "Key Steps

(a) Originating insurer in India (New India) contacts J.B. Boda/M.B. Boda for placing identified risks/class of risks with international reinsurers.

(b) J.B. Boda contacts one or more international firms of reinsurance brokers outside India requesting for proposals from international reinsurers/syndicates.

(c) International reinsurance brokers like **Guy Carpenter** contact other primary brokers and various syndicates in the Lloyds market for competitive proposals.

(d) Based on the various offers received J.B. Boda presents the various options to New India which makes the final decisions. Based on the decisions made by New India the policy terms are agreed and the risk is placed with the Lloyds market. Further, as per normal industry practice the reinsurance premium net of brokerage of 10 per cent as per the policy contract is remitted to **Guy Carpenter** for onward transmission to the reinsurers in the Lloyds market.

(e) Separately the intermediation fee (brokerage) is remitted by New India to J.B. Boda, **Guy Carpenter** and other Indian and overseas intermediaries based on a mutually agreed ratio which accounts for their relative contribution in the reinsurance process. Typically however, the Indian and overseas reinsurance intermediaries would share the total brokerage income equally. It may however, be noted that in any reinsurance transaction more than one insurance intermediary may be involved at the India and overseas level. For e.g. in the illustrative transaction the Indian brokers involved were J.B. Boda & M.B. Boda and international brokers involved are **Guy Carpenter** & Alsford Page and Gems Ltd."

**9.** The assessee also submitted the information about the visit of his employees to India during financial years 2004-05, 2005-06 and 2006-07 and contended before the AO that there was occasional business visits by two or three personnel in India to maintain general business awareness and reinforce business contracts/relationships in India for 15 calendar days (Solar days) in a year (aggregating to 45 man days), neither of which meet the time threshold provided in Art. 5(2)(k) of the India U.K. tax treaty. The AO then collected the certain information from the website of the company and directed them in para 3.4 of his order.

**10.** The AO then had taken note of the expression "fees for technical services" as defined under s. 9(1)(vii) of the Act and also under Art. 13 of the tax treaty between the India and U.K. The AO then issued a notice to the assessee to explain as to why not the income received by assessee, be taxed as "fees for technical services" both as per the provisions of the tax treaty and the IT Act. In reply thereto, the assessee submitted its reply vide letter dt. 15th Dec., 2008, which has been reproduced by the AO in para 4 of his order. The assessee contended that in the light of the explanation given by the assessee, the commission income would not qualify as fees for technical services under the IT Act, 1961 nor under the provisions of Art. 13 of the Indo-UK tax treaty.

**11.** The AO then issued a notice under s. 133(6) to New India Insurance Company Ltd. to provide certain information. The following information were submitted by the company as reproduced by the AO in para 4.1 of his order :

(1) "Officials from **Guy Carpenter** visit our office occasionally. Normally they visit us along with Foreign Insurers/Reinsurers who are transacting business with us through **Guy Carpenter**.

(2) They do not make any presentations during the meetings but the proposals for reinsurance is done through the broker (**Guy Carpenter**) who places business with the reinsurer for the ceding company. These proposals are sent through post/ mail.

(3) Accounts are received through the broker and the related correspondence is done only with the broker. The correspondence/accounts for the last six months would be very voluminous and it will take us some time to extract the information.

(4) The proposal presentations from Brokers/Reinsurers always help in better understanding the

nature of business, international market, trends and the impact of global phenomena.

(5) Normally the payments are done from our Foreign Currency bank account in London/New York if the payments are done directly to **Guy Carpenter**. If the business is co-broked by J.B. Boda payment is done to J.B. Boda."

**12.** After considering the assessee's contention and the materials on record, the AO opined that the services provided by the assessee are consultancy in nature and payments received by the assessee would fall within the definition of fees for technical services as defined under Expln. 2 to s. 9(1)(vii) of the Act as well as vide para (4) of Art. 13 of the tax treaty between India & U.K. The AO's conclusion in this regard are as under :

After enumerating the facts in brief, now the contentions of the assessee are discussed hereunder :

(i) The assessee has referred to the decision of Hon'ble Madras High Court in the case of Skycell Communications Ltd. & Anr. vs. Dy. CIT (2001) 170 CTR (Mad) 238 : (2001) 119 Taxman 496 (Mad). The decision was with regard to payment by the subscribers for availing cellular telephone services and the applicability of s. 194J of the act was the issue. The Hon'ble Court held that these are the standard services availed by the subscribers and provisions of s. 194J will not apply. The facts are different; therefore, the ratio of this decision is not applicable.

(ii) The assessee has further claimed that the services related to commission or brokerage are covered by s. 194H of the Act, therefore, provisions of s. 9(1)(vii) will not apply. This contention is misplaced, because the provisions of ss. 194H and 194J are for the purpose of deduction of tax out of payments to resident. These sections do not characterize the income. The assessee on its website did not claim that it is a broker, but the same states that it provides assistance, advise, studies, reduce etc. and also a host of financial analysis-related consultancy services, rating agency advisory services, risk based capital analysis. Therefore, the services of the assessee are more of advisory/consultancy in nature, therefore, this contention of the assessee is also not acceptable.

(iii) The assessee has referred to the definition of fees for technical services and emphasis has been laid on the applicability of make available clause. It has also compared the contents of the Indo-UK tax treaty with Indo-US tax treaty and has also referred to the MoU appended to the DTAA with USA. It has also referred to the decision of Hon'ble Tribunal, Bombay in the case of Raymond Ltd. and also the decision of Kolkata High Court in the case of SESC Ltd. and decisions in other cases.

In the case of the assessee, it is clear that it provides advisory/consultancy services and New India (Customer), has submitted that the proposals/presentations from brokers/reinsurers always help in better understanding the nature of business, international market trends etc. It is the advise and services provided by the persons like assessee, the Indian insurance companies understands the complexities involved in the reinsurance, it helps them to analyse the risks and ultimately in selecting the appropriate reinsurance company. The assessee has developed the quantitative and modelling skills and its extensive reinsurance services provides essential resources for clients looking to capitalize on trends, enhance their risk management and make informed business decisions. Therefore, it is clear that the advisory/consultancy services of the assessee make available the necessary skills, knowledge, experience to the recipient of services.

Accordingly, considering the facts of the case of the assessee, the consideration received by it is taxable as fees for technical services and the authorities cited by the assessee are distinguishable on facts.

In view of these facts, the services provided by the assessee are consultancy in nature and the payments fall within the definition of fees for technical services available in Expln. 2 to s. 9(1)(vii)

of the Act. The consideration received by the assessee make available experience, skill of the assessee to the Indian insurance companies, accordingly, the payment is also covered by the definition of fees for technical services available in para 4(c) of the Art. 13 of the tax treaty between India and U.K. Accordingly, such payments are made by the Indian companies, therefore, the fees for technical services is deemed to arise in India as per provisions of para 7 of Art. 13 and such fees for technical services is taxable at a reduced rate of 15 per cent of the gross amount of fee.

The gross receipts of the assessee are GBP 258,663, which works out to Rs. 20,078,715 (Exchange rate of INR 77.625). These receipts are taxable @ 15 per cent as per the provisions of tax treaty and accordingly, tax is worked out at Rs. 3,011,807."

**13.** Being aggrieved with the AO's order, the assessee preferred an appeal before the learned CIT (A).

**14.** Before the learned CIT(A) the assessee submitted that services provided by the assessee were not in the nature of technical services within the meaning of Expln. 2 to s. 9(1)(vii) of the Act as well within the meaning of Art. 13 of tax treaty between India and UK. It was further submitted that the income received by the assessee by way of commission from insurance companies is in the nature of brokerage and does not constitute fees for technical services as the assessee, as a broker, is not engaged in the business of providing managerial and technical consultancy.

**15.** After examining the AO's order and assessee's submission, learned CIT(A) hold that the payments received by the assessee would fall within the scope of fees for technical services as defined under s. 9(1)(vii) of the Act r/w Art. 13 of the treaty. The learned CIT(A) observed that if plain meaning or literal interpretation is given to the definition of fees for technical services as defined under Expln. 2 to s. 9(1)(vii) of the Act and also under Art. 13 of Indo-UK treaty, it would clear that the amount received by the assessee from Insurance Company is in the nature of fees for technical services. The operative portion of learned CIT(A) order in this regard is as under :

"2.5 The rule of 'plain meaning' or 'literal interpretation' described in Maxwell's Interpretation of Statute as 'the primary rule' could not be altogether abandoned today in interpreting any document. It is said that the length and detailed of modern legislation, has undoubtedly reinforced the claim of literal construction as the only safe rule. The object of interpretation and of construction is to discover the intention of the law maker in every case. This object can, obviously, be best achieved by first looking at the language used in the relevant provisions. Other methods of extracting the meaning can be resorted to only if the language used is contradictory, ambiguous or leads really to absurd results.

2.6 The appellant has referred the case of Cushman & Wakefield (supra). Cushman was an internationally famed real estate broker. In the present case, the services provided are different and the factual finding as established by the AO would also speak for itself regarding creating the same as FTS. In Azadi Bachao (supra) nowhere it was stated that there should not be literal interpretation of the agreement entered upon between the two States and hence this example will not fortify the grounds of the appellant. Examining it from any point of view be it from taxation statute or from the agreement entered upon by two countries, there is no escapement from the fact that the receipt shown by the appellant is exclusively in the nature of FTS. The fact that the employees of the other personnel of the appellant visit India and the proposals are submitted by them, the content of the website as given by the appellant (which established both form and the subject-matter of the case under review), providing the client deep technical insides and transaction capabilities by line of business, providing various services under the head 'Current market intelligence' would prove beyond any iota of doubt that the payments under question would fall within the ambit of s. 9(1)(vii) r/w para 4(c) of the Art. 13. I find no merit in the argument of the appellant and thereby the action of the AO is sustained."

**16.** Hence, the assessee is in further appeal before the Tribunal.

**17.** In the course of hearing of this appeal, the learned counsel for the assessee highlighted the activities undertaken by the assessee with regard to the process of reinsurance of the risks placed by Indian Insurance Companies with International Reinsurance Companies and has explained the background of the activities undertaken by the assessee for earning reinsurance brokerage income by the assessee from Indian Insurance Companies. In this regard, he invited our attention to the assessee's submission dt. 26th Dec., 2007 filed before the AO during the course of assessment proceedings. The assessee also invited our attention to the assessee's submission dt. 12th June, 2008, 4th Sept., 2008, 22nd Nov., 2008, 15th Dec., 2008, 19th Dec., 2008 filed before the AO. The learned counsel for the assessee also drew our attention to the submission dt. 9th Feb., 2011 filed before the learned CIT(A). In these submissions, filed before the AO as well as before learned CIT(A) the assessee has explained the activities undertaken by the assessee company to earn brokerage income received from Indian Insurance Companies on account of services of reinsurance inter-mediation rendered outside India. The learned counsel for the assessee then explained that the amount of commission received by the assessee for the services of reinsurance of inter-mediation rendered outside India would not qualify as fee for technical services as defined under Expln. 2 to s. 9(1)(vii) of the Act or under Art. 13 of the Indo-UK treaty. In this respect the learned counsel for the assessee has relied upon the following decisions :

(i) Raymond Ltd. vs. Dy. CIT (2003) 80 TTJ (Mumbai) 120 : (2003) 86 ITD 791 (Mumbai)

(ii) Real Resourcing Ltd., In re (2010) 230 CTR (AAR) 120 : (2010) 36 DTR (AAR) 132 : (2010) 322 ITR 558 (AAR).

**18.** The learned Departmental Representative on the other hand, merely relied upon the orders of the authorities below and reiterated their respective orders.

**19.** We have heard both the parties and perused the material on record. We have gone through the orders of the authorities below as well as various papers and documents placed in the paper book filed by the assessee.

**20.** In this case, we are concerned with the question as to whether payments received by the assessee in consideration of services rendered to Insurance Co. in India in the process of reinsurance of the risk placed by Indian Insurance Co. with international reinsurance companies is amounted to "fees for technical services" within the meaning of the same under the DTAA between India and U.K. It is, therefore, appropriate to have a look at the relevant provisions defined in the IT Act as well under the treaty between India and U.K.

**21.** The expression "fees for technical services" is defined under Expln. 2 of cl. (vii) of sub-s. (1) of s. 9 which reads as under :

9(1) the following incomes shall be deemed to accrue or arise in India—

(vii) income by way of fees for technical services payable by—

(a) the Government; or

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

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

any income from any source in India :

Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.

Explanation 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before the date.

Explanation 2.—For the purposes of this clause, fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

(2) Notwithstanding anything contained in sub-s. (1), any pension payable outside India to a person residing permanently outside India shall not be deemed to accrue or arise in India, if the pension is payable to a person referred to in art. 314 of the Constitution or to a person who, having been appointed before the 15th Aug., 1947, to be a Judge of the Federal Court or of a High Court within the meaning of the Government of India Act, 1935, continues to serve on or after the commencement of the Constitution as a Judge in India.

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under cl. (v) or cl. (vi) or cl. (vii) of sub-s. (1) and shall be included in the total income of the non-resident, whether or not,—

- (i) the non-resident has a residence or place of business or business connection in India; or
- (ii) the non-resident has rendered services in India.

**22.** The assessee is admittedly a non-resident, being a company incorporated in London and, therefore, the treaty under DTAA between India & UK is applicable to the present case. We, therefore, find it proper to refer to the definition of fees for technical services as defined under Art. 13 of the treaty between India and UK, which reads as under :

Article 13—Royalties and fees for technical services—

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the law of that State; but if the beneficial owner of the royalties or fees for technical services is a resident of the other Contracting State, the tax so charged shall not exceed :

(a) in the case of royalties within para 3(a) of this articles, and fees for technical services within paras 4(a) and (c) of this article,—

(i) during the first five years for which this Convention has effect;

(aa) 15 per cent of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the first mentioned Contracting

State or a political sub-division of that State, and

(bb) 20 per cent of the gross amount of such royalties or fees for technical services in all other cases; and

(ii) during subsequent years, 15 per cent of the gross amount of such royalties or fees for technical services; and

(b) in the case of royalties within para 3(b) of this Article and fees for technical services defined in para 4(b) of this article, 10 per cent of the gross amount of such royalties and fees for technical services.

3. ....

4. For the purposes of para 2 of this article, and subject to para 5, of this Article, the term "fees for technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services of a technical or other personnel which :

(a) are ancillary and subsidiary to the application of enjoyment of the right, property or information for which a payment described in para 3(a) of this article is received; or

(b) are ancillary and subsidiary to the enjoyment of the property for which a payment described in para 3(b) of this article is received; or

(c) make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.

5. The definition of fees for technical services in para 4 of this Article shall not include amounts paid :

(a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property, other than property described in para 3(a) of this article;

(b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships, or aircraft in international traffic;

(c) for teaching in or by educational institutions;

(d) for services for the private use of the individual or individuals making the payment; or

(e) to an employee of the person making the payments or to any individual or partnership for professional services as defined in Art. 15 (Independent personal services) of this Convention.

6. ....

7. ....

8. ....

9. ....

**23.** The meaning and scope of the words "fees for technical services" appearing in Art. 13.4(c) of

the DTAA with UK has been explained by the Income Tax Tribunal, Mumbai Bench, 'C' in the case of Raymond Ltd. vs. Dy. CIT (supra) by observing and holding as under :

"90. Having thus, held that the UK agreement of 1993 was rightly applied by the AO, we now proceed to a consideration of the question as to the meaning and scope of Art. 13.4 of the same. On a very careful consideration of the rival contentions which were, with respect, presented before us with admirable clarity, ability and assiduity by both sides, we find ourselves persuaded to agree with the assessee's contentions with regard to the interpretation to be placed on the aforesaid article. The language used in the article, first of all, excludes 'managerial services'. We have therefore, to interpret the 'technical and consultancy' services. The article may be extracted below :.....

The definition of 'technical services' in Art. 13.4 of the earlier DTA agreement with UK, which was superseded by the 1993 agreement, was similar to the language employed in s. 9(1)(vii) of the Income tax Act, 1961 and included 'managerial' services. But in the subsequent agreement in 1993, the Art. 13.4(c) used different language as may be seen. It dropped the 'managerial' services. There are also significant additions. It is however common ground that Art. 13.5 does not apply. We should also keep in view the gentle but firm reminder of Mr. Dastur that in the meantime (1990) India had entered into a DTA with USA and also a MoU thereunder in which the parties thereto had understood the definition in a particular way and there was no reason why the parties would not have intended to give the same meaning to the identical definition in the subsequent DTA with UK. There is a good deal of sense and logic in the argument because it is difficult to postulate that the same country (India) would have intended to give different types of treatment to identically defined services rendered by entrepreneurs from different countries. There must be strong and incontrovertible evidence to show such an intendment. We have not been referred to any such evidence on behalf of the Revenue. Thus, not only is there a significant departure from the language employed in the first DTA agreement (which was similar to the IT Act) but the departure has also been explained and understood in a particular manner with reference to the US agreement where also the language employed in the concerned article is similar in substance with that employed in the second UK agreement. To, therefore, understand the meaning and scope of the concerned article in the same manner as one would understand the relevant provisions of the IT Act—as suggested on behalf of the Department before us—would be totally off the mark.

91. Now, we have to see if the meaning ascribed to the words 'make available' by Mr. Dastur is acceptable or reasonable. Whereas s. 9(1)(vii) stops with the 'rendering' of technical services, the DTA goes further and qualifies such rendering of services with words to the effect that the services should also make available technical knowledge, experience, skills etc. to the person utilizing the services. These words are 'which make available'. The meaning ascribed by Mr. Kapila for the Department is that these words merely mean 'to allow somebody to make use of, whether actually made use of or not', but in our opinion and with respect, this meaning does not take due note of the addition of such words to the 'rendering of any technical or consultancy services'. The meaning suggested by Mr. Kapila is embedded in the 'rendering of the services itself. When somebody 'renders' services, it presupposes that somebody else is 'making use' of the same. But the 'making use of' should be contrasted with the 'making available'. The 'making available', in our opinion, refers to the stage subsequent to the 'making use of' stage. The qualifying word is 'which'—the use of this relative pronoun as a conjunction is to denote some additional function the 'rendering of services' must fulfil. And that is that it should also 'make available' technical knowledge, experience, skill etc. In grammar, the word 'which' is called a relative pronoun 'because it refers or relates (i.e. carries us back) to some noun going before, which is called its Antecedent' (see High School English Grammar and Compositions by Wren and Martin (1994) revised edition, p. 45). The noun going before the relative pronoun 'which' in the article is 'services'. At pp. 46 and 47 of the same book by Wren and Martin, it is stated as under :

"Note—The relative pronouns 'who' and 'which' can be used

(i) To restrict, limit, or define more clearly the antecedent;.....

(ii) To give some additional information about the antecedent;.....

(italicized ours)

92. We hold that the word 'which' occurring in the article after the word 'services' and before the words 'make available' not only describes or defines more clearly the antecedent noun ('services') but also gives additional information about the same in the sense that it requires that the services should result in making available to the user technical knowledge, experience, skill, etc. Thus, the normal, plain and grammatical meaning of the language employed, in our understanding, is that a mere rendering of services is not roped in unless the person utilizing the services is able to make use of the technical knowledge etc. by himself in his business or for his own benefit and without recourse to the performer of the services in future. The technical knowledge, experience, skill etc. must remain with the person utilizing the services even after the rendering of the services has come to an end. A transmission of the technical knowledge, experience, skills etc. from the person rendering the services to the person utilizing the same is contemplated by the article. Some sort of durability or permanency of the result of the 'rendering of services' is envisaged which will remain at the disposal of the person utilizing the services. The fruits of the services should remain available to the person utilizing the services in some concrete shape such as technical knowledge, experience, skills etc.

93. In the present case, as Mr. Dastur pertinently pointed out, after the services of the managers (Merrill Lynch and other co-managers) came to an end, the assessee-company is left with no technical knowledge, experience, skill etc. and still continues to manufacture cement, suitings etc. as in the past.

94. The Memorandum of Understanding appended to the DTAA with USA and the Singapore DTA can be looked into as aids to the construction of the UK DTA. They deal with the same subject (fees for technical services, referred to in the US agreement as 'fees for included services'). As noted earlier, it cannot be said that different meanings should be assigned to the US and UK agreements merely because of the MOU despite the fact that the subject matter dealt with is the same and both have been entered into by the same country on one side (India). The MOU supports the contention of the assessee regarding the interpretation of the words 'make available'. The portions of the MOU explaining para 4(b) of the relevant article, which we have extracted earlier in our order while adverting to the contentions of the assessee, fully support its interpretation. Example (4) given in the MOU also supports it. This is of a US company manufacturing wallboard for the assessee using assessee's raw material but using its own plant. No technical knowledge, experience, skills, plan or design is held to have been made available in such a case. However, in contrast, example (5) is of a US company rendering certain services in connection with modifying the software used by the Indian company to suit a particular purpose. A modified computer software programme is supplied by the US company to the Indian company. It is, therefore, held that there is a transfer of a technical plan (i.e. computer software) which the US company has developed and made available to the Indian company. The fees are chargeable. These examples affirm the position taken by the assessee company before us as to the interpretation of the words 'make available'.

95. Article 12.4(b) of the DTA with Singapore was relied on by both sides—by Mr. Dastur to show that the words sued therein, viz. 'if such services....make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein...' merely make it explicit what is meant by 'make available' while Mr. Kapila contended that these words being absent in the DTA with UK, it indicates that the assessee-company need not be in a position to apply the technology for its own use in future without recourse to the person rendering the services. On a careful consideration of the matter, we are of opinion that the addition of these words in the Singapore DTA merely make it explicit what is

embedded in the words 'make available' appearing in the DTA with UK and USA. The MoU under the US DTA and the examples given there under, to which we have already referred, make it clear. The meaning of those words were expressly incorporated in the Singapore agreement by adding the necessary words. What would be the use of coining the words "make available" if it is not intended, as contended by Mr. Kapila, that the person utilizing the services should be in a position to apply the technology for his own use in his business in future without recourse to the person rendering the services? Would it not be a contradiction in terms to say that though the technical knowledge etc. are 'made available', the person to whom they are made available cannot apply the same for his benefit? The treaties, in our opinion, could not have intended such a result. What was therefore, implicit in the concerned articles in the UK and US DTAs was made explicit by adding the necessary words in the Singapore agreements. As Mr. Dasture rightly remarked, it is a process of evolution guided by experience and what started in 1990—the DTA with the US—as a MoU gradually crystallized and got incorporated in the article itself in the DTA with Singapore.

96. Contrast the definition of 'fees for technical services' in art. 3(b) of the DTA with Belgium, art. 13.4 of the DTA with Canada, art. 13.4 of the DTA with Denmark and art. 13.4 of the DTA with Sweden. In all these articles, the definition is substantially the same as in the superseded DTA with UK and in s. 9(1)(vii) of the IT Act. Thus, a different intention has been expressed in these articles, which include managerial services within the fold of technical services and also do not contain words indicating that the rendering of services should 'make available' technical knowledge, experience, skill etc. We cannot give the same meaning to words differently defined in two sets of DTAs, which would be the result if we accept what has been argued before us on behalf of the Department.

97. For the above reasons, we are of the considered opinion that (1) the DTA with UK applies to the present case and (2) no technical knowledge, experience, skills, know-how or process etc. was 'made available' to the assessee-company by the non-resident managers to the GDR issue (Merrill Lynch and others) within the meaning of art. 13.4(c) of the DTA.

What happens if the DTA with UK is applicable?

98. We now proceed to consider the consequence of our conclusion that the DTA with UK is applicable to the present case.

99. It was very fairly stated by Mr. Kapila, learned Representative for the Revenue, that if the DTA is held applicable, then no part of the fees for 'managerial services' can be considered as fees for technical services, since the word 'managerial' does not find a place in the article concerned. There can be no two opinions about his view. We, therefore, hold that the "management commission" of US\$ .0938 per GDR cannot be charged to tax in the hands of Merrill Lynch to whom the same is paid. The assessee-company consequently was under no obligation to deduct tax under s. 195. We hold accordingly.

100. As regards the 'underwriting commission', in view of the foregoing discussion, we have to hold that no technical knowledge, etc. was made available to the assessee company by the rendering of the underwriting services and therefore, the definition in the DTA is not applicable.

101. As regards 'selling concession' or 'selling commission', Mr. Dastur relies on Circular No. 786, dt. 7th Feb., 2000 [(2000) 158 CTR (St) 61] (copy placed at pp. 318-319 of the paper book filed by the assessee) to contend that it is not income in the hands of the recipient. We have gone through the circular. It is applicable to export commission paid by an assessee to a non-resident for services rendered by the latter outside India. The CAG had raised an objection that since no tax was deducted from the commission by the resident, s. 40(a)(i) of the Act applied and the commission cannot be allowed in the assessment as a deduction. The Board, following its earlier circular issued in 1969, took the view that the commission cannot be considered as income arising to the non-resident agent operating outside India and, therefore, no tax was deductible under s.

195. The viewpoint was explained to the CAG who had agreed to drop the objection.

102. The circular prima facie appears to support the assessee but we are unable to give effect to the same in the view we have taken regarding the interpretation of the words 'technical services' appearing in s. 9(1)(vii) r/w Exln. 2. It may be recalled that we have taken the view that the services rendered by the lead manager and other managers in connection with the GDR issue shall be considered as 'managerial' or 'consultancy' services. The circular would appear to take a contrary view. However, the circular has no application where the interpretation of the relevant article in the DTA is involved. It has been issued in connection with s. 195 of the Act. In the view we have taken of the import of the words 'make available' appearing in art. 13.4(c) of the DTA with UK, it is unnecessary for us to dilate on the circular further. In fact, the reference to the circular in connection with the interpretation of the said article, with respect, would appear to be out of place.

103. For the above reasons, we hold that neither the management commission, nor the underwriting commission nor even the selling commission/concession would amount to fees for technical services within the meaning of the DTA with UK and consequently there is no obligation on the part of the assessee-company to deduct tax under s. 195."

**24.** Now, we revert to the facts of the case and decide the issue in the light of meaning of "fees for technical services as noted above. It is an admitted position that the assessee is a tax resident of the U.K. and therefore, eligible to claim shelter under DTAA between India and U.K. to the extent more beneficial than the corresponding provisions of the IT Act, 1961, as so well settled by decisions of various Courts.

**25.** The assessee company is an International reinsurance intermediaries (brokers) and is a tax resident of United Kingdom. It is a recognized "broker" of the financial services authority of UK. It is an admitted position that assessee does not maintain any office in India. It has been stated by the assessee that assessee maintains strong relationships with the International reinsurance market, which is concentrated in London (Lloyds market) and elsewhere including Europe Switzerland/Germany/France) and also Japan. The assessee has submitted that assessee has a referral relationship with J.B. Boda Reinsurance Brokers (P) Ltd. of Mumbai. J.B. Boda is duly licensed by Insurance Regulatory & Development Authority to transact reinsurance business in India.

**26.** During the year under consideration the assessee received from Indian clients total commission amounting to GBP 2,54,859 equivalent to Rs. 20078715 (exchange rate of INR 77625) for the alleged services of reinsurance inter-mediation rendered outside India. During the year, the assessee was engaged by certain Indian Insurance Companies to help place reinsurance business in the International market. During the course of assessment proceedings, the assessee submitted a copy of agreement with the New India Insurance Company Ltd., Mumbai. The said agreement is entered in conjunction with J.B. Boda Reinsurance Brokers P. Ltd. and M.B. Boda and Alsford Page and Gems Ltd. By this agreement, the New India Insurance Company placed the risks for Reinsurance with the International Reinsurance Company. The reinsurer is Hannover Ruckversicherung AG, CCR, Lloyd's Underwriter Syndicate, Swiss Re and Wurttembergische, London. In this agreement, it is stated that Slip Policy shall be submitted by this assessee company to Axis for Signing. This Slip Policy constitutes a full taxed Slip Policy wording and shall be sealed by the Bureau where applicable in accordance with the provisions as stated under the form. Before the AO, the assessee explained key steps in placing risks by the Indian Insurance Companies with International reinsurers, which has already been set out above in para 8 of this order. The originating insurer in India used to conduct J.B. Boda/M.B. Boda for placing identify risks/class of risks with International reinsurers, and J.B. Boda in turn contacts one or more International firms of reinsurance brokers like assessee, for competitive proposals from international reinsurers. International reinsurance brokers like present assessee contact other primary brokers and various syndicates in the Lloyds market for competitive proposals. Based on the various offers or proposals given by International Reinsurance Brokers to J.B. Boda, J.B. Boda presents the various options to

originating Insurer in India, which makes the final decision. Based on the decisions made by the originating insurer in India, the policy terms are agreed and the risk is placed with the International Reinsurers. As per normal industry practice, the reinsurance premium net of brokerage of 10 per cent as per the policy contract has been remitted to the assessee, reinsurance broker, for onward transmission to International Reinsurers. Separately, the inter-mediation fee (brokerage) is remitted by originating insurer in India to J.B. Boda, the assessee and other International Intermediaries based on a mutually agreed ratio which accounts for the relative contributions in the reinsurance process. In the illustrative transaction with New India Insurance Company Ltd., the Indian Broker involved were J.B. Boda and M.B. Boda and International Brokers involved are assessee and Alsford Page and Gems Ltd.

**27.** In the illustrative transaction, New India Insurance Co. Ltd. In India has entered into an agreement to reinsure on an Excess Loss basis the catastrophe risk arising from its primary insurance cover in conjunction with J.B. Boda and Alsford Page and Gems Ltd. (the reinsurance brokers). The terms of the agreement specifies that the assessee in conjunction with J.B. Boda are recognized as intermediary, through whom all communications relating to this agreement shall pass. The terms of the agreement further provides that the assessee will provide all the details of agreed endorsements to the reinsurers by e-mail or facsimile and shall submit the slip policy to XIS (Lloyd's processing market) for signing. The assessee will act as a claim administrator and will submit claims advises to relevant market systems. For the services rendered, the assessee along with the other reinsurance brokers acting as an intermediary in the reinsurance process for New India Assurance Co. will be entitled to 10 per cent brokerage. From the role played by the assessee in the reinsurance process as discussed above, it is evident to us that the assessee was rendering only intermediary services while acting as an intermediary/facilitator in getting the reinsurance cover for New India Insurance Co. There exists no material or basis on the basis of which, it could be said that the assessee was rendering any kind of technical/consultancy service within the meaning of Art. 13 of Indo-UK treaty. The consideration received by the assessee acting as an intermediary in the reinsurance process cannot, by any stretch of imagination, be qualified as a consideration received for rendering any financial analysis related consultancy services, rating agency advisory services, risk based capital analysis etc. as alleged by the AO.

**28.** On going through the definition of "Fees for technical services" given in the DTAA between India and UK so as to find out whether the services rendered by the present assessee would fall under the purview of "Fees for technical services" as enumerated in Art. 13(4) of DTAA between India and U.K., it is clear that Art. 13(4) emphasis on rendering any technical or consultancy services, which are ancillary and subsidiary to the application for enjoyment of any right, property or information for which a payment is received, or made available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of technical plan or technical design. In the present case, we are concerned with the scope of meaning of Art. 13(4)(c) of Indo-UK Treaty, which emphasizes a rendering of any technical or consultancy services (including provisions of services of technical or other personnel), which made available technical knowledge, experience, skill, know-how or processes or consist of the development and transfer of technical plan or technical design.

**28.1** From the nature of services rendered by the present assessee as noted above, the services do not fit into either of the categories defined in Art. 13, since the services rendered by the assessee do not involved technical expertise, nor did the assessee made available any technical know-how, experience, skill etc. What was being done by the assessee was basically acting as an intermediary in the process of finalization of reinsurer suggesting various options to the Indian Insurance Co. for their consideration and acceptance. From the agreement of services entered into by the assessee with Indian company for acting as an intermediary, it is clear that what was made available by the assessee to the Indian Insurance co. was advisory services and opinion for selection of re-insurer in the international market. It has been mentioned by the AO that the services provided by the assessee were consultancy in nature as it provides a host of financial analysis related consultancy services, rating agency advisory services, risk based capital analysis

etc. on the basis of some observations found mentioned in the assessee's website but the AO has not been able to point out any material or evidence on the basis of which, it could be said that the consideration received by the assessee during the year under consideration is towards any financial analysis related consultancy services, rating agency advisory services, risk based capital analysis etc.

**29.** At this stage, it is pertinent to note that the language used in Art. 13(4) excludes "Managerial services". It emphasizes only a rendering of any technical or consultancy services. It is further noticed that in the Art. 13(4)(c), the expression used is "make available". The meaning ascribed to the words "make available" has been elaborately appreciated by the Tribunal, Mumbai Bench 'C' in the case of Raymond Ltd. vs. Dy. CIT (supra), where it has been observed that once s. 9(1)(vii) of the IT Act stops with the "rendering" of technical services, the DTAA between India and UK goes further and qualifies such rendering of services with words to the effect that the services should also make available technical knowledge, experience, skills, know-how or processes to the person utilizing the services. The Hon'ble Tribunal further observed that the word "which" occurring in the said Article after the word "services" and before the words "make available" not only describes or defines more clearly the antecedent noun ("services") but also give additional information about the same in the sense that it requires that the services should result in making available to the user technical knowledge, experience, skill, know-how or processes etc. Thus, the normal, plain and grammatical meaning of the language employed in the said Art. 13(4)(c) is that a mere rendering of services is not roped in unless the person utilizing the services is able to make use of the technical knowledge, experience, skills, know-how or processes by himself in his business or for his own benefit and without recourse to the performer of the services in future. The technical knowledge, experience, skill, know-how or processes must remain with the person utilizing the services even after the rendering of the services has come to an end. A transmission of the technical knowledge, experience, skills, know-how or processes from the person rendering the services to the person utilizing the same is contemplated by the Art. 13(4)(c) of the Indo-UK Treaty. Some sort of durability or permanency of the result of the "rendering of services" is envisaged which will remain at the disposal of the person utilizing the services. The fruits of the services should remain available to the person utilizing the services in some concrete shape such as technical knowledge, experience, skills, know-how or processes.

**29.1** By making available the technical skills or know-how and the like, the recipient of the service will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider. In other words, to fit into terminology "make available", the technical knowledge, skills, know-how or processes must remain with the person receiving the services even after the particular contract comes to an end. It is, thus, fairly clear that mere provision of technical services is not enough to attract Art. 13(4)(c) of the Indo-UK Treaty. It additionally requires that the service provider should also make his technical knowledge, experience, skill, know-how etc. known to the recipient of the service so as to equip him to independently perform the technical function himself in future, without the help of the service provider. In other words, payment of consideration would be regarded as fees for technical services only if the twin test of rendering services and making technical knowledge available at the same time is satisfied.

**30.** The identical view taken by the Tribunal, Mumbai Bench 'C' in the case of Raymond Ltd. (supra), has also been taken in the following cases :

1. Invensys Systems Inc., In re (2009) (2009) 225 CTR (AAR) 113 : (2009) 27 DTR (AAR) 26 : (2009) 317 ITR 438 (AAR).
2. Intertek Testing Services India (P) Ltd., In re (2008) 220 CTR (AAR) 540 : (2008) 16 DTR (AAR) 93 : (2008) 307 ITR 418 (AAR).
3. R.R. Donnelley India Outsource (P) Ltd., In re (2011) 241 CTR (AAR) 305 : (2011) 56 DTR

(AAR) 1 : (2011) 335 ITR 122 (AAR).

4. Asstt. CIT vs. Viceroy Hotel Ltd. (2011) 60 DTR (Hyd)(Trib) 1 : (2011) 11 Taxmann.com 216 (Hyd) : (2011) 46 SOT 4 (Hyd) URO decided by Tribunal, Hyderabad Bench.

**31.** In the present case, the New India Insurance Co. or other Insurance Company in India, who avails the services of the assessee as a broker in the process of the re-insurance of the risk is left with no technical knowledge, experience, skill, know-how or processes so as to bring the services rendered by the assessee within the ambit of Art. 13(4)(c) of the Treaty. As already observed above, the nature of services rendered by the assessee are also not in the nature of any technical or consultancy services which make available technical knowledge, experience, skill, know-how or processes to the user. We, therefore, hold that the payment received by the assessee in consideration for rendering intermediary or advisory services in the process of selecting re-insurer, cannot be qualified to be in the nature of fees for technical services as contemplated under Art. 13(4)(c) of the DTAA between India and UK. Since the DTAA between India and UK applies to the present case and the benefit of the provisions contained in DTAA with UK are available to the assessee as so well settled, and since the payment received by the assessee is not qualified to be in the nature of fees for technical services within the meaning of Art. 13(4)(c) of the treaty, we hold that the payment received by the assessee from the Insurance Co. in India, cannot be brought to tax in India as fees for technical services.

**32.** It is not the case of the Revenue that the assessee has a PE in India so that the amount received by the assessee is otherwise taxable in India under any other Articles of DTAA between India and U.K.

**33.** In the light of the discussion made above, we, therefore, hold that the payment received by the assessee from Indian Insurance Co. in the process of reinsurance risk placed by Indian Insurance Co. with International reinsurance companies is not taxable in India as "fees for technical services". We, therefore, delete the addition confirmed by the CIT(A) by setting aside the orders of the authorities below and allow this appeal filed by the assessee.

**34.** In the result, the appeal filed by the assessee is allowed.

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