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

BEFORE SHRI D.KARUNAKARA RAO, ACCOUNTANT MEMBER
AND SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.976/Hyd/2011 : Assessment year 2001-02
ITA No.977/Hyd/2011 : Assessment year 2002-03
ITA No.978/Hyd/2011 : Assessment year 2003-04
ITA No.979/Hyd/2011 : Assessment year 2004-05
ITA No.980/Hyd/2011 : Assessment year 2005-06
ITA No.981/Hyd/2011 : Assessment year 2006-07

Additional Director of Income-tax (International Taxation)-I, Hyderabad
V/s
M/s. BHEL-GE-Gas Turbine Servicing (P)Ltd., Hyderabad

(**PAN - AAACB 5126 H**)

(Appellant) (Respondent)

C.O. No. 41/Hyd/2011
(in ITA No.976/Hyd/2011) : Assessment year 2001-02

M/s. BHEL-GE-Gas Turbine Servicing (P)Ltd., Hyderabad
V/s
Additional Director of Income-tax (International Taxation)-I, Hyderabad

(**PAN - AAACB 5126 H**)

(Cross-Objector) (Respondent)

Assessee by : *Shri V.Srinivas*
Department by : *Shri Arvind V. Sonde*

Date of Hearing	16.7.2012
Date of Pronouncement	31.7.2012

O R D E R

Per D.Karunakara Rao, Accountant Member:

There are six appeals by the Revenue in this bunch, which are directed against separate orders of the Commissioner of Income-tax(Appeals) V, Hyderabad, all dated 14.3.2011, in the context of the orders passed by the assessing officer under S.201(1A) of the Act, for the assessment years 2001-02 to 2007-08. Assessee has also filed cross-objection in the appeal of the Revenue for the assessment year 2001-02.

Since common issues are involved, these appeals are being disposed off by this common order for the sake of convenience.

2. Effective grounds of the Revenue, common in all its appeals, read as follows-

> **"2. The learned CIT(A) has ignored the explanation in Para 8 of the AO order, where in the Assessing officer clearly explained that it is not mere repair work but specific and technical expertise are required to perform the work order.**
>
> **3. The Learned. CIT(A) has erred where he has treated the services rendered by the assessee as non technical services in view of the Section 9(1)(vii) of the Income-tax Act. However, technical personnel is included in the definition of technical services and as per Section 9(1)(vii) of the Income-tax Aft. Therefore, it will be treated as technical services as defined in the I.T. Act. "**

3. Briefly stated, relevant facts of the case common in all these cases excepting for the amounts involved, as taken from the appeal for assessment year 2001-02, are that the assessee is a joint venture company involving Bharat Heavy Electrical Limited (BHEL) and GE Pacific (Mauritius) Limited. TDS survey took place in the premises of the assessee. During the survey action under S.133A of the Act, it was noticed that, in the financial year 2001-02, BHEL-GE has paid to/credited the accounts of Middle East Engineering Company Ltd,, Saudi Arabia with Rs.4,89,39,5335; and M/s. Watt & Ackkermans Pte. Ltd. of Singapore with Rs.61,06,400/- for repairing and refurbishment etc., and the assessee made the above referred payments to the said companies abroad without making TDS. Assessing officer came to the conclusion that the said amounts constitute *'Fee for technical services'* as defined in S.9(vii) of the Act of the Income-tax Act. The assessee objected to the said proposal on the ground that the works in question are the works done by the foreign companies abroad, and the payment is made for carrying out the work and not for performing any technical service, since no intellectual aspect is involved in the repairs and refurbishment activity

carried out by those foreign companies. Other reasons put forth by the assessee opposing the proposal of the assessing officer are narrated by the assessing officer in para 4 of the impugned order passed by the assessing officer under S.201(1A) of the Act. After considering the submissions of the assessee, the assessing officer analysed the provisions of S.9(1) of the Act in general and clause (vii) of the said subsection relating to *'fee for technical services'* in particular. Further, the assessing officer perused the scope of the works carried on by the non-resident companies vide clauses (a) to (s) enlisted in para 8 of the impugned order and came to the conclusion that these items of work done by the foreign agencies cannot be said to be consisting mainly of physical involvement, since those woks would definitely involve technical inputs of high order by the qualified engineers and trained technical personnel. Accordingly, he decided that the payments in question would fall within the scope of 'Fee for Technical Services' (FTS) as defined in sec.9(1)(vii) of the Act. Further, the assessing officer also examined the applicability of the provisions of Double Taxation Avoidance Agreement(DTAA) between India - Saudi Arabia and India - Singapore and came to the conclusion that knowledge and skill are made available in this case while repairing and refurbishment of the items sent broad and therefore, he held that the provisions of S.195 of the Income-tax Act are applicable and the provisions of Double Taxation Avoidance Act shall not come to the aid of the assessee. For both the reasons, the assessing officer invoked the provisions of S.195(1) of the Act, and passed the impugned orders under S.201(1A) of the Act dated 30th March, 2007.

4. Aggrieved by the above, the assessee filed an appeal before the CIT(A) and raised ten grounds, which are extracted in para 3 of the impugned order of the CIT(A). As can be seen from the discussion at 5.3 to 5.6 of the impugned order, the CIT(A) analysed the scope of S.5(2) of the Act and S.9(1)(vii) of the Act and interpreted the same by

stating that it is only where any application of any technical knowledge is involved, it amounts to providing technical services, and otherwise not. He analysed the list of items and the schemes of works listed in (a) to (s) of the impugned order of the assessing officer, also extracted by him, and concluded that they do not involve providing of any knowledge. In para 5.4.2, the CIT(A) referred to certain controversial list of items, before concluding that any evaluation and testing of a repair work done by the repairer cannot be termed as technical service. In the process, the CIT(A) also examined the applicability of the Delhi Tribunal decision in the case of Lufthansa Cargo India Private Limited V/s. Dy. CIT(274 ITR (AT) 20)- Del which in turn considered various other decisions for the proposition that every repair and maintenance of the components of air-crafts, which does not involve any inter-action of the technicians and assessee's personnel, does not amount to 'fee for technical services'. Further, he relied on the decision of the Kolkata Bench of the Tribunal in the case of CESC Ltd. V/s. DCIT(87 ITD 653), for identical proposition. Finally, the CIT(A) concluded by stating that the payments made to both the parties in Saudi Arabia and Singapore do not fall within the definition of 'fee for technical services' and therefore, no TDS was required to be effected on the same. He accordingly granted reliefs to the assessee. In other words, the above decisions holds that the imparting of technical knowledge to the assessee or its employees or its nominees, attracts the FTS colour.

5. Aggrieved by the order of the CIT(A) on the above lines for all these years, Revenue preferred the present appeals before us.

6. Assessee filed cross-objection relevant to assessment year 2001-02, stating the order passed by the assessing officer for that year is required to be quashed also for the reason that the same was passed beyond the limitation and therefore, it is time-barred.

7. During the proceedings before us, the Learned Departmental Representative for the Revenue made various submissions/arguments, which include that the assessee made payments to Middle East Engineering Company Ltd, Saudi Arabia and M/s. Watt & Ackkermans Pte. Ltd. of Singapore and these amounts were paid for repairing and refurbishment of gas turbines. As per the assessing officer, such services constitute service charges and therefore, the same constitute fee for technical services. The Learned Departmental Representative referred to the provisions of S.9(1) of the Act and mentioned that he is of the opinion that the expression 'rendering', used in the Explanation of defining the expression 'FTS', should be understood in common sense parlance, which should include all kinds of services. In that case, the impugned services shall constitute FTS. Referring to the views of the CIT(A) on whether the impugned services are FTS or not, Learned Departmental Representative is of the view that CIT(A) is not an expert on the issue of this kind and when he himself is not an expert, that view is against the spirit of the judgment in the case of Bharathi Cellular Ltd (330 ITR 299) and mentioned that the said judgment was rendered in the context of the provisions of S.9(1)(vii) of the Act. The expression 'make available' is a language of the provisions of DTAA and the should not be extended to define the expression 'rendering' used in Explanation 2 to clause (vii) of Section 9(1) of the Act. When the expression 'rendering' is understood in normal common sense parlance, any payment for the rendering of services, gets covered by the meaning of FTS used in S.9(1)(vii). It is the fact that once the payment in question constitutes 'fee for technical services', the same must be subjected to TDS as per the provisions of S.195 of the Act. The Learned Departmental Representative also relied on the decisions of the Delhi Bench of the Tribunal in Sahara Airlines Ltd. V/s. Dy.CIT(83 ITD 11) and Hyderabad Bench in the case of Mannesmann Demag L Kauchhammer V/s. CIT(1988) 26 ITD 198(Hyd), for the proposition that when the services

are rendered and the payments involved, it should ordinarily must constitute 'fee for technical services'. The Learned Departmental Representative also argued stating that when the payments are received abroad for the items relatable to the assets located in India, such payments should be subject to tax. For this purpose, reliance is placed on the decision of the Delhi Bench of the Tribunal in NHK-Japan Broadcasting Corporation V/s. Dy. CIT(101 TTJ 292). Thus, the Learned Departmental Representative for the Revenue attempted to make out a case by stating that the payments to Middle East Engineering Company Ltd,, Saudi Arabia; and to M/s. Watt & Ackkermans Pte. Ltd. of Singapore for repairing and refurbishment etc., made by the assessee, constitute fee for technical services, and the same are chargeable to tax in India, and consequently, the provisions of S.201(1A) are attracted in respect of such payments.

8. Per contra, the learned counsel for the assessee, Shri Sonde, explained the facts of the case and relied heavily on the orders of the CIT(A). Explaining the same, he mentioned that normally, the assessee takes up the works of third parties and send them to parties abroad, say Middle East Engineering Company Ltd,, Saudi Arabia and M/s. Watt & Ackkermans Pte. Ltd. of Singapore for repairing and refurbishment etc. The said non-resident companies undertake the repair and refurbishment works as may be required for use, and return the refurbished /repaired articles by raising invoices against which the assessee makes the payments. In this regard, the learned counsel took us through various pages, say pages 335 to 341, which relates to the case of supplying works for ESSAR, and demonstrated that it is a case of receiving works for refurbishment of GE components by sending them to Singapore for its refurbishment, assembly and returning the same with the invoices raised by the Singapore company against which the assessee made the payment of $ 136000 US. In this regard, he mentioned that the

employees of the company never accompanied the Turbine parts to be refurbished abroad. Therefore, there is no interaction or importing of technical skill or knowledge by the non-resident company. Thus, it is straight case of repairing, maintenance and refurbishment. Explaining the provisions of S.9(1)(vii) of the Act in general and its Explanation 2 in particular, learned counsel for the assessee mentioned that the issue of rendering service arises only after the event of providing services, which is the case of the assessee, and therefore, the act of providing refurbishing service comes outside the scope of the provisions of S.9(1)(vii) of the Act. Further, he mentioned that 'making available' of the services would arise only if it involves transfer of knowledge and skill to the employees of the assessee directly or indirectly. Therefore, the case of the assessee falls in stage prior to the rendering of services. Referring to the case-laws relied upon by the Learned Departmental Representative, Learned counsel for the assessee mentioned that the decision in the case of Lufthansa Cargo India (P)Ltd. (supra) was rendered only after distinguishing the decision of the Madras Bench of the Tribunal in the case of Raymond Ltd. (86 ITD 79). He relied on the decision of the Hyderabad Bench of the Tribunal in the case of Mannesmann Demag L Kauchhammer V/s. CIT(1988) 26 ITD 198(Hyd), and Sahara Airlines (83ITD 11), but submitted that the ratio of the decision in the case of Lufthansa Cargo India Ltd. (supra) is relevant for the proposition that the provisions of S.9(1)(vii) are not applicable to the payments made to the foreign companies for execution of normal maintenance and repairs without any involvement or consultation with the assessee's or their employees, and such payment does not tantamount to **'fee for technical services'**.

9. Without prejudice to the above, learned counsel mentioned that the contracts in question are predominantly works oriented contracts and not service oriented contracts in which case the provisions

of S.195 has no application. He further mentioned that only fee for technical services involving non-residents are covered by the provisions of S.195. Further, without prejudice to the above, learned counsel mentioned that the case of the assessee involves failure to deduct tax and certainly not the one covered under S.201 of the Act. Referring to the pre-amended provisions of S.201, the learned counsel mentioned that sub-section (1) only deals with defaults under S.200 and also 194 of the Act. These cases are the one where the assessees have failed to deduct TDS. The cases like that of the assessee, are outside the provisions of the erstwhile S.201 of the Act. In this regard, learned counsel drew our attention to the notes to retrospective amendment to S.201 and mentioned that the amended provisions took care of the cases in which the assessee fail to deduct TDS, but the retrospective amendment does no apply only to the assessment year 2001-02 and 2002-03. On this count also the orders passed by the assessing officer under S.201(1A) for assessment years 2001-02 and 2002-03 have to be quashed.

10. The learned counsel read out the copy of the notes and clause 43 to the above amendment to support the above interpretation of the assessee. Referring to the cross-objection filed by the assessee about the limitation, learned counsel fairly mentioned that the said issue is now covered against the assessee by the Special Bench decision in the case of Mahindra and Mahindra V/s. DCIT (30 SOT 374)(SB), for the proposition that the orders under S.201(1A) could be passed within a period of six years specified for initiating and completing the re-assessment s and the said period constitutes reasonable period for taking action under s.201 and 201(1A) of the Act.

11. During the rebuttal time, the Learned Departmental Representative, primarily reiterated the arguments made by him earlier

and pleaded that the impugned orders of the CIT(A) requires to be reversed.

12. We heard both the sides. Actually, this is a case where the assessee obtained works orders from third parties such as ESSAR, and the items such as turbines are required to be repaired or refurbished and for this, these items are sent abroad to Saudi Arabia and Singapore for repairs and refurbishment by the non resident companies abroad. It is a fact that the assessee personnel do not accompany these items and therefore, there is no involvement of assessee's personnel in getting the items repaired or refurbished. As per the invoices raised by the said nonresident companies, the assessee makes the payment. In these factual circumstances, we are to decide whether the said payment made by the assessee to the nonresident companies would constitute 'fee for technical services' as defined in the Explanation 2 to section 9(1)(vii) of the Act.

13. The case of the Revenue is that in view of the language of Explanation 2 to clause (vii) to sub-section (1) of section 9 of the Act, i.e. 'rendering of technical services', the expression 'rendering' if interpreted in its common parlance, the payments made by the assessee would amount to 'fee for technical services'. The said expression 'rendering' does not involve providing for or transfer of any technical knowledge to the assessee or its accompanying personnel. Therefore, the fact no personnel of the company is sent abroad along with the items to be repaired, is not relevant factor for deciding the nature of the services. Ld DR relied on the Hyderabad Bench decision in the case of Mannesmann Demag L Kauchhammer V/s. CIT (supra) in support of the above. Further, LD DR also relied on the judgment in the case of Bharati Cellular Ltd. (supra) for the proposition that the CIT(A) should have sought the expert opinion, as he himself is not an expert in the field.

14. On the other hand, the case of the assessee is that the scope of works include assembly, disassembly, inspection, evaluation etc and none of these works fall within the scope of services within the meaning of 'fee for technical services'. These are the repairs oriented work and are outside the scope of services of FTS nature and the same are outside the scope of S.195. Reliance is placed heavily on the Delhi Bench decision in the case of Lufthansa Cargo India Ltd. (supra), which was decided after considering the Hyderabad Bench decision for the proposition that the repairs of routine and recurring nature do not constitutes FTS and therefore such payments do not constitute income u/s 9 of the Act. The expression 'rendering' used in the Explanation 2 to clause (vii) to section 9(1) fall in the stage prior to the stage of providing technical services or making available of the technical services. These stages alone attract the FTS provisions and not mere cases of 'rendering of technical services'. Mere repairs and refurbishing of the damaged turbines do not constitute services. Therefore, the payment made by the assessee is not for rendering of the technical services and therefore, such consideration is not for FTS. For falling with the basket of FTS, there must be transfer of the technical knowledge or skill to the assessee or its personal. The case of decision of the Hyderabad Bench involves transfer of such knowledge to the accompanying personnel of the assessee and therefore, the said case is distinguishable on facts.

15. We have perused the said principles in the light of the detailed scope of work done in the case of the assessee, which as noted by the CIT(A) in the impugned appellate order for assessment year 2001-02, from the order of the assessing officer in para 5.4 thereof the impugned order, which reads as under-

"a) Receive and un-box fuel nozzle assemblies.
b) Perform incoming conditional evaluation of fuel nozzle assembly.

c) Removal of premix gas flexible manifolds.
d) Perform incoming flow test of fuel nozzle assembly.
e) Disassemble fuel nozzle assemblies using GE approved method
f) Clean {chemical, ultrasonic, grit blast} bolts tubing, gas swozzles, oil/water, cartridges, end covers, and water manifold to remove dirt, rust foreign material and paint.
g) Disassemble, clean rebuilt and pressure test the distributor value.
h) Perform Non-destructive Evaluation of fuel nozzle components.
i) Perform boroscope inspection on end cover gas passage,
j) Individually flow test fuel nozzle components according to GE factory standards.
k) Complete evaluation of components and test results (GE Engineering)
l) Utilize piece part flow data to best match fuel nozzle tips and oil/water cartridges to the end covers.
m) Re-assemble all fuel nozzle components with new seals and lock plates.
n) Perform final flow check and leak check of assembly to verify work.
o) Reassembled all fuel nozzle components with new seals and lock plates.
p) Complete final Quality Assurance inspection (GE Engineering)
q) Ship parts to customer with a copy of the flow test results'
r) Provide repair report.
s) Ship parts to the customer with a copy of the flow test results."

16. The above activities involve assembly, disassembly, inspection, reporting and evaluation. CIT(A) examined every activity enlisted above and came to the conclusion that none of the above works involve services of technical nature. The discussion given by the CIT(A) in para 5.4.2 is relevant. We agree with the same considering the settled legal position that routine maintenance repairs are not FTS as held by the Delhi Bench of the Tribunal in the case of Lufthansa Air Cargo (supra). For the purpose of completeness of this order, we reproduce below the relevant praragraph of the said decision in the context of the questions raised in the said decision-

> **"In conclusion, Technik carried out the repair work in the normal course of its business in Germany, without any involvement or participation of the assessee's personnel. The overhaul repairs involved were <u>routine maintenance repairs.</u> It cannot therefore be said that Technik rendered any managerial, technical or consultancy service to the assessee. In this view of the matter, we hold that the payments made by the assessee to non-residents workshops outside India do not constitute payment of fees for managerial, consultancy or Technical services as defined in Explanation 2 to section 9(1)(vii). The assessee succeeds on this ground."**

Regarding the decision of the Hyderabad in the case of Mannesmann Demag L Kauchhammer V/s. CIT (supra) which involves deputing of technicians to India for supervision of repairs to be carried out at the plant and machinery purchased by the NMDC, we find that the said decision is distinguishable on facts. Such deputation, whether deputation or supervision, is absent in both instant cases as well as the case before it, as observed by the Delhi Bench of the Tribunal in the cited case. The relevant para of the order of the Tribunal in that case reads as follows-

> ***"We find that in Demag's case, the foreign company rendered 'technical consultancy' by way deputing a technician to India for supervising repairs to be carried out on the plant and machinery purchased by National Mineral Development Corporation. It is not the repair work per se which has been held to be technical services but it is the provision of the consultant technician deputed to India for supervising the repairs which has been treated as consultancy services. The foreign technician stayed on in India for 44 days to advise and supervise repair work which was obviously carried out by the engineers and workers of the Indian Company. Thus, the nature of services rendered by the foreign company was consultancy of technical nature through the provision of its technician deputed to India. Our conclusion is supported by the decision of Andhra Pradesh high court in the same case reported in 238 ITR 861, wherein Hon'ble High Court affirming the aforesaid decision of the Tribunal held that the Explanation 2 has expanded the scope of Section 9(1)(vii)(b) by providing that the services of technical or other personnel would be taxable. It has been repeatedly stated by the assessee that no foreign Technician was ever deputed of India. The lower authorities and the DR have not pointed out any instance of a technician having been assigned of India. This decision therefore is of no assistance to the Revenue."***

Thus, the above decisions of the Tribunal are relevant for the proposition that the routine repairs do not constitute 'FTS' as they are merely repair works and not technical services. Technical repairs are different from 'technical services'. Thus, the payments made for 'technical services' alone attract the provisions of S.9(1)(vii) and its Explanation 2. Further, it is also a settled issue at the level of the Tribunal that every consideration made for rendering of services do not constitute income within the meaning of S.9(1)(viii) of the Act and for considering the same, first of all the said consideration is for the FTS. Therefore, considering the above, decision of Delhi Bench of the Tribunal, which explained the scope of the provisions, we are of the view that the impugned orders of the CIT(A), for the years under consideration, on this aspect of the matter, do not call for interference. Accordingly, the grounds raised in these appeals of the revenue are **dismissed**.

17. Without prejudice, the assessee raised the issue of non-applicability of the provisions of S.201 to the assessment years 2001-02 and 2002-03 and the said argument was never raised or discussed by the lower authorities. Since the impugned order of the assessing officer was passed prior to the amendment to the provisions of S.201 by the Finance Act, 2008 with retrospective effect from 1.4.2003, to be fair, the Revenue normally deserves fresh opportunity to be heard on this issue. Instead of setting aside this issue to the files of the lower authorities, considering the alternative nature of the argument, and also considering the fact, we have already granted relief to the assessee as per discussion in the preceding paragraphs of this order on merits, we dismiss the alternate argument of Ld Counsel holding the adjudication of this issue becomes an academic exercise. Therefore, the same are dismissed as academic.

18. In the result, all the appeals of the Revenue are **dismissed**.

Assessee 's Cross Objection:

19. Effective grounds of the assessee in its cross-objection for the assessment year 2001-02, reads as follows-

> "1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax(Appeals) erred in not holding that the order passed under section 201 and 201(1A) of the Act by the learned Assistant Commissioner of Income-tax -15(1) were bad in law and thereby consequently erred in not quashing the same.
>
> 2. On the facts and in the circumstances of the case and in law, the ld Commissioner of Income-tax(Appeals) erred in holding that the order passed under section 201 and 201(1A) of the Act by the learned Assistant Commissioner of Income-tax -15(1) was not barred by limitation."

At the time of hearing, the learned counsel for the assessee fairly submitted that the issue involved is squarely covered in favour of the Revenue by the decision of the Tribunal in the case of Mahindra and Mahindra Ltd. (supra), and hence did not press the same. Consequently, the Cross-Objection of the assessee for assessment year 2001-02 is dismissed as not pressed.

20. To sum up, in the result, all the six appeals of the Revenue are dismissed and the Cross Objection of the assessee is **dismissed** as not pressed.

Order pronounced in the Court on 31.7.2012 .

Sd/-	Sd/-
(Saktijit Dey)	**(D.Karunakara Rao)**
Judicial Member.	**Accountant Member.**

Dt/- 31st July, 2012

Copy forwarded to:

1. M/s. BHEL-GE-Gas Turbine Servicing (P)Ltd.,
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2. Additional Commissioner of Income-tax(Intl. Taxation)-I, Hyderabad
3. Commissioner of Income-tax(Appeals) V, Hyderabad
4. Commissioner of Income-tax IV Hyderabad
5. Departmental Representative, Hyderabad

B.V.S.