IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI SHAILENDRA KUMAR YADAV,
JUDICIAL MEMBER, AND
SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA Nos.2563, 2564 & 2565/PN/2012
A.Y. 2008-09

Mahindra Forgings Ltd.
Gat No.856 to 860,
Chakan Ambethan Road,
Tal. Khed, Pune - 410501

PAN: AABCM6632J   Appellant

Vs.

ADIT, (Intr. Tax.)-1, Pune   Respondent

ITA No.1985/PN/2012
A.Y. 2008-09

ADIT, (Intr. Tax.)-1, Pune   Appellant

Vs.

Mahindra Forgings Ltd.
Gat No.856 to 860,
Chakan Ambethan Road,
Tal. Khed, Pune - 410501

PAN: AABCM6632J   Respondent

Assessee by	:	Shri Kishore Phadke
Department by	:	Shri P.L. Pathade
Date of Hearing	:	20.02.2014
Date of order	:	27.02.2014

ORDER

PER SHAILENDRA KUMAR YADAV, J.M:

Three appeals filed by the assessee and one by revenue pertain to the same assessee arising from the consolidated order of CIT(A)- IT/-TP. So these were heard together and are being

disposed off by this consolidated order for the sake of convenience.

2. In ITA No.2563/PN/2012, the assessee has filed the appeal on the following grounds:

> 1. The learned CIT (A) - IT/TP, Pune erred in law and on facts in holding that the assessee is an 'assessee in default' due to non deduction of alleged TDS amounting to Rs. 51,598/- on payment made to M/s. Prato Spol S.R.O., Czech Republic for services in connection with purchase of 4000 tons forging press.
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> 2. The learned CIT (A) - IT/TP, Pune further erred in law and on facts in not appreciating that service work on 4000 tons forging press was wholly connected to the transaction of purchase of 4000 tons forging press by the assessee.
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> 3. The assessee craves leave to add / modify / delete all or any of the grounds of appeal.

2.1 In ITA No.2564/PN/2012, the assessee has filed the appeal on the following grounds:

> 1. The learned CIT (A) - IT/TP, Pune erred in law and on facts in holding that the assessee is an 'assessee in default' due to non deduction of alleged TDS amounting to Rs.382,539/- on payment made to M/s.Presstrade Pressenhandel GmbH, Germany for installation, assembly work, erection and commissioning services in connection with of purchase of 4000 tons forging press.
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> 2. The learned CIT (A) - IT/TP, Pune further erred in law and on facts in not appreciating that installation, assembly, erection and commissioning services of 4000 tons forging press was **wholly connected** to the principal transaction of **purchase** of 4000 tons forging press by the assessee from M/s. Presstrade Pressenhandel GmbH, Germany.
>
> 3. The assessee craves leave to add / modify / delete all or any of the grounds of appeal.

2.2 In ITA No.2565/PN/2012, the assessee has filed the appeal on the following grounds:

1. The learned CIT (A) - IT/TP, Pune erred in law and on facts in holding that the assessee is an 'assessee in default' due to non deduction of alleged TDS amounting to Rs. 1,538,347/- on payment made to M/s. Firma Ralekc, Russia for supervision services in connection with of purchase of 4000 tons & 6300 tons forging press.

2. The learned CIT (A) - IT/TP, Pune further erred in law and on facts in not appreciating that services of supervision of erection and installation of 4000 & 6300 tons forging press was wholly connected to the principal transaction of purchase of 4000 & 6300 tons forging press by the assessee from M/s. Firma Ralekc, Russia.

3. The assessee craves leave to add / modify / delete all or any of the grounds of appeal.

2.3 In ITA No.1985/PN/2012, the revenue has filed the appeal on the following grounds:

1. In the facts and circumstances of this case, the CIT(A) was not correct in holding that the payments made by the assessee for supply of designs and drawings to the Manyo Co. Ltd, resident of Japan, is not taxable in India.

2. In the facts and circumstances of this case, the CIT(A) was not factually correct in holding that the payments were made by the assessee for mere supply of drawings to the Manyo Co. Ltd, resident of Japan as the payments were made for supply of designs and drawings.

3. The CIT(A) was not correct in applying the decisions of Hon'ble ITAT in the case of Mangalore Refinery and Petrochemicals Ltd v DDIT(2008) 113 ITD 85 (Mum) ignoring the factual difference in the cases and specifically that in this case of the assessee payments made were not for certain basic material along with the goods but for special designs & drawings.

4. The CIT(A) was not correct in applying the decisions of Hon'ble ITAT in the case of Skoda Exports Co Ltd. Vs. DCIT(2003) 81 TTJ (Vishaka) 633 ignoring the factual difference in the cases and specifically that in this case of the assessee had not paid import/custom duty for designs & drawings charges, if the same were treated as "plant & machinery".

3. At the outset of hearing, the learned Authorized Representative has stated that there is a delay in filing of the appeal and requested to condone the same, inter alia stated that Order u/s 201 & 201(1A) in respect of appeals CIT (A) - IT/TP, Pune on 27-07-2012 were personally collected by the authorized representative of the assessee on 02-08-2012 and handed over to assessee company on 12-08-2012. The last date for filing of appeal before ITAT was 01-10-2012 i.e. 60 days from the date of receipt of order which is 02-08-2012. The company officials were required to deliberate on the same and take the directions / approvals from the Management in this regard. Considering the highly technical matter, expert opinion was also sought for. The assessee company is MAHINDRA Group which has a team of counsels acting in various capacities. Their view was sought as crucial before finally filing the appeal. In the said process, delay of about 86 days was occurred. In view of above, the assessee requested to condone the delay of about 86 days in filing the appeal attributable to above mentioned reasons. In this regard, the learned Authorized Representative has pointed out the Hon'ble Allahabad High Court in the case of Bharat Auto Center Vs. CIT (2006) 282 ITR 366 (Alh) had condoned the delay since an important legal point relating to the jurisdiction of assessing authority was involved. The assessee sought legal opinion of several counsels which took long time and early Writ Petition was filed and subsequently appeal was also filed, the aforesaid reason was found to be sufficient, accordingly, delay was condoned. Finding force in the argument of learned Authorized Representative that the decision of Bharat Auto Center (supra) is applicable to the facts of the present case as far as condonation of delay for filing the appeal is concerned, we condone the delay and appeal is being decided on merit.

4. The assessee company is engaged in manufacturing of forgings for the automotive industry. Common facts in these

appeals are that the assessee company purchased the following machinery during the financial year 2007-08.

1. Forgning Presses of 4000 T and 6000 T from Firma Ralekc, Russia

2. Bolster and Cassette for 4000 T Forging Press from Manyo Co Ltd., Japan and

3. 4000 Tons from Pressdtrade Pressenhandel GmbH, Germany

5. The assessee company made payments in relation to these purchases without deducting tax at source. These payments were made for the purchase of machinery, for 'erection and commissioning' (Pressdtrade pressenhandel Gmbh), for 'supervision of erection' (Firma Ralekc) and for drawing and designs of the machinery (Manyo Co Ltd). One appeal stands on a separate ground. In this appeal, the assessee had paid 'service charges' to Prato Splo SRO of Czech Republic for the machine purchased from Pressdtrade Pressenhandel GmbH, Germany.

6. Following are the details of the payments made by the assessee and demand raised by the Assessing Officer on account of the Orders u/s.201 and u/s.201(1A):

s.no	Payee Name	Country	Facts	Demand by the AO (Rs)
1	Firma Ralekc	Russia	Purchase of forging presses and supervision of erection thereof from the same party, through separate PO	18,04,745
2	Manyo Co. Ltd.	Japan	Purchase of 'Bolster & Cassettes' of forging press and supply of Designs & Drawings by the same party, through same PO	6,91,560

3	Pressdtrade Pressenhandel GmbH	Germany	Purchase of forging press and erection and commissioning thereof from the same party, through separate PO	4,36,211
4	PratoSpol S.R.O.	Czech Republic	Purchase of forging press and service work thereof from the two different parties, through separate PO	57,274

7. The Assessing Officer in his Orders passed u/s 201 and u/s 201(1 A) held that the payments (other than for purchase) made to Russian Company Firma Ralekc, Russia, to German company Pressdtrade Pressenhandel GmbH and to Prato Spol SRO of Czech Republic are taxable under Section 9(l)(viii) as 'fees for technical services'. These payments were taxable under Article 12 of the India's Tax Treaties with the respective countries as 'fees for technical services'.

8. The Assessing Officer also treated payment made for acquiring designs and drawings from Manyo Co. Ltd. Japan liable for tax deduction at source. According to the Assessing Officer, payment made for acquiring designs and drawings is 'fees for technical service' under sec.9(l)(vii) and also taxable under Article 12 India-Japan Tax Treaty as 'fees for technical services'.

9. The matter was carried before the first appellate authority, wherein the various contentions were raised and having considered the same, CIT(A) observed that the main argument of assessee is that purchase and installation is a composite activity. The purchase order placed for the machinery and the order placed for the installation is indivisible composite contract. The contract for the installation is a part of the purchase order and hence, not liable for the tax deduction at source. The assessee did not entered into any contract with seller. In this regard, it was clarified that however purchase order raised for

requisitioning the services list has certain terms and conditions. Therefore, this purchase order for services may be treated as contract between the assessee and seller. It was stand of assessee that in the case of payment to Firma Ralekc, Russia and Pressdtrade Pressenhandel Bmbh, Germany the assessee has purchased machinery from said parties and erection, commissioning and supervision services were requisitioned vide separate orders. In the case of payment made to Prato Spol SRO of Czech Republic, the machine was purchased from Pressdtrade Pressenhandel Gmbh, Germany and Czech company was paid the services charges.

10 Following are the terms and conditions mentioned in the purchase order dt: 23 July 2007 issued for the erection charges paid by the assessee:

"Firma Ra.le.kc, Moscow P.O.No.1200001244

Service charges:

You will depute 3 Engineers for erection supervision.

The service charges mentioned above are considering erection and commissioning to be completed within 3 months from the date of start. However you have agreed to try your level best to commission the press ready for commercial production within 2 months, it is agreed that if machine is commissioned in less than 3 months you shall still be paid service charges of Euro 45000. For any eventuality if your engineers have to stay back due to reasons attributable to us then we shall pay you Euro 55000 for the total period of 4 months and above.

In addition to the above service charges we shall pay you Economy Class Air fare (only one time) to and fro from Russia to India for 3 Engineers. Local conveyance in India shall arranged by us at our cost. We shall provide lodging (in our Guest house) and boarding as available to equal level of our engineers. Any other charges/expenses/insurance etc. shall be arranged by you at your cost and we shall not be held responsible for the same in any manner whatsoever.

Erection labour and lifting tackles shall be arranged by us for the erection and commissioning purpose at our cost.

We shall arrange the tools and tackles and make preliminary preparation for erection and commissioning of Press as per annexure (1 page) enclosed herewith which is advised by you enclosed please let us know within 7 days of receipt of order, failing which it is your responsibility to arrange the same in order to avoid idling of your engineers.

Payment terms

As agreed we shall pay you Euro 22500 on Tie road assembly of Forging Press by Telegraphic transfer.

Balance payment shall be made after successful trials as soon as it is ready commercial production by telegraphic transfer.

Warranty:

You shall guarantee trouble free performance of the press for a period of one year from the date of commissioning on account of workmanship of erection. Should there be any defects due to faulty erection in the press the same shall be rectified by you at your cost.

Working hours:

Our factory works 6 days a week Thursday being holiday. Our normal working hours are 9.00 a.m. to 5.30 p.m. with ½ hour lunch break, however in view of urgency for availability of Press for commercial production we shall be working up to 12-14 hours a day for erection and commissioning of the Press.

Timing plan:

We would request you to furnish the erection sequence and timing plan within 7 days of receipt of order at your end with the target date of 2 months for commissioning of the machine

Russian Translator

Though we are trying to arrange a Russian to English Translator we would request you to locate a translator from your end and send us your offer for the services of Translator since we are facing difficulty for getting proper translator.

You shall, depute your engineers on 15 days clear intimation from us."

11. Following are the terms and conditions mentioned in the purchase order dt: 28th August 2007 issued to for the service charges paid by the assessee:

Purchase order number 1200001677 Pressdtrade Pressenhandel Gmbh

Payment terms

Euro 23000 shall be paid to you as advance by telegraphic transfer. Balance payment shall be made after successful trials as soon as forging press is ready for commercial production by telegraphic transfer.
14/09/07 23000 Euros - Advance for erection charges press 4000 Tons

08/02/08 36480 Euros - Assembly work for H 4000 Tons
59480 Euros

Note

You will depute 4 Assemblers and 2 Engineers for erection purpose.

The service charges mentioned above are considering erection and commissioning to be completed within 6 weeks from the date of start. In addition to the above service charges we shall pay you Economy Class Air Fare only (only one time) to and fro Prague to Mumbai for 6 persons.

Local conveyance in India shall be arranged by us at our cost.

We shall provide lodging and boarding (in our guest house) as available to equal level of our engineers. Any other charges/expenses/insurance etc. shall be arranged by you at your cost arid we shall not be held responsible for the same in any manner whatsoever.

Erection labour and lifting tackles shall be arranged by us for the erection and commissioning purpose at our cost.

We shall arrange the tools and tackles and make preliminary preparation for erection and commissioning of Press as per annexure (1 page) enclosed herewith which is advised by you should you require any other additional tools and tackles preparation in addition to the list enclosed please let us know within 7 days of receipt of order, failing

> which it is your responsibility to arrange the same in order to avoid idling of your engineers.
>
> Warranty:
>
> You shall guarantee trouble free performance of the press for a period of one year from, the date of commissioning on account of workmanship of erection.
>
> Should there be any defects due to faulty erection in the press the same shall be rectified by you at your cost.
>
> Working Hours
>
> Our factory works 6 days a week Thursday being holiday. Our normal working hours are 9.00 a.m. to 5.30 p.m. with Vi hour lunch break, however in view of urgency for availability oj Press for commercial production we shall be working up to 12-14 hours a day for erection and commissioning of the Press.
>
> Timing Plan
>
> We would request you to furnish the erection sequence and timing plan within 7 days of receipt of order at your end with the target date of 8 weeks for commissioning of the machine."

12. On perusal of the above purchase orders, revenue authorities observed that it could not be termed as an 'agreement' or 'contract' in a conventional sense as it is not signed by both the parties. However, rendering of the services based on this terms and conditions of the purchase order would amount to implicit acceptance of the terms by the person rendering services and would be taken as a contract. Thus, the CIT(A) in para 4.5. of its order has accepted the implicit contract for rendering services based on terms and conditions of purchase order discussed above.

13. Having said so, the CIT(A) examined the issue whether the above contract is a composite contract of purchase and installation depends on intention of parties from the terms of

contract. In this regard reliance was placed on the decision of Ishikawajima – Harima Heavy Industries Ltd. Vs. DIT (2007) 288 ITR 408 (SC), wherein, it was held that in construing a contract, the terms and conditions thereof are to read as a whole. A contract must be construed keeping in view of the intention of the parties. No doubt, that applicability of tax law would depend on the nature of contract, but same should not be construed keeping in view the taxing provisions.

14. The CIT(A) further observed that in most of the cases seller of the goods undertakes the responsibility of installing and commissioning of the machinery as a part of sale of goods. Such a contract's performance is concluded on successful installation and commissioning of the equipment. In such circumstances, installation and commissioning charges are embedded in the purchase price. Even if they are not embedded in the purchase price and are charged separately, the basic fact that installation as a part of purchase would not change if the seller has undertaken responsibility of installation as part of the composite contract. CIT(A) also observed that erection and commissioning contracts even treated as separately from purchases by having specific terms and conditions relatable to the erection and commissioning. So, the CIT(A) held that there is no composite contract for purchase and erection and commissioning.

15. The assessee has taken an alternative plea, inter alia submitted that even if both the activities are treated separately, installation activity is being incidental to the main activity of purchase, it will draw colour from the main activity of purchase and hence will not be liable for the tax deduction at source. This plea of assessee was rejected by CIT(A) observing that TDS provisions would be attracted on payment made for installation, commissioning and service charges if the transactions of

erection, commissioning and purchase are not composite and are separate. In view of above, CIT(A) held that the transactions of purchase and transaction of erection, commissioning and supervision shall be treated separately for the payments made to Firma Ralekc, Russia and to Pressetrade Pressenhandel GmbH, Germany. The Service charge paid to Prato Spol SRO, Czech Republic is clearly 'Fees for Technical Services'. All these payments were liable for the deduction of tax at source.

16. The CIT(A) further observed that the provisions of the Explanation 2 to sec.9(l)(vii) deals with the services provided by the Non-Resident Company should be taken as an executor service, and, hence should be exempted from payment of taxes. The Explanation 2 to sec.9 (1) (vii) is reproduced under:

> ***Explanation [2]*** *- For the purpose 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 he income of the recipient chargeable under the head "Salaries ".*

17. For the purpose of this clause fee 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".

18. From the above, CIT(A) observed that "consideration for any construction, assembly, mining or like project undertaken by the recipient" are not considered as 'fees for technical services'.

Circular 202 dated 5th July 1976 sheds light on the intention behind this provision. The relevant para form the circular is reproduced under:

> "Circular No. 202 dated 5th July 1976
>
> Explanatory notes on the provisions of the Finance Act, 1976
>
> 16.3. The expression " fees for technical services " has been defined to mean any consideration (including any lump sum consideration) for the rendering the managerial, technical or consultancy services, including the provision of service of technical or other personnel). It, however, does not include fees of the following types, namely:
>
> Any consideration received for any construction, assembly, mining or like project undertaken by the recipient. Such consideration has been excluded from the definition on the ground that such activities virtually amount to carrying on business in India for which considerable expenditure will have to be incurred by a non-resident and accordingly it will not be fair to tax .such consideration in the hands of a foreign company on gross basis or to restrict the expenditure incurred for earning the same to 20 per cent of the gross amount as provided in new s. 44D of the Act. Consideration for any construction, assembly, mining or like project will, therefore, be chargeable to tax on net basis, i.e., after allowing deduction in respect of costs and expenditure incurred for earning the same and charged to tax at the rates applicable to the ordinary income of the non-resident as specified in the relevant Finance Act."

19. From this, CIT(A) observed that intention behind exempting certain 'projects' from 'fees for technical services' was to tax non-resident on net basis or u/s 44D as these activities amount to carrying on business in India and considerable expenditure would have been incurred by non-resident for these activities. Therefore the Statute uses the word 'project' in the explanation 2 and the exclusion in the taxation for 'fees for technical services' is limited to only projects and not to all the activities.

20. Considering the magnitude of erection and commissioning activity undertaken in the present appeal, it could not be considered as a 'project'. Therefore, it does not fall within the exclusion clause of the Explanation 2. The CIT(A) further observed that the charges are paid for erection' and commissioning are not excluded from the definition of 'fees for technical services'. Whereas payments made for 'supervision of erection' and for 'service work' were clearly out of the exclusion of Explanation 2 and are taxed as 'fees for technical services'. Therefore, the CIT(A) held that payments made by the assessee are covered and are taxable under 'fees for technical services' u/s 9(l)(vii).

21. Second limb of the assessee’s argument was that that the PE of the Non Resident Company did not exist in India during the year. Non- resident technicians responsible for erection, commissioning and supervision also did not stay in India for more than three months. Accordingly, the payment made to the non resident company could not be taxed in India. Rejecting the argument of assessee, the CIT(A) observed that the above payments are not being taxed as a 'business income' on the basis of the existence of PE of the non- resident company in India. These payments are taxed as "fees for technical services" under Section 9(l)(vii) and Article 12 of the relevant tax treaty and this payments are liable for the TDS under Section l95 of the Act. Finally, CIT(A) held that the Assessing Officer was correct in holding that the assessee in default for non-deduction of TDS. The assessee ought to have deducted tax of ₹ 5,15,980 made to Prato Spol SRO Czech Republic on payment of ₹ 38,25,394 made to Prestrade Presentrade Gmbh, Germany and on payment of ₹ 1,53,83,470/- made to Firma Ralekc, Russia.

22. Regarding the payment of ₹ 61,20,000/- to Manyo Company Japan for acquiring the design and drawings of Bolster &

Cassette. The stand of the assessee has been that these designs and drawings were acquired by it for ensuring smooth performance of the purchased Plant and Machinery. The assessee did not use these drawings in manufacturing of the machinery or did not exploit it for any other commercial purpose. In these circumstances, the acquisition of these drawings along with the purchase of machinery was necessary for its maintenance. So, the CIT(A) held it as purchase transactions as no technology know how relating to this machinery is made available to the assessee. Accordingly, the CIT(A) held that the assessee was not liable to deduct tax on payment made by it to Manyo Corporation Ltd., Japan because payment made on mere supply of drawings is not taxable in India.

23. Before us, the assessee has made detailed arguments with regard to its three appeals. The learned Authorized Representative mainly reiterated the submissions before authorities made and in addition to that made legal and factual submissions before us to support his stand. In sum and substance, the stand of assessee was that there is composite contract of purchase and installation. So, the order of authorities below is not justified, same should be set aside. On the other hand, learned Departmental Representative has supported the order of authorities below vis-à-vis assessee's appeal while he supported the order of Assessing Officer with regard to revenue's appeal and learned Authorized Representative supported the order of CIT(A) wherein, the CIT(A) has held that assessee was not liable to deduct tax on payment made to Manyo Company Ltd., Japan for acquiring designs and drawings of Bolster and Cassette.

24. After going through the rival submissions and material on record, we find that the assessee company wanted to set up a

forging industry at Pune. The assessee bought forge and similar machines from various parties. The assessee intended that these heavy machinery needs to be properly erected, considering technical aspects of installation. The assessee agreed for separate consideration for transport / travel of the machines. The assessee also ordered the parties to supervise erection / installation of the heavy machines. The assessee also agreed to separate consideration for Air-fare (economy class) for the technicians assigned by supplier for the puprpose. The Assessing Officer held that the assessee ought to have made TDS u/s 9(l)(vii) of the ITA, 1961 on the payments other than machinery cost. The assessee preferred an appeal before the CIT(A), who dismissed the appeal for the reasons discussed above. The first issue is with regards to the payments for C & F charges (i.e. movement of machinery from overseas factory to Railway station, then to port in the foreign territory and then for high seas travel) relates to functions and activities performed in foreign country. The payments for such transportation do not accrue in India since there is no aspect involved which creates a charge for Income-tax in India. The payment terms for these C & F charges indicate the nexus to the transaction of sale of machinery (i.e. 40% on loading in platforms + 50% on loading into Ocean Vessel + 10% on arrival in Mumbai). Such payment cannot be said to be accrued in India since there is no aspect involved which created charge for under the provisions of I.T. Act, because this took place only outside Indian Territory. The Assessing Officer is directed accordingly.

25. The second issue is regarding travelling expenses of technicians. The technicians' travel expenses were negotiated and paid separately on economy airfare basis. Such expenses were for cross border travel and hence, do not arise in India and does not attract provisions of Indian Income Tax Act.

26. Third issue in general is with regard to Supervision of installation / erection. The supervision of installation / erection of machinery is an activity which relates to sale of machinery and is of specific nature i.e. hyper technical and its supervision of installation / erection of machinery was also hyper technical. Even in para 4.7 of order of CIT(A) he observed that in large contracts, installation charges form integral part of the purchase price of the machinery. Such situation remains unaffected, whether these installation charges are embedded in the cost of purchase price or, are charged separately. In contradiction to this, the CIT(A) further observed in para 4.8 of its order that when the transaction of installation charges are independent of purchase sale transaction, the same does not form part of the purchase price. In this regard, CIT(A) has given an example of modular furniture, etc. to support his view that, in all such cases, installation charges do not form part of purchase price. The key contention of the assessee remains unaddressed by CIT(A). The machines purchased are complex equipments and hence, could not be installed by any ordinary technical person. This is the reason the only machinery seller was given the contract of erection & installation supervision in these transactions. Such erection / installation of highly complex machines is not comparable to ordinary transactions of sale of modular furniture just because two separate agreements are reached, one for purchase-sale transaction and another for installation / erection & other related services. The principle of "inextricable nexus" does not change. In the present case, part payment for purchase-sale of machinery transaction was linked to successful erection of the Machinery at Chakan Plant, Pune. We find that the Hon'ble Calcutta High Court in the case of Andrew Yule & Co. Ltd V. CIT - (1994) 207 ITR 999 (Cal.), had decided an issue with regard to double taxation agreement

entered into between India and Germany. The contract for supply of machinery by Germany firm was entered into. Supplier has Permanent Establishment in Germany wherein machinery (Press) was manufactured. Certain services were also rendered in connection with setting up of Press in India. It was held that these services could not be treated as personnel services even if rendering services was embodied in separate agreement. Regarding TDS on payment to non-resident i.e. Germany company rendering services in connection with setting up certain machinery in India and it had Permanent Establishment in India. In view of agreement for avoidance of double taxation between India and Republic Germany, no income accrued in India. So it was held that there was no liability to deduct TDS at source. We also find that the Hon'ble High Court of Andhra Pradesh in the case of CIT V. Sundwiger EMFG & Co. (2003) 262 ITR 110 (AP) has decided an identical issue, wherein the Resident company entered into contract with a non-resident company for supply of different types of capital equipments in connection with setting up of special metal and alloy projects. Separate agreement was also entered for providing technical services covering supervision of erection, start up, etc. For same non-resident had to send on deputation specialist employees to India apart from payment on daily basis and assessee had to meet the expenses of travel, living and pocket expenses of said specialists. The Assessing Officer's charge that the payments made to non-residents as technical fee u/s.9(l)(vii), was held not justified. It was held that two agreements constituted one and the same transaction. Services rendered by the experts and payments made towards the same were part and parcel of sale consideration. The payment was exempt under Explanation 2 to sec.9(1) of DTTA. We also found that Hon'ble Supreme Court in the case of Ishikawajma Harima Heavy Industries Ltd. Vs.DIT (2007) 288 ITR 408 (SC) held that tax is levied on one transaction where the operations which may

give rise to income may take place partly in one territory and partly in another. The question which would fall for consideration is as to whether the income that arises out of the said transaction would be required to be proportioned to each of the territories or not. Income arising out of operation in more than one jurisdiction would have territorial nexus with each of the jurisdiction on actual basis. If that be so, it may not be correct to contend that the entire income accrues or arises in each of the jurisdiction. The authority has proceeded on the basis that supplies in question had taken place offshore. It, however, has rendered its opinion on the premise that offshore supplies or offshore services were intimately connected with the turnkey project. The principle of apportionment is also recognized by clause (a) 01 Explanation to sec.9. Thus, if submission of the Addl. Solicitor General is accepted that the contract is a composite one, then offshore supply would be of equipment designed and manufactured in one territory (Japan), and then sold in another tax territory, leading to division of profits arising in two tax territories, which is not envisaged under our taxation law. In construing a contract, the terms and conditions thereof are to be read as a whole. A contract must be construed keeping in view the intention of the parties. No doubt, the applicability of the tax laws would depend upon the nature of the contract, but the same should not be construed keeping in view the taxing provisions. We also find that ITAT, Chennai Special Bench (2010) 125 ITD 263 (Chennai) (SB) wherein the issue of applicability of section 195 of the Income-tax Act, 1961 i.e. Deduction of tax at source has arisen. Payments were made to non-resident - Assessment year 2002-03 whether where payer has a bona fide belief that no part of payment has income character, then section 195(1) would not apply because section 195(1) applies only if payment is chargeable to tax, either wholly or partly. The assessee company was awarded a contract by the

Tourism Department of the State Government to establish IMAX Theatre. Therefore, the assessee entered into an agreement with IMAX Ltd., Canada for purchase of equipment, maintenance and installation. As per the agreement, the assessee was to make payment to IMAX Ltd. on account of purchase of system and also as technology transfer fee without deducting tax at source (TDS). During the relevant assessment years, the assessee made certain payments to IMAX Ltd. The Assessing Officer was of the view that the payment made by the assessee was for provision of a technical services by IMAX Ltd. which would fall u/s.9(1)(vii). He further concluded that since the assessee had not obtained any order under section 195(2), 195(3) or under section 197, the gross sum remitted by the assessee was liable to tax under section 195. On appeal, the Commissioner (Appeals) set aside the order of assessment order by observing that as per terms and conditions of agreement, IMAX was to install equipment tested and also provide training for four purchasers. The question arose whether in view of the facts that the Assessing Officer had examined the aforesaid services of transfer of technology, whereas, they were auxiliary to sell the equipment, but amount remitted by the assessee was not chargeable to tax in India and thus, the order of Commissioner (Appeals) was justified in setting aside the impugned assessment order. We find that Mumbai Bench “L” in the case of DCIT, Mumbai Vs.Dodsal (P.) Ltd. (2013) 29 taxmann.com 65 (Mum), wherein, the assessee was engaged in business of engineering and general contracting. It entered into contracts with a Canada based company, namely, 'S' Ltd., for supply of equipments and for installation and commissioning work. Assessee claimed that amount paid by it to ‘S’ Ltd. towards installation and commissioning charges was not chargeable to tax in India as the same was covered by the exception given in Explanation 2 to section 9(1)(vii) and, thus, assessee was not liable to deduct tax at source from the said payment. The

Assessing Officer disallowed assessee's claim mainly on the ground that there were two separate agreements entered into by the assessee with 'S' Ltd., one for supply and other for installation and commissioning. He was of view that the contract for installation and commissioning was a separate contract and 'S' Ltd. was not bound to provide the services of commissioning and installation in relation to equipment supplied by them to the assessee. Thus, Assessing Officer held that the amount paid to 'S' Ltd. towards installation and commissioning charges was not covered in the exception provided in Explanation 2 to section9(1)(vii). In first appeal, the Commissioner (Appeals), allowed the claim of the assessee holding that the said amount was covered in the exception provided in Explanation 2 to section 9(1)(vii) as well as in the article 12(5)(a) of the Treaty between India and Canada. In revenue's appeal, the Tribunal having gone by the scope of work to be done by 'S' Ltd. broadly under the agreement observed that it was difficult to accept the stand of the assessee that the consideration paid to 'S' Ltd. for the said work could be regarded as consideration for any construction, assembly, mining or like project undertaken by 'S' Ltd. as contemplated in exception to Explanation 2 to section 9(l)(vii). It was observed that the equipment was to be supplied by 'S' Ltd. as per the separate agreement entered into by the assessee simultaneously on the same date and both the orders for supply of equipment system and for installation and commissioning of it were placed with reference to the same letter of intent. Having regard to all these facts of the case and the terms and conditions of both the agreements entered into between the assessee and 'S' Ltd., it was observed that the services rendered by 'S' Ltd. of installation and commissioning were ancillary and subsidiary, as well as inextricably and essentially linked to the supply/sale of equipment and, thus, amount paid for the said services by the assessee was not chargeable to tax in India in the hands of 'S'

Ltd. as fees for included services by virtue of article 12(5)(a) of the DTAA between India and Canada. In view of above, it was held that the assessee was not liable to deduct tax at source from the payment made to 'S' Ltd. and the disallowance made by the Assessing Officer by invoking the provisions of section 40(a)(i) was not sustainable. In view of above discussion, we are of the view that supervision of installation / erection of machinery activity carried by non resident relates to sale of machinery in such large contract. The installation charges forms integral part of purchase price of machinery. In such a situation, remains unaffected, whether these installation charges are embedded in the cost of purchase price or, are charged separately.

27. It is undisputed that the machinery is complex equipment, hence could not be installed by any ordinary person that is why only machinery seller non resident was given contract of erection and installation and services thereof. Such erection / installation of highly complex machinery was not comparable to ordinary installation just because two separate agreements were reached, one for sale transaction and other for installation / erection and other related services. The principle of "inextricable nexus" does not change. In the facts before us, the part payment for purchase of sale of machinery transaction was linked to successful erection of machinery at Chakan, Pune in all these contracts. So, it was not obligatory on the part of assessee to deduct the tax at source on entire payment even if it does not offer u/s.195(2) for deduction at a lower or nil rate. The Assessing Officer is directed accordingly.

28. Regarding revenue's appeal, wherein payment of ₹ 61,20,000/- was made to Manyo Company, Japan for acquiring the designs and drawings of Bolster & Cassette. These designs and drawings were acquired by assessee for ensuring smooth

performance of purchased plant and machinery. The assessee neither used these drawings in manufacturing of the machinery nor did exploit it for any other commercial purpose. Under the facts and circumstances, the acquisition of these drawings along with purchase of machinery was necessary for its maintenance. So, CIT(A) was justified in holding that it was purchase transaction as no technology know how relating to machinery was made available to assessee. So, the assessee was not liable to deduct tax on payment made to Manyo Company Ltd., Japan. We uphold the same.

29. In the result, three appeals filed by the assessee are allowed and that of revenue is dismissed.

Pronounced in the open Court on this the day 27th of February, 2014.

Sd/-	Sd/-
(R.K. PANDA)	(SHAILENDRA KUMAR YADAV)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Pune, Dated: 27th February, 2014
GCVSR

Copy to:-

1) Assessee
2) Department
3) The CIT(A)-IT/TP, Pune
4) The CIT-IT/TP, Pune
5) The DR, "A" Bench, I.T.A.T., Pune.
6) Guard File

By Order

//True Copy//

Senior Private Secretary,
I.T.A.T., Pune

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