IN THE INCOME TAX APPELLATE TRIBUNAL,
BANGALORE BENCH 'B'

BEFORE SHRI N L KALRA, A.M. AND
SHRI GEORGE GEORGE K, J.M.

ITA Nos.636,637 & 665/Bang/2008,
(Asst. Years 2003-04, 2005-06 & 2004-05)
ITA No.1452/Bang/2008 &
(Asst. year 2004-05)
ITA Nos.676 to 679/Bang/2009
[Asst. Years 2003-04, 2004-05 & 2005-06]

M/s Bovis Lend Lease (India) P Ltd.,
105, Embassy Square, 148, Infantry Road,
Bangalore-1. - Appellant
vs
The Income Tax Officer,
International Taxation,
Ward-19(1), Bangalore. - Respondent

Appellant by : Shri Padamchand Khincha
Respondent by : Smt. Swathi S Patil

O R D E R

PER BENCH :

Bovis Lend Lease India Private Limited – the assesse company – has preferred eight appeals in toto, aggrieved by the findings of the Ld.CIT (A)-IV, Bangalore, for the assessment years [AYs] 2003-04, 2004-05 & 2005-06.

2. The assessee company has raised eight exhaustive identical grounds [running into six pages] in ITA Nos:636, 637,

665 & 1452/B/08. On a careful perusal of these grounds, we find the essence and crux of the issue is that –

(i) the order passed u/ss 201(1) and 201(1A) be quashed or in the alternative:

(a) the assessee be held as not liable to deduct tax at source u/s 201(1) and, hence, not an assessee in default;
(b) the reimbursements made to the foreign company be not considered as fees for technical services or income chargeable to tax in India;
(c) at any rate, since the situs of the services was outside India, no part of the payment be held as deemed to accrue or arise in India;
(d) without prejudice, the payments made be bifurcated to ascertain the profit element and only the appropriate portion be held as income chargeable to tax in India; &
(e) Interest levied u/s 201(1A) be deleted.

Similarly, the assessee company has raised three identical grounds in ITA Nos: 676, 677,678 and 679/B/09. On a close scrutiny of these grounds, we find that the ground No: 1 being general and not specific, it doesn't survives for adjudication. In the remaining two grounds, the crux of the issue is that -

"the orders passed u/s 201(1A) be quashed or in the alternative;

"interest levied u/s 201(1A) be deleted."

3. As the issues raised in these appeals are more or less identical and rather inter-linked, for the sake of

convenience and clarity, these appeals are taken up for consideration together and disposed off in this common order.

4. The brief history of the case is that the assessee company is an Indian Company engaged in the business of project and construction management. It is a part of the Bovis Lend Lease Group. The assessee company entered into a 'Management Services Agreement' (MSA) with one of its group concern M/s Lend Lease Asia Holdings Pte Ltd (LLAH) – a Company based in Singapore on 01.07.2001. Under the said agreement, LLAH agreed to provide services to the assessee company in relation to day to day business operations consisting of administrative, legal, finance and accounting matters. In consideration of rendering of services, LLAH agreed to recover the costs incurred by it in providing the above services to the assessee company. The cost recovery according to the agreement was based on the time spent in rendering of services to the assessee company. The recovery did not include any profit mark up. The auditors report by KPMG also certified that the amounts charged to the assessee company did not include any profit mark up. An application was made u/s. **197(1)** of the Act by **LLAH** for receiving the payments under the MSA without deduction of tax at source. In the said application it was explained as to why no tax was required to be deducted at source. A copy of the auditors report certifying that the payments under the MSA did

not include any profit element was also enclosed along with the said application.

5. The AO, after considering the application issued certificate u/s 197 to the assessee company for making payments to LLAH without deduction of tax at source. The certificates issued u/s 197 on various dates were neither revoked nor cancelled thereafter. Subsequently, notices were issued u/s 201 of the Act by the AO to show-cause as to why the payer should not be treated as assessee in default u/s 201(1) of the Act and also interest should not be levied u/s 201(1A) of the Act. A detailed written submissions were made rebutting the the AO's claim and various judicial pronouncements were cited to drive home the assessee company's point. Rejecting the submissions of the assessee company, the AO went ahead and passed the impugned orders, wherein it was held that the payments represented fees for technical services under the Income-tax Act as well all the Double Taxation Avoidance Agreement (Treaty) between India and Singapore and that the certificates issued were not in accordance with law. In conclusion, the AO had stated that –

> *as on the dates of crediting the amounts, the payee had the right to receive them and hence the income had accrued to the payees. Further, there was no certificate on these dates, authorizing payment/credit without deduction of tax and hence, the payer was required to deduct tax u/s 195 of the Act;*

(a) the amounts in question are not reimbursement of expenses as claimed by the payer and they were the consideration payable for the services rendered the payee;

(b) in terms of the Article 12 of the DTAA, the FTS are taxable on gross sums and, hence, no payments can be categorized as re-imbursements to exempt them from the purview of taxation;

(c) the payee has made available the technical knowledge, experience, skill, know-how, or processes, to the payer and, hence, the payments fall into the category of FTS;

(d) Since the payments in question are FTS, the payer was required to deduct tax in terms of provisions of s.195(1). As the payer has failed to deduct tax, it is hereby order as an assessee in default in terms of provisions of s.201(1). It is liable to pay this tax along with interest u/s 201(1A) of the Act.

6. Aggrieved, the assessee company took up these issues before the CIT (A) for redressal. The assessee company had reiterated what had been urged before the AO coupled with the various judicial pronouncements in support of its claim. After due consideration of the assessee company's forceful arguments and also extensively quoting the legal position, the Ld. CIT (A) concluded thus –

(i) the payments made by the appellant to LLAH cannot be considered reimbursements. The appellant has also not been able to establish that the payments made were exactly equivalent to the expenses incurred by LLAH and do not contain any element of markup. The extent or otherwise of any markup, in such circumstances, is hardly of great relevance. Under the circumstances, the appellant's reliance on various judicial precedents

that only reimbursements with an income element are chargeable to tax is hardly of any relevance and is quite inconsequential in the light of the foregoing analysis, as such precedents can come into play only if the appellant's claim of the payment constituting reimbursements were to be accepted;

(ii) The Hon'ble Supreme Court in the case of National Cement Mines Industries v. CIT (1961) 42 ITR 77 had observed that, "the name which the parties give to the transaction which is the source of receipt and characterization of the receipt by them are of little moment and the true nature and character of the transaction have to be ascertained from the covenants of the contract in the light of the surrounding circumstances". Hence, the AO had rightly concluded that the payments could not be exempted from tax merely because they are termed as 'reimbursement'. Briefly put, the true nature and character of the transaction are relevant in deciding the application of TDS provisions. To sum up, the covenants of the contract and the surrounding facts and circumstances clearly suggest that the amounts in question are consideration for services rendered by the payee and cannot constitute reimbursement of expenses as claimed by the payer;

(iii) With regard to as to whether or not the liability to deduct tax is attracted at the time of credit or at the time of actual payment in accordance with the provisions of s.195 and whether credit of amount to outstanding expenditure a/c is tantamount to crediting the party's account and whether income accrued to the non-resident on that very date, the CIT(A) was of the view that a certificate issued u/s 197 cannot cover payments/credits made prior to the date of issue of such certificate. Drawing support from the C CBDT's Circular No.774 dt: 17/3/99, she concluded that the certificate u/s 197 issued in this regard cannot apply

to credits made prior to the dates of issue of certificates;

(iv) With regard to the assessee company's claim that the AO erred in concluding that the services rendered by LLAH, Singapore were in the nature of managerial, technical & consultancy services so as to fall under the category of 'fees for technical services' [FTS] as defined in Article 12(4) of the DTAA between India and Singapore and, therefore, liable for TDS u/s 195 and that LLAH, Singapore had made available technical knowledge, skill, know-how or process to the assessee, the CIT(A) after extensively quoting the Article 1 of the MSA and in comparison with the DTAA between India and USA titled "Royalties and fees for included services" etc. and also keeping in view the principles laid down by the Hon'ble ITAT, Mumbai Bench in the case of Raymond Ltd. v. DCIT reported in 86 ITD 791, the CIT(A) was of the view that since the conditions laid down in the MOU to the DTAA have been completely fulfilled in so far as the concept of 'make available' is concerned and the criteria prescribed by the Mumbai Bench of Hon'ble ITAT referred supra wherein the concept of 'make available' has been elaborately discussed are also satisfied, the AO had rightly concluded that the provisions of services of technical personnel by LLAH, Singapore to the payer squarely falls within the definition of 'included services' as contemplated in Article 12(4)(b) of the DTAA. Drawing support from the finding of AAR in the case of AT & S Austria Technologie & Systemtchnik, Aktiengesellschaft v. CIT that 'reimbursement of salary and other related expenses by an Indian company on assignment of personnel of foreign company to work for that Indian company would be chargeable as FTS, the service being the service of provision of technically qualified personnel, the CIT(A) had confirmed the action of the AO;

(v) In regard to the Department itself had granted 'Nil' deduction certificates for the AYs in dispute, thereby treating the reimbursement of expenses as not constituting income, the CIT(A) was of the view that at the time of issuing certificate u/s 197, there was no mandate that a finding should be given at this juncture regarding the chargeability of the sum or any conclusion arrived at that the sums constitute income;

(vi) In respect of the assessee company's grievance that the AO had not applied the rationale of judicial precedents which support the assessee's claim, the CIT(A) asserted that the AO had given a clear finding that the case laws on which the assessee company had placed reliance were distinguishable on facts. With regard to the citation in the case of Decta v. CIT relate to the issue of reimbursement which has come up during the course of regular assessment wherein the issues have been scrutinized in detail. With regard to the provisions of s.195, she was of the view that relating to TDS being tentative in nature and leaving very little scope for conducting investigation/enquiries or in-depth examination of facts cannot be placed on the same level. This view was supported by the provisions of ss.195(2), 195(3) AND 197 which safeguard the interest of both the payer and the payee;

(vii) The assessee company's denial of its liability to pay interest u/s 201(1A), the CIT(A) was of the view that if any person does not deduct the whole or part of the tax, he is liable to pay simple interest at the relevant rate on the amount of such tax from the date on which such tax was deductible to the date on which such tax was actually paid. Extensively quoting various decisions, notably, in the cases of (i) Bennet Coleman & Co Ltd v. CIT (157 ITR 812 (Bom); (ii) CIT v. Dhanalakshmy Weaving Works [245 ITR 13 (Ker)], she held that the payment of interest u/s 201(1A) is consequential,

mandatory and automatic and no 'reasonable cause' is required to be established.

Taking above view, the Ld.CIT(A) had virtually dismissed the contentions of the assessee company and upheld the action of the AO for the assessment years under dispute.

7. Agitated over the finding of the CIT(A) referred supra, the assessee company has come up with the present appeals.

8. During the course of hearing, the Ld A.R had furnished voluminous paper Books, various judicial pronouncements, Transfer pricing report for international transactions with associated enterprises [BLLPPL] to substantiate the claim of the assessee company. The submissions of the Ld. A R are summarized as under:

9. Nature of TDS Obligation:

A reading of sections 4, 190 and 191 indicate that the primary liability to pay tax is on the person who is the recipient of the relevant sums. This liability may be discharged either partially or fully by the mechanism of TDS. TDS thus constitutes that a substitutionary or vicarious liability. The Supreme Court in the case of ***Transmission Corporation of AP V CIT (1999) 239 ITR 587*** stated that TDS represents a tentative deduction. This tentative deduction is subject to a

final assessment. TDS provisions are thus complementary in nature (being substitutionary or vicarious in character) as they enable a discharge of the primary liability of an assessee. The Mumbai Tribunal in the case of ***IDBI Vs ITO 293 ITR (AT) 267*** has also confirmed this view. The fact that TDS is only a substitionary mechanism is reinforced by section 202. Section 202 provides that tax deduction is only one mode of recovery. This mode is without prejudice to any other manner of recovery.

10. Having provided for various types of payments liable to tax deduction at source, the statute also contains inherent mechanisms to mitigate the rigour of these provisions. The statute for example may exempt the payer from complying with the TDS obligations if the sum is below the threshold limit. (e.g. limit of Rs.20,000/- under section 194C). In respect of payments to non-residents the payer can make an application under section 195(2) for determination of the appropriate sum on which tax is to be required to be deducted at source. Similarly provisions are incorporated to mitigate hardship for a payee also. A declaration may be filed under section 197A by the payee, to enable him to receive the money without deduction of tax at source. Similarly, an application may made under section 197(1) by the payee to the assessing officer. If the assessing officer is satisfied, he may direct that the sums be paid without deduction of tax at source. Apart from section 197(1), a non-resident recipient could also make an application under section

195(3) for receipt of the sums without deduction of tax at source. Rules have been framed under either section as to how and when such applications could be made.

11. The obligation upon the payer to deduct tax at source is generally associated with event of the credit of the sums to the account of the payee or the payment thereof, whichever happens earlier. There is however no such time stipulation for the payee to make an application for receipt of sums without tax deduction. In terms of timing therefore these two provisions do not have a uniform import. In other words, there are two provisions having varying import. However neither of the provisions stand on a superior pedestal as compared to the other. One provision is not subject to the other. When two provisions are of equal strength, neither can be ignored. ***[CIT v Associated Electrical Agencies (2007) 295 ITR 496 (Mad)]***

12. In view of the above , to say that the provisions of section 195(2) shall prevail and override the provisions of section 197(1) would not be a correct statement of law. There is no prioritization between the two. One is not subject to the other. Both the provisions would therefore have to be given effect to. Their object is to enable the recovery of tax which is correct in law as well as in quantum. If therefore a benefit or concession is granted to one of the parties, (the payer or the payee) by a process known to law, its effect cannot be whittled down on the ground that such benefit or concession is not envisaged to the

other party. The provisions contained in 197(1) or 195(2) or 195(3) are beneficial in nature. They have to be interpreted in a manner that promotes the objective sought to be achieved and not frustrate it [***Bajaj Tempo Ltd. V CIT 196 ITR 188 (SC)***]. Even otherwise, if two provisions conflict with one another, an interpretation that favours the assessee is to be adopted. [**Vegetable Products case *88 ITR 192 (SC)***]

13. In the present case applications were filed under section 197(1). These applications were filed by the Singapore Company being the recipient of the sums. The Income tax officer issued a certificate authorizing payment of the sums to the non-resident without deduction of tax at source. Some payments were made to the Singapore Company after the receipt of the above said certificate. An application was made for renewal of the certificate (for NIL TDS) under section 197 for two payments due. The said application has not been acted upon. Instead, notice under section 201 of the Income Tax Act was issued and an order ultimately passed there-under.

14. Section 197 provides that the certificate shall be issued by the assessing officer if he is satisfied that the circumstances of the case justify a lower or nil deduction of tax at source. Satisfaction refers to situation where the element of uncertainty or doubt no longer exists. The expression employed in section 197(1) is '**satisfied**'. As per Shorter Oxford English

Dictionary, the term 'satisfaction' means *'sufficient information, proof or removal of doubt, conviction, provide with sufficient proof or information, free from doubt or uncertainty, convince'.* The usage of the word **'shall'** obligates or mandates an assessing officer to issue the certificate on being satisfied. The issue of a certificate under section 197(1) presupposes that the assessing officer is satisfied that the payments in question justify lower or nil deduction of tax at source.

15. Thus, the meaning of the term 'satisfied' in section 197 is that the assessing officer has reached a clear conclusion that the certificate issued under the said section justifies lower or nil deduction of tax at source.

16. The said certificate was never cancelled at any point of time. Section 197(2) states that the certificate shall have validity for the financial year mentioned therein. Certain payments were made during the validity of the certificate. The action of the appellant was thus in compliance of the directions issued through the certificate in form 15AA issued by the assessing officer. The payment having been made in accordance with the certificate in force, there should be no occasion to warrant a conclusion that the appellant was in default in terms of section 201. For the pending (but renewed) application, in view of the fact that there were no change in the facts and circumstances, that for similar payments a certificate had been

granted earlier and for the unpaid amounts also, a certificate for NIL withholding had been granted, there was no occasion or need not to issue the NIL certificates.

17. The aspect of "credit" of a sum to the account of the payee or any other account inviting or mandating the deduction of tax at source is not to be regarded as having an all pervasive effect. For example, an application is made to the Authority for Advance Ruling for a determination whether the payment under a transaction warrants deduction of tax at source. The Authority has a time of six months to dispose the said application. If the application is made close to the financial year end, it is possible that the Authority may give its ruling after the expiry of the financial year. In the meanwhile the company may pass accounting entries to close book of accounts to have the same audited and publish the financial results. Technically therefore, the credit would happen before the ruling is obtained. If TDS liability is to be triggered on the factum of credit, then the certificate obtained from the Authority subsequently would be of no avail. Similar would be the position when an application (for NIL TDS certificate) is made to the assessing officer before the accounting year end but the same is disposed by him after financial year and subsequent to the passing of the accounting entries by the payer. In either circumstance, the ruling or certificate obtained subsequently should enable the recipient of the sums to receive the amount without deduction of tax at source. It should therefore be held

that the payees' obligation and the timing there under is one facet of the issue. The other facet is the payees' right to take advantage of certain avenues to mitigate or reduce the rigors of TDS. These two aspects represent two sides of the same coin. Any favourable conclusion under one facet should therefore be held as equally applicable to the other facet.

18. In the instant case the applications were disposed of by assessing officer authorizing the reimbursements without deduction of tax at source. The certificate clearly mentions that there is no liability to withhold tax on the sums credited to the account of the payees. The certificate cannot be invalidated on the ground that it was issued subsequent to the passing of the accounting entries by the payer.

19. As already detailed, it is not mandatory under section 197(1) that the certificate should have been obtained or the application made before the date of credit. It is only under the second proviso to section 194C(3) there is a mandate that the requisite declaration has to be in the prescribed form and filed before the prescribed time. Rule 29D(2) issued in this context states that the declaration shall be filed before the date of credit. There is no such requirement under section 197. A certificate obtained after the date of credit but in accordance with the mandate of the provisions of law should consequently be regarded as valid, effective and binding. The

directions under the certificate would therefore ensure to the benefit of both the payer as well as the payee. As a result, the certificate obtained under section 197(1) would continue to govern the transaction and the payments should be made in accordance with the mandate of the certificate.

20. This matter could be viewed from another angle also. A declaration under section 197A in Form No. 15G or 15H enabling the receipt of interest or other sums without deduction of tax at source could be filed by the payee at any time before the expiry of the relevant year and before the receipt of the payment of interest. It is possible in meanwhile that the payer concerned has passed periodic entries (monthly or quarterly) crediting the amount of interest. In such circumstances it cannot be stated that the eventuality of "credit" having been completed, Form No. 15G or 15H would be of no avail. On the contrary, declaration on Form No. 15G or 15H should help the receipt of interest without deduction of tax at source. The declaration in Form No. 15G and 15H would thus have "retrospective effect" to cover even the credits made preceding the date of such declaration.

21. Even otherwise, in the present case, the certificates under section 197 were issued on three different occasions in pursuance of three different applications covering the various years under appeal. These certificates were issued

by successive and different officers. One of them was Additional Commissioner of Income-tax Act. A subsequent assessing officer different from those who had issued a certificate has now passed an order that the conclusion drawn by the preceding officers were not in accordance with law. Such a finding by a succeeding officer is not permissible under the statute. This is more particularly so when one of the preceding officers was higher in rank. The entire exercise by the succeeding assessing officer to reexamine the issue and pass a contrary order is bad in law and void ab initio

22. The impugned transactions were reported by the appellant in an audit report under section 92E under the "Transfer Pricing" provisions [Chapter X of the Act]. It was mentioned therein that the impugned sums represent reimbursements. The characterization there under has not been disturbed. The assessment orders for two of the years were passed under section 143(3). One of these orders (For AY 04-05) was passed subsequent to the issuance of notice under section 201 proposing to record a finding that the transaction warranted deduction of tax at source. For the assessment year 05-06, the intimation under section 143(1) was passed after the notice under section 201 was issued. Despite such proposal, the assessment was completed without disallowing any sums under section 40(a)(i) of the Income-tax Act. this means that the assessing officer has accepted the proposition that the

transaction did not warrant tax deduction at source. One wing of the department having accepted the transaction as reported another wing of the same department cannot be permitted to adopt a different view. It has been so held in the many decisions, a compilation of which is separately attached.

23. Assuming for a moment that the certificates were wrongly issued, the transactions were accomplished on the basis of a valid and subsisting certificate. An order generally issued would continue to have affect till it is withdrawn or cancelled by a process known to law. [observations in ***CIT v Ramachandra Hatcheries 305 ITR 117, 121 (Mad])***. An order, whether wrong, right or incomplete is a valid and effective order unless quashed or upset by the competent authority. This was the view held in many decisions, a compilation of which is separately attached.

24. If the obligations have been performed in accordance with the mandate thereunder, no fault can be found with the assessee even if the order is wrong. The department cannot take advantage of its own wrong. It has been so held in many decisions, a compilation of which is separately attached:

25. In the context of section 40A(2), in para 75 of Circular No. 6P dated 6th July 1968, the Board has clarified as follows:

> *" .....that where the scale of the remuneration of the director of the company had been approved by the Company Law Administration, there was no question of the disallowance of any part thereof in the income tax assessment of the company on the ground that the remuneration was unreasonable or excessive." (emphasis supplied).*

Even as per the Board therefore, a finding by one wing of the Government shall be binding on another wing.

26. Even otherwise, in a case where payments are made to a non resident without deduction of tax at source in accordance with the order passed under section 195(2), the payer cannot be held to be an assessee in default under section 201 of the Act. This was the view held by the Mumbai ITAT in the case of ***Mangalore Refinery and Petrochemicals Ltd. v. DDIT 114 TTJ 632.***

27. The Rajasthan High Court in the case of ***Jaipur Udyog Ltd.v CIT 155 ITR 476*** observed as follows:

> *" In this regard, it may be mentioned that merely because certain material was required to be placed before the ITO for the purpose of enabling him to grant and certificate and such material was not placed before him by the assessee and the said material was also not required to be produced before the ITO would not invalidate a certificate which otherwise satisfies the requirements of*

section 197(3) of the Act. This is also because the determination made by the ITO under an error of law would not cease to be a determination on which the assessee can legitimately act and it is not open to the Department to hold the assessee liable for short deduction of tax made on the basis of such certificate. (emphasis supplied).

28. The Supreme Court in the case of ***ITO v Jaipur Udyog Ltd. (1996) 217 ITR 190*** has confirmed the above view.

29. The orders passed by the CIT(A) are otherwise also bad in law. During the course of the appeal hearing, the CIT (A) has asked for various details. One such letter in the hand writing of the CIT (A) calling for details was faxed to the appellant on 13th March 2008 at 5.18 p.m. 14th March 2008 was a Friday. 15th and 16th March were holidays being Saturday and Sunday. The details called for were filed at the office of CIT(A) on 17th March 2008 i.e. within one effective working day of request. Detailed breakup of the relevant data supporting the invoices for all the three years was filed. Time sheets on which the details were based were carried to the office. The appeal order is dated 17th March 2008 i.e. the very same date on which the details were furnished and produced. Keeping in view the time sequence, it is unlikely that such material and detailed particulars were examined before the conclusions were drawn. This is further reinforced by the fact that material portions of the CIT (A) order are verbatim reproduction of the assessing

officer's order. The order of the CIT (A) thus suffers from a non-application of mind as also the vice of ignoring material particulars. The same being bad-in-law is liable to be quashed.

30. As per section 201 of the Act, a person is deemed to be an 'assessee in default', ***if he is required to deduct tax at source in accordance with the provisions of the Act***, and does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act. The precondition for the applicability and / or operation of section 201 is that the assessee is required to deduct tax at source in accordance with the provisions of the Act.

31. As per sec. 197(2), the person responsible for paying the income **shall** deduct income tax at the rates specified in certificate or deduct no tax, as the case may be, until such certificate is cancelled by the assessing officer. The usage of the term 'shall' would mandate and leave no option for the payer but to act, in terms of the certificate issued under subsection (1). As a result, till such certificate issued under subsection 1 is cancelled, the payer would not be statutorily required to deduct tax at source under the provisions of the Act. consequently section 201 would not be attracted. As a result, the payer (appellant were) cannot be held to be an assessee in default in terms of section 201.

32. TIMING OF TDS LIABILITY:

The lower authorities have concluded that since the amounts payable under MSA were credited to the account of LLAH before obtaining the certificates under section 197, the said certificates have no legal validity. Reliance has been placed on CBDT Circular No. 774 in this connection.

33. The amounts payable under the MSA were initially credited to 'outstanding expenses' account. Thereafter, after obtaining the certificates under section 197, the said sums were credited to the account of LLAH and subsequently the payments were made.

34. In ***IDBI v ITO (2007) 293 ITR (AT) 267 (Mum)*** it has been held that crediting of interest to outstanding expenses would not be liable for deduction of tax at source. Thus, the contentions of the lower income tax authorities are without any merit and liable to be disregarded.

35. Even otherwise, circular No. 774 [1999] 236 ITR (St.) 250 recognizes the practice of applications made beyond the dates of credit. In the operative portion of the above circular, the direction of the Board is that a certificate under section 197 should not be issued after the amount stands credited or paid whichever is earlier. The direction of the Board is not that the certificate if issued would be invalid. The

direction is only to enforce the conduct of the assessing officer in a particular manner. The circular does not stipulate that if the assessing officer were to act contrary to the direction, the certificate would be bad-in-law. The circular also states that assessees having technical hardship in submitting application on time, may refer the matter to the Board for condonation of delay. The circular thus recognizes the possibility of a certificate being issued even subsequent to the date of credit.

36. In instruction No. 555, dated 11th June 1973 issued in the context of section 197(3) read with section 80K of the Income-tax Act, the Board stated that the assessing officer assessing the company shall be held responsible for any loss of revenue because of failure to observe the relevant instructions. The Board instruction referred to above also does not state a certificate issued in controvertion of the instructions would be invalid. It is only states that the assessing officer has to be vigilant.

37. Even otherwise, the law recognizes the possibility of a delayed application. Where the validity of the earlier certificate expires; the assessee may make another application. The second application for a fresh certificate may be make after the expiry of the earlier certificate (refer Rule 28AB). On the date of the second certificate the credit entry to the account of

the payee would have already have been made. The law nevertheless visualizes and postulates a fresh application.

38. This means that:

(i) a certificate issued after the accounting entry would be valid and binding;
(ii) the credit to the account of the payee should not always be regarded as mandatorily leading to a tax deduction;

Also, there is no dispute regarding payments having been made after obtaining the certificates under section 197. Thus, the conditions for invoking the amendment to 195 were not satisfied in the present case.

39. Even otherwise, circulars not beneficial, are not binding on an assessee. They cannot affect an assessee in an adverse manner. ***UCO Bank Vs. CIT 237 ITR 889, 896 (SC).*** There is no mandate of law that the application has necessarily to be made before credit or payment. To that extent the circular is not to be regarded as binding and hence liable to be ignored.

40. Even otherwise, assuming that the certificate for NIL TDS was wrongly issued does not mean that the revenue would be left without any remedy. As already detailed, TDS is a

mechanism of discharging the primary liability of the recipient. If the payer of sums secures an exemption from withholding tax at source, the assessing officer may not be without remedy. He has the power to make an assessment on the non-resident directly. He also has the power to regard a person in India as an agent of the non-resident and recover the taxes from such agent. The issuance of a nil deduction certificate is therefore not the end of the story.

SINCE THE PAYMENTS TO LLAH WERE BEREFT OF PROFIT ELEMENT, THERE WAS NO LIABILITY TO WITHHOLD TAX AT SOURCE.

41. Management Services Agreement (MSA) was entered into between the appellant and its holding company in Singapore. The MSA is dated 1st of July 2001. The MSA was preceded by the terms being outlined vide correspondence dated 30th June 2001. It was agreed that the appellant would contribute to the cost of providing the services. A "cost contribution arrangement" was agreed upon. It was stipulated that – (i) there would be no mark up on costs. (ii) certain costs would not be recovered. (iii) the costs would not in way be referable to the Singapore Company's function as a shareholder (iv) the costs would not give rise to duplication of functions performed by the employees of the appellant. The arrangement was akin to that before the Calcutta High Court in the case of

CIT v Dunlop Rubber Co Ltd [1983] 142 ITR 493 where-under various associated and subsidiary companies utilizing the fruits of the technical research undertaken by the holding company based in London agreed to proportionately share the expenses incurred by the holding company towards technical research and accordingly made payments to foreign holding company. The High Court held that the amounts received by the holding company from its associates were pure reimbursement of expenses bereft of profit / income element and hence not chargeable to tax in India.

42. The allocation of costs was on the basis of the following:

- → Costs attributable to specific projects were charged to the recipient of the services. The basis was the time involved and the cost of the services based upon such time.

- → All other cost are apportioned between the recipients of the services on the basis of a formula based on either the labour hours or the relevant expenses involved.

The invoices (called as tax invoice and carrying the description of debit note) were raised periodically. The details of the employees who rendered the services, the function under which the same were provided, the time devoted, the cost of the employee whose time was involved and the manner of allocation of the overheads were submitted. The manner of determining

the cost as also the allocation of overheads was certified by a firm of independent auditors who have also confirmed that the same is bereft of a profit element. In other words, the payments to LLAH were pure reimbursement of costs.

43. The lower authorities have held that the appellant has not established that the payments were bereft of profit element. The appellant furnished all the details required by the lower authorities. The basis of computation of recovery of costs was also furnished. The recovery of costs was based on the actual time spent multiplied by the cost of resources employed. The Bovis Lend Lease Group has sufficient controls with regard to the correct computation of recovery of costs. The same were vouchsafed by an independent auditor (and a "third party" expert). On the contrary the lower authorities have not brought any material / evidence on record to prove that the allocation of costs included a profit element. The contentions of the lower authorities are without any merit.

44. Thus, the contention of the lower authorities that application ought to have been made under section 195(2) before crediting the payments to LLAH is without any merit.

45. In the present case, the payments made to LLAH, were bereft of any iota of profit element. The payments represented a reimbursement of costs incurred. The said

payments were made after obtaining certificates under section 197(1).

46. A listing of some of the cases is separately attached where it has been held that reimbursement does not have any component of income and hence is not income chargeable to tax.

47. The Karnataka High Court in an unreported decision Karnataka State Urban Infrastructure Devlopment Finance Corpn, B'lore v ITO Karnataka High Court ITA No. 466 / 2004 decision dated 04.08.2008 observed as follows:

> *"In the circumstances, we are of the opinion that the levy of penalty* (tax) *under section 201 in respect of the tax not deducted* ***on the amount of the reimbursement made by the assessee*** *has to be set aside."*

48. In ***Expeditors International India (P) Ltd. vs. Addl. CIT (2008) 118 TTJ (DELHI) 0652*** it has been held as follows:

> *" We are of the view that the amount paid by the assessee company to its parent company on account of reimbursement of expenditure incurred in respect of global accounts manager cannot be treated as payment of salary so as to attract the deduction of tax at source. Undisputedly, the global management staff employed at headquarters were the employees of the parent company viz.*

Expeditors, USA and there being no employer employee relationship between the said employees and the assessee company, the reimbursement of expenses incurred in relation to them on proportionate basis by the assessee company to the parent company could not be treated as in the nature of salary paid by the assessee company. ***It was a case of reimbursement of common expenses incurred by the parent company for the benefit of all the group concerns including the assessee company which did not attract any deduction of tax and there was no question of making any disallowance by invoking the provisions of s. 40(a)(iii) for non-deduction of tax from such reimbursement."***

49. The Bangalore Bench of ITAT in M/s ***Bangalore International Airport Ltd v ITO (International Taxation), ward 19(1), Bangalore ITA Nos. 536 to 539 / Bang / 06 decision dated 17.12.2007*** held that reimbursement of costs to foreign company would not be subjected to deduction of tax at source u/s 195 of the Act.

50. In view of the above, there was no requirement to deduct tax at source in respect of the payments made to LLAH. The reliance by the lower authorities on the decisions of the Andhra Pradesh High Court and of the Supreme Court in the Transmission Corse Corporation's case is misplaced

51. Even otherwise, as an application was made and the requisite details furnished, the lower authorities could have

examined the facts of the case and limited the direction of the withholding tax to the appropriate amount of income only.

52. Payments to LLAH not chargeable under the DTAA between India – Singapore:-

In respect of persons to whom the Double Taxation Avoidance Agreements are applicable, the provisions of the Income Tax Act, 1961 would apply only to the extent they are beneficial to the assessee. This is provided in subsection 2 to section 90 of the Income Tax Act, 1961. For this principle, support can also be drawn from, among others, *Union of India* v. *Azadi Bachao Andolan* [2003] 263 ITR 706 (SC) ; *CIT* v. *Visakhapatnam Port Trust* [1983] 144 ITR 146 (AP) ; *CIT* v. *Davy Ashmore India Ltd.* [1991] 190 ITR 626 (Cal) ; *CIT* v. *R. M. Muthaiah* [1993] 202 ITR 508 (Karn) ; *Arabian Express Lines Ltd. of U. K.* v. *Union of India [1995] 212 ITR 31 (Guj) and Advance Ruling P. No. 13 of 1995, In re [1997] 228 ITR 487 (AAR). CBDT Circular No. 333 dated April 2, 1982 ([1982] 137 ITR (St)1*

53. In the present case, assuming without admitting that the payments to LLAH are chargeable under the Act, it is submitted that the said payments does not constitute *'fees for technical services'* under Article 12 of the DTAA between India and Singapore.

54. The definition of the term 'fees for technical services' under Article 12 of the DTAA is as follows.

> *"The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services :*
>
> *(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or*
>
> *(b)* ***make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein*** *; or*
>
> *(c) consist of the development and transfer of a technical plan or technical design,* ***but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.***"

55. The meaning of the term 'make available' has been explained in the MOU between India-US DTAA as follows:

> *"This category is narrower than the category described in paragraph 4(a) because it excludes any service that does not make technology available to the person acquiring the service. Generally*

> *speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. The fact that the provision of the service may requires technical input by the person providing the service does not per se mean that technical knowledge, skills, etc., are made available to the person purchasing the service, within the meaning of paragraph 4(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available."*

56. The DTAA with Singapore uses expressions that narrow the meaning than that conveyed in the India-USA DTAA. The DTAA with Singapore no doubt includes managerial services apart from technical and consultancy services which two terms are what the India-USA DTAA is limited to. However, all the three category of services should make available technology. The "make available" concept as embodied in clauses 'b' as well as 'c' of the definition of fees for technical services – something that the DTAA with USA also does not incorporate. To that extent, the definition under the India-Singapore DTAA is narrower.

57. The term *"make available"* has a distinct meaning under the Treaty. It postulates a concept wherein the recipient of the services is **not only benefited by the services but there is also a transfer of the technology, processes, skill etc., to the recipient in a manner which will enable the latter to apply**

the technology, processes, skill etc., in future without recourse to the service provider. The term "make available" encompasses some sort of durability and stability with reference to the transfer of technology, processes and skill etc., so that the same is not regarded as transient or ephemeral

58. Under section 9(1)(vii) of the Income-tax Act mere rendering services is sufficient to deem the accrual of income. A rendering of services normally translates into a utilization of such services by the recipient. In other words, generally, when a person renders services, the other person is said to have made use of those services. Making use of services is therefore a consequence of the rendering of services. Under the Treaty however, it not just the rendering of services or "making use of" services that enables the classification of the payment as fees for technical services. A payment would be classified as fees for technical services only when it "makes available" technical knowledge, skill, experience or processes. "Making available" refers to a stage subsequent to the "making use of" services.

59. In ***Raymond Ltd v. DCIT (2003) 86 ITD 791 (Mum-Trib),*** in the course of interpretation of the MOU between India and US, the Tribunal held that unless technical services are rendered in a manner which would enable the recipient to apply the technology, it would not constitute fees for included services under the Indo – US treaty.

60. The Hon'ble ITAT, while deciding the matter, made following observations:

> *(i) In our understanding, 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 <u>without recourse to the performer of the services in future</u>;*
>
> *ii) The technical knowledge, experience, skill, etc must remain with the person utilizing the services even after the rendering of the services had come to an end;*
>
> *iii) 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;*
>
> *iv) 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;*
>
> *v) 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.*

61. The Treaty warrants technology to be the underlying characteristic of the transaction for the payment to

be classified as fees for technical services. The initial part of the definition no doubt refers to managerial, technical or consultancy services. Nevertheless the aspect of making available technology in the definition means that the broad classification of services would have to fulfill additional conditions to be regarded fees for technical services. The underlying services should pertain to a technology. It should enable the other to acquire and apply the technology. Mere use of the said services is not sufficient. The Treaty does not refer to a recipient of services. It refers to a person who has acquired to the technology. Technology is said to be acquired when the recipient is enabled to apply the said technology in his business without recourse to the provider of the services. Thus, consultancy services which are not of a technical nature cannot be classified as 'fees for technical services'. The fact that the provisions of services may require technical input by the person providing the services does not per se mean that technical knowledge, skill etc., are made available to the persons purchasing the services. Similarly, the use of the product which embodies technology shall not per se be considered to make technology available.

62. The fact that the service provider uses / employs sophisticated technology in providing the services is not relevant. Example 7 given protocol to the India – USA DTAA also signifies that mere use of sophisticated technology in providing the

services does not lead to the conclusion that the service provider has made available the technology.

63. The Tribunal in the case of *Raymonds Ltd (supra)* was dealing with India – UK Treaty wherein the definition of FTS was similar to the India – US Treaty. The Tribunal held that the elucidation of the concept of *"make available"* in the India – US Treaty would hold good also for the India – UK Treaty. The conclusion as above was reiterated in ***Intertek Testing Services India Private Limited in Re (2008), 307 ITR 418 (AAR)*** whereunder services similar to the case of the appellant were rendered the AAR observed as follows:

64. In another recent decision in ***Diamond Services International P Ltd Vs Union of India (2008) 304 ITR 201 (Bom)*** a Division Bench of the Bombay High Court held that the job of grading diamonds in the laboratory and furnishing a grading certificate did not amount to transferring any (technical) skill or knowledge to the customers. Nor did it amount to transfer of any industrial or commercial experience of the company which issued the certificates.

65. Apart from the above, in the following decisions, it has been held that mere rendering of services cannot be considered as included services unless the person utilizing the services is able to make use of the technical knowledge himself in

his business and / or for his own benefit and without recourse to the performer of the services. It was also held that the usage of technology in rendering the services cannot be said to make available the technology etc.

- ***CESC Ltd. v. DCIT 80 TTJ 765 (Kol);***
- ***National Organic Chemical Industries Ltd. v. DCIT 96 TTJ 765 Mum;***
- ***NQA Quality System Registrar Limited vs. DCIT 92 TTJ 946 Del;***
- ***Cushman & Wakefield Pvt Ltd vs. DIT (2008) 305 ITR 208 (AAR);***
- ***Mahindra & Mahindra Ltd Vs DCIT (2009) 313 ITR (AT) 263 (Mum) (SB).***

66. In the present case, the services rendered by LLAH were not in the nature of technical services. LLAH was rendering services in relation to certain administrative, financial, personnel, legal, marketing, insurance support matters. These services did not 'make available' any technical knowledge, experience, skill, know-how or processes to the appellant. These services did not involve the transfer of any technical plan or technical design to the appellant. The services did not therefore constitute "fees for technical services" and hence were outside Article 12 of the Treaty.

67. The lower authorities have concluded that since the employees of the appellant were trained by LLAH, the underlying payment tantamounted to making available technical knowledge etc. The payments in the instant case were not towards training,

although training was one of the areas/subjects mentioned in the MSA. The conclusions of the lower authorities are therefore incorrect.

68. Even otherwise, training per se, would not result in make available of technology, experience, skill, processes etc., Unless the training involves the transfer of technology, processes, skills, etc to the recipient in a manner which enables the recipient to apply the technology and to derive benefit therefrom without recourse to the tutor, it would not fall within the expression *"technical services"* as defined in the Treaty.

69. In the present case, the MSA included training services. The training was with regard to operation manual, accounting system cheops, management information system and other internal / statutory reporting, safety regulations, etc. Training of the above nature does not 'make available' technical knowledge, experience, skill, know-how or processes. There was no transfer of technology. It merely facilitated the employees of the appellant to work in accordance with the expected standards. Thus, the training did not '**make available**' any technical knowledge, experience, skill, know-how or processes.

70. Similarly, the various other services outlined in the order of the learned CIT (A) were with regard to matters such as administrative, financial, personnel, legal, marketing, insurance

matters. These services were with regard to day to day business operations and did not involve transfer of any technical knowledge, experience, skill, know-how or processes to the appellant. The services in relation to 'information technology' merely allowed use of certain facilities in return of payment for such services. Thus, the services in relation to information technology did not make available any technical knowledge, experience, skill, know-how or processes.

71. In the case of ***McKinsey And Co., Inc (Philippines) vs. ACIT (International Taxation) 284 1TR 227 (AT) (Mumbai)***, it has been held that when there is no material to suggest that the payment is for any services which enable the recipients of those services to apply the technology itself, it cannot be concluded that the consideration paid for such consultancy services is taxable in India under Article 12(4)(b) as included services under the DTAA. It has also been held that the onus is on the revenue to demonstrate that there was a 'make available' of technical knowledge etc. Similar was the conclusion in the case of *Motorola Inc. & Ors. v. Dy. CIT (2005) 96 TTJ 1 (SB – Del).*

72. In the present case, it has not been demonstrated by the lower authorities that there was a 'making available' of technical knowledge etc to the appellant. No evidence / material has been produced to demonstrate the same. Thus, there is no

merit in the contention of the lower authorities that there was 'making available' of technical knowledge etc. In view of all the above, the payments made under the MSA did not make available any technical knowledge, experience, skill, know-how or processes to the appellant. The payment was therefore outside the scope of 'fees for technical services' under Article 12 of the DTAA between India – Singapore. They were not taxable in India under any other article of the Treaty. There was therefore no obligation to withhold tax at source.

73. On the other hand, the learned DR supported the orders of the authorities below. It was submitted that the order of the learned CIT(A) itself is explanatory. In respect of issue raised by the learned AR, the learned DR submitted that all these issues have been considered by the learned CIT(A) and reliance was placed on the finding of the learned CIT(A).

74. To drive home her point, the Ld. D.R. has placed strong reliance on the following case laws:

(a) *Karnataka Urban Infrastructure Development Finance Corporation v. CIT(A) & another ITA NO.468/2004 - High Court of Karnataka;*
(b) *Ashok Leyland ltd. v. DCIT (2008) 119 TTJ 716;*
(c) *ITO v. Sinar Mas Pulp & Paper (India) Ltd. (2004) 85 TTJ (Del) 794;*
(d) *Jindal Thermal Power co. Ltd. v. DCIT (TDS) – ITA NO.302W1/2005 - High Court of Karnataka;*

(e) Ranbaxy Laboratories ltd. v. DCIT (2004)91 TTJ (Del) 831;
(f) Gentex Merchants (P) Ltd. v. DDIT (2005) 95 TTJ (Cal) 956;
(g) Jindal Tractebal Power co. Ltd. v. DCIT (2007) 106 TTJ(Bang) 1011;
(h) Cargo Community Network Pte Ltd., IN RE 289 ITR 355 (AAR);
(i) CIT & ANR. V. ONGC (2008) 299 ITR 438 (Uttaranchal);
(j) Gujarat Ambuja Cements Ltd. v. DCIT (2005) 2 SOT 784 (Mumbai);
(k) Headstart Business solutions P.Ltd. in re. vs (Authority of Advance Ruling (2006) 285 ITR 530; &
(l) DIT(Intl. Taxation) v. Morgan Stanley & Co., INC. (2007) 292 ITR 416 (SC).

75. We have heard both the parties. The assessee, Bovis Lend Lease India Private Limited, (hereinafter referred to as BLL), is engaged in the business of project and construction management. It is a part of the Land Lease group of companies, which have worldwide presence. M/s BLL entered into a management service agreement (hereinafter referred to as MSA) with another group company M/s Lend Lease Asia Holdings Pte Ltd., Singapore (hereinafter referred to as M/s LLA) on 1st July, 2001. The purpose of the MSA was to utilize the knowledge and expertise of the LLAH in the fields of Management Services, Administrative Services, legal services, financial services, marketing services, business operational services and information technology services in the business

operations of the BLL which are carried on in India. As per Article 3 of the MSA, M/s LLAH, after providing the services was required to submit a statement of service charges to M/s BLL and the claim was to be settled within 30 days from the time the invoice is tendered. Accordingly, M/s LLAH raised the invoices and the claim of M/s LLAH was admitted. As per the invoices, the expenditure was debited by BLL under the head "Regional Overhead Charges A/c" and corresponding amounts were credited to the "Outstanding Expenses A/c". M/s BLL before remitting payment to M/s LLAH in respect of the invoices raised by M/s LLAH made an application to the concerned officer u/s 197 of the I T Act so as to enable the appellant to make the payment without deduction of tax at source. The concerned party issued certificate u/s 197 and the payments were remitted. However, the Assessing Officer, International Taxation, initiated proceedings u/s 201(1) and 201(1A) of the I T Act. The stand of the revenue is that the certificates issued were not valid and were not applicable in case the tax was required to be deducted at source on a date prior to the date of issue of certificates. In respect of the payments made, the details in respect of the date of invoices and date of application u/s 197 etc. are as under:-

ITA No.636, Asst. year 2003-04, order dated 29th December, 2006 by the AO

Date of Invoice	Date of Application u/s 197	Date on which Certificate u/s 197 was issued
1. 01.08.2002	19th May, 2003	10th June, 2003
2. 14.10.2002	17th June, 2004	15th July, 2004

ITA No.637, Asst. year 2005-06, order dated 31st August, 06 by the AO

Date of Invoice	Date of Application u/s 197	Date on which Certificate u/s 197 was issued
1. 19.05.2004	8th August, 2005	19th Sept., 2005

ITA No.665, Asst. year 2004-05, order dated 31st August, 06 by the AO

Date of Invoice	Date of Application u/s 197	Date on which Certificate u/s 197 was issued
1. 14.11.2003	8th August, 2005	19th Sept., 2005

ITA No.1452, Asst. year 2004-05, order dated 29th December, 06 by the AO

Date of Invoice	Date of Application u/s 197	Date on which Certificate u/s 197 was issued
1. 24.04.2003	17th June, 2004	6th August, 2004

76. The stand of the revenue is that as per section 195, the payer has to deduct tax at source at the time of credit of income to the account of the payee or at the time of payment, whichever is earlier. The revenue has also relied on Explanation to section 195 of the I T Act which says that "crediting of the sum payable under the head 'suspense account' or by any other name, will be deemed to be credit of such income to the account of the payee and the provisions of section 195 are applicable".

Hence, the assessee was required to deduct tax at source when the sums were debited under the head "Regional Overhead Charges A/c" and credited to the Outstanding Expenses A/c. Application u/s 197 could have been made before the assessee was required to deduct tax at source. Thus, the application should have been made before the amounts were credited to the outstanding expenses account. Since in the instant case, application has been made subsequently, therefore, the certificate issued u/s 197 was not valid. It was further submitted that certificate u/s 197 acts prospectively and it could not have enable the assessee not to deduct tax at source on the basis of such certificate.

77. It is true that the primary responsibility of paying the tax is on the recipient and the TDS is one of the modes of collection of such tax. The payer discharges the liability of the payee and therefore liability in the hands of payer is a vicarious liability. For taxation of income, one has to consider either the residence of the person receiving the income or has to consider the place of taxation on the basis of the source of income. In the case of a non resident, who is having no other presence in the country, income is being taxed in such a case on the source basis. Income accruing or arising to a non resident in India is taxable in India. In the instant case, M/s LLA is having no presence in India though u/s 163 of the I T Act, the appellant can be considered as an agent. In order to collect the tax on income of

the non resident, who is having no presence in India, TDS is only and effective source of collecting such tax. Section 40A(i) stated that no deduction of expenditure is allowable in case the tax at source is not deducted in respect of royalty and fee for technical services and interest. Such provision was made to ensure effective compliance of the provisions of section 195 of the Act relating to TDS in respect of payments outside India. This has been clarified vide Circular No.528 dated 16th December, 1988. In the instant case, as we had already pointed out, M/s LLAH was having no permanent establishment in India and therefore TDS was the effective source of collecting tax in respect of income, which has accrued to M/s ALL.

78. The appellant has not deducted tax at source at the time of crediting the account under the head 'outstanding expenses a/c'. However, before making remittance of the payment, the assessee filed an application u/s 197 of the I T Act. We had already reproduced the dates on which such applications were made. Copies of such applications are available in the paper book filed by the learned AR on 14th November, 2008. All the applications contain the similar information, so we will be considering the contents of one such application. Application moved on 17th June, 2004 is available at pages 25 to 27 of the paper book filed on 14th November, 2008. In the application, the appellant has referred to the agreement under the head 'background' for making it clear as to why the appellant

has to make the payment and therefore has applied for a certificate u/s 197. In the application, it is mentioned that the appellant is reimbursing LLAH for all costs incurred in provision of services rendered by LLAH. It is also mentioned that the assessee company has received the debit note on 14th October, 2002 and 24th April, 2003. The certificate was being sought on the ground that the appellant is making reimbursement of the expenses and there is no element of income involved in such payment. It was submitted in the application that payments to be made by BLL does not constitute income and therefore, this will not be subjected to tax at all. Copies of the tax invoices were also attached with the application. The ITO, International Taxation, Ward 19(1) issued certificate on 15h July, 2004 vide which he authorised the appellant to pay without deduction of income tax the sums credited in the name of M/s LLAH, Singapore. In the certificate, the officer concerned has given the debit note number and date and has also mentioned the description of such debit note. The description as mentioned in the certificate clearly show that the debit notes were in respect of Regional Overhead Charges for the half-year ending December, 2002 and June, 2003. Thus, it was clear to the concerned officer that the debit note pertained to the financial year prior to the financial year in which he is issuing the certificate. The certificate has been issued in respect of specific payments and is not in reference of payments to be made after the issue of the certificate.

79. The Hon'ble Gujarat High Court in the case of Sarika Estate and Investments Pvt. Ltd. v ACIT 246 ITR 254 had an occasion to consider the issuing of certificate u/s 197 on application made after the amount of interest was credited. In that case, the Hon'ble Gujarat High Court noticed that the revenue has issued certificate u/s 197 in numerous cases when the applications have been made after the amount of interest was credited. It was contended before the Hon'ble High Court by the revenue that this was being done erroneously and in violation of the express provisions of law. After noticing the argument of the revenue, the Hon'ble High Court held as under:-

> *"Held, that assuming that the grant of certificates under section 197 on applications made after the amount of interest was credited was in violation of the express provisions of law, since the certificates had been issued in almost all cases, there would be a class of people, who having applied for the certificate after credit of interest, were under a bona fide belief that such practice had come to stay. The CBDT was to consider how the practice developed, and if it was not permissible, issue appropriate guidelines".*

80. The CBDT issued Circular No.774 dated 17th March, 1999 (236 ITR 250 (St.)) in which it was noticed by the Board that in certain charges, a practice has developed to issue certificate u/s 197(1) of the Act even after the credit or

payment of amounts subject to tax deduction at source. According to the Board, this practice is not in accordance with the provisions of law. The Board clarified that no certificate u/s 197(1) of the I T Act should be issued after the amount subject to tax deducted at source stands credited or paid, whichever is earlier. In the Circular it was also mentioned that if the assessee is having genuine hardship in submitting application u/s 197(1) on time, may refer to the Board for condonation of delay in terms of section 119(2)(b) of the I T Act.

81. From this Circular it is clear that the delay in submitting the application u/s 197 can be condoned by the Board. The AO instead of intimating the applicant for submitting an application for condonation of delay issued a certificate and in the certificate, it is clear that the credits were made prior to the date of issue of certificate. Thus, the officer, who has issued the certificate, was fully aware that tax was required to be deducted at the time of credit and the application filed u/s 197 is belated one. It is to be noted that the certificate is issued to the payer while the application is made by the payee. The payer can act upon such certificate issued by the AO. The payer has no authority to review such certificate or to seek clarification from the AO in respect of the certificate. This is so because the certificate has been issued on the application made by the payee.

82. The Hon'ble Kerala High Court in the case of Cochin International Airport Ltd. v DCIT 2009-TIOL-197-C-Kerala had an occasion to consider the applicability of a certificate issued by AO, who was not having jurisdiction. The issue before the Hon'ble High Court was with respect to validity of certificate for the period from the issue of certificate to the date when such certificate was withdrawn. The Hon'ble High Court observed that there is no doubt that the order u/s 197 was issued initially without the authority in law. Hence, the revenue was empowered to withdraw such certificate. However, having regard to the sequence of facts and passage of time, which took place after the grant of certificates and the payments, which are effected on the strength of the certificates, it is not fair to allow the retrospective cancellation of the certificates. Obviously everybody acted on the basis of the certificates and payments were made without deduction on the strength of the certificates. The officer concerned who issued the certificate cannot be considered to be totally un-connected with the administration of the Income Tax Act. Therefore, the Hon'ble High Court held that the impugned order of withdrawal of certificate will have prospective effect.

83. In the instant case, the revenue has taken no steps to cancel such certificate. If the revenue has taken the proceedings for cancellation of the certificate on the ground

that application was made belatedly then the assessee would have got a chance to apply to the Board for condonation of delay.

84. The Hon'ble Calcutta High Court in the case of Navbharat Vanijya Ltd. v CIT 226 ITR 537 had an occasion to consider the authority of the AO in changing the ratio as determined in the certificate u/s 197(3) on the ground that the assessments of the company happened to fall within his jurisdiction was completed. Section 197(3) provided exemption of income in the hands of shareholders of a portion of the dividend attributable to profits for which deduction is allowable u/s 80K to the company. Since the issue of computation of deduction u/s 80K in the case of the company may be disputable but in case a certificate has been issued u/s 197(3) then the AO, who is to assess the shareholder, has to accept such provisional certificate unless such certificate is rectified, modified or changed. Thus, the officer to whom such certificate is issued is required to comply with the certificate unless such certificate is changed, modified or withdrawn irrespective of the fact that officer concerned was having jurisdiction over company as well as on some of its shareholder.

85. The Hon'ble Bombay High Court in the case of CIT v Garware Nylon Ltd. 212 ITR 242 had an occasion to consider as to whether an appeal can be filed against an order passed u/s 197(3) of the Act. Though there was no specific reference to

consider as to whether the certificate u/s 197(3) can be considered as an order but the Hon'ble High Court while considering that appeal cannot be filed in respect of certificate u/s 197, has considered the same as an order u/s 197(3).

86. Section 197(2) provides that the person responsible for paying the income has to deduct the tax at source at the rate specified in the certificate. The person responsible for paying the income has to comply with such a certificate until such certificate is cancelled. In the instant case, the revenue has not taken any proceedings to cancel the certificate. As we had pointed out that certificate u/s 197 is equivalent to the order and the CIT can exercise jurisdiction u/s 263 to cancel such an order. The Kerala High Court in the case of Cochin International Airport Ltd. (supra) has upheld the order of the CIT to withdraw the certificate.

87. The Hon'ble Rajasthan High Court in the case of Jaipur Udyog Ltd. v CIT 155 ITR 476 had an occasion to consider as to whether the assessee can be treated as an assessee in default u/s 201 when the company acted on the letter of the AO in which the AO stated the amounts which were exempt u/s 80(4) and 101. The Hon'ble Rajasthan High Court held that the letter amounted to a certificate u/s 197(3) of the I T Act and the assessee distributed dividend on the basis of such letter. The assessee cannot be treated as an assessee in default u/s

201. It was held that Income-tax Authorities cannot take advantage of erroneous determination by ITO. The above decision of the Hon'ble Rajasthan High Court has been upheld by the Apex Court reported at 217 ITR 190. Thus, it is a settled position of law that nobody can take advantage of the wrong committed by it. In case the revenue has issued certificate u/s 197 and the assessee company has acted on such certificate and has not deducted tax at source, then the revenue subsequently cannot declare the assessee as an assessee in default u/s 201 of the I T Act. Hence, it is held that the assessee could not have been declared the assessee as an assessee in default u/s 201(1) in view of the fact that the assessee acted on the certificates and such certificates have not been cancelled before the AO took the proceedings u/s 201(1).

88. During the course of proceedings before us, the learned AR has raised a plea that provisions of section 195(3) and 197 stand on the same pedestal. 195(3) is subject to Rule 29B. As per Rule 29B, provisions of section 195(3) can be applied in case person concerned is a banking company or a person who carried on business or profession in India through a branch. There is no such restriction u/s 197. In the instant case, section 195(3) is not applicable. Hence, it cannot be said that section195(3) and 197 stand on the same pedestal. In case the payer wants to remit the payment without deduction of tax at source, he can file an application u/s 195(2). Alternatively, the

payer can deduct the tax at source and deposit the same and can file an appeal u/s 248 of the I T Act before the Commissioner of Income Tax (Appeal). In case the payee wants to have the remittance without deduction of tax at source then it has to apply for a certificate u/s 197. In the instant case 195(3) is not applicable and the payee could not have moved an application u/s 195(3). Hence to say that the application u/s 197 could have been made before receipt of payment by equating it to section 195(3) is not correct. Normally, an application u/s 197 is to be made before the credit or payment, whichever is earlier. However, by virtue of Circular No. 774, the assessee can make an application and can request for condonation of delay. Hence, an application u/s 197 can be made belatedly also. In the instant case, the applications have been made belatedly and the certificates have been issued and the appellant company has acted on the basis of such certificates.

89. As per section 40A(i), expenditure is not allowable in case the assessee fails to deduct tax at source in a case where such tax deduction at source is required. Proceedings u/s 201 for the asst. year 2004-05 and 2005-06 were initiated vide letter dated 27th April, 2006. Similarly for payments made during asst. years 2003-04 and 2004-05, proceedings were initiated vide letter dated 13th October, 2006. Copies of such notices are available in the paper book filed by the learned AR on 14th November, 2008. It is true that order u/s 201(1) and

201(1A) were passed on 31st October, 2006 and 29th December, 2006. Assessment for the asst. year 2004-05 has been completed on 28th December, 2006 u/s 143(3) of the I T Act. Similarly, assessment for the asst. year 2003-04 has been completed on 23rd March, 2006. Return for the asst. year 2005-06 has been processed in August, 2007. Perusal of the assessment order show that the AO has not made any disallowance u/s 40A(i) for the asst. year 2003-04 and 2004-05. It is true that the assessment for the asst. year 2003-04 was completed before the proceedings u/s 201 were initiated. However, the assessment for the asst. year 2004-05 has been completed after the initiation of proceedings u/s 201. The time limit for taking action u/s 263 of the I T Act for the asst. years 2003-04 and 2004-05 stands already expired. Thus, the AO, who has completed the assessment has held that no tax was required to be deducted in respect of the payments made to M/s LLAH. Thus the revenue while completing the assessment has recorded the finding that no tax was required to be deducted u/s 195 of the I T Act. Even no transfer pricing adjustment has been made though the assessee has disclosed in the annexure attached with the return that it is making reimbursement of costs. It means that the left hand does not know what the right hand is doing and the revenue in assessment proceedings has accepted that no tax was required to be deducted at source and such orders have become final except for the asst. year 2005-

06. On this ground also, the lower authorities are not justified in raising the demand u/s 201 of the I T Act.

90. Agreement between BLL and LLAH is available at pages 15 to 25 of the paper book filed on 14th November, 2008. As per the agreement, LLAH was to provide the following services:-

a) Assistance with respect to administrative matters between the appellant and LLAH;
b) Assistance with respect to personal matter;
c) Assistance with respect to legal matters;
d) Assistance with respect to finance and accounting information;
e) Assistance with respect to marketing support;
f) Assistance with respect to insurance matters;
g) Assistance in operation of the business;
h) Treasury Management;
i) Information Technology.

91. As per Article 2 of the agreement, the appellant company was to reimburse LLAH for all costs incurred by it in providing the above referred services. Such costing is to be done on the basis of actual time and cost of providing the services i.e time incurred by individual supporting staff of LLAH or its associate which are attributable to and in support of the appellant. In respect of assistance in operation of the business, it is mentioned that LLAH will provide education and training including preparation of training material and the implementation of training session and seminar for the appellant company staff

on or offshore. The learned AR has drawn our attention towards the report from the auditor in respect of allocation of costs. Such report is available at pages 30 to 35 of the paper book filed on 14th November, 2008. The auditor has mentioned in the foot-note as under:-

> *"The expenses included in the Asia General and Administrative Support Expenses are items of administration and overhead expenses for the year ended 30th June, 2003 identified by Lend Lease Asia Holdings Pte Ltd. to have been incurred by the Asia Regional Office in Lend Lease Asia Holdings Pte Ltd. They exclude profit mark-up, income tax payments, capital expenditure, depreciation, entertainment expense, interest expense, goodwill and royalty payments".*

92. The learned AR has relied on the following decisions in which it has been held that reimbursement does not have any component of income and hence, it is not income chargeable to tax:-

- *CIT v Tejaji Farsaram Kharawalla Ltd. 61 ITR 95 (SC);*
- *CIT v Telco 245 ITR 823 (Bom);*
- *CIT v Indian Engineering Projects Pvt Ltd. 202 ITR 1014 (Del.);*
- *Clifford Chance UK 82 ITD 106 (Mum);*
- *Raymond Ltd. v DCIT (2003) 86 ITD 791 (Mum);*
- *CIT v Dunlop Rubber Co. Ltd (1983) 142 ITR 493 (Cal.)*
- *HNS India VSAT Inc v DDIIT 95 ITD 157;*

- *Gujarat Ambuja Cements Ltd. v DCIT (2005) 2 SOT 784 (Mum);*
- *MSEB v DCIT (2004) 90 ITD 793 (Mum);*
- *Saipem SPA v DCIT (2004) 88 ITD 213 (Del.) (TM);*
- *Sedco Forex International Drilling Inc v DCIT (2000) 72 IRD 415;*
- *Pilcom v ITI (2001) 77 ITD 218 (Cal.);*
- *DECTA 237 ITR 190 AAR;*
- *Coca Cola India Inc. v ACIT (2006) 7 SOT 224 (ITAT-Del.);*
- *United Hotels Ltd. v ITO 93 TTJ 822 (ITAT-Del.);*
- *ITO v Dr. Willmar Schwabe India (P) Ltd. 95 TTJ 53 (ITAT-Del.);*
- *Expeditors International India P Ltd. v ACIT (2008) 118 TTJ Del 652;*
- *BIAL v ITO Bang Tribunal order dated 17.12.07 in ITA No.536 to 539/Bang/2006*

93. The learned CIT(A) has considered the submissions but held that the payments are not to be treated as reimbursement. The finding of the learned CIT(A) are as under:-

> *"4.2 In this connection, it is pertinent to note that the meaning of the term 'reimbursement' for the purposes of chargeability is quite close to its dictionary meaning, viz. "to pay back money spent by someone else on one's own count". For this to happen it is essential to have the following conditions satisfied cumulatively.*

a) *The actual liability to pay should be of the person who reimburses the money to the original payer.*
b) *The liability ought to have been clearly determined. It should not be an approximate or varying amount.*
c) *The liability ought to have crystallized. In other words, payments which were never required to be done, but were done just to avoid a potential problem may not qualify.*
d) *There should be a clear ascertainable relationship between the paying and reimbursing parties. Thus, an alleged reimbursement by an unconnected person may not qualify.*
e) *The payment should be first be made by somebody else whose liability it never was and the repayment should then follow to that person to square off the account.*
f) *There should be clearly three parties existing – the payer, the payee and the reimburser.*

If one were to examine the transactions in the instant case from the point of view of the satisfaction of the conditions mentioned above, I am of the view that one would be hard pressed to accept that these conditions are satisfied. For example, the first condition requires that the actual liability to pay should be that of the person making the reimbursement. In the appellant's case, that can hardly be considered to be so. By way of illustration, let us take the

example of labour costs. These emanate from the payment of salary by LLAH, Singapore to its employees. Merely because these employees are spending part of their time rendering service for the benefit of the appellant does not transfer the liability for payment of salary from LLAH to the appellant. Similarly, the fifth condition requires that somebody else whose liability it never was should first make the payment and the repayment to such person should then follow. This condition too, in my view, is not satisfied. LLAH makes the payment because the liability to pay is directly theirs and is not taking on anyone else's liability.

On an application of the above tests, I find that the transactions tested fail to meet the criteria that would enable the payments to be treated as reimbursements".

94. The learned CIT(A) has also observed that the basis for exemption of 1920 hrs per employee was not furnished as the same was taken by the auditor to justify that the payments were made to reimburse the costs. The learned CIT(A) has relied on the following judgements to say that section 195 is not applicable because it is alleged that it is a case of pure reimbursement:-

- *CIT v Superintending Engineer, Upper Sileru Road 152 ITR 753 (AP);*

- *Transmission Corporation of AP Ltd. and Another v CIT 239 ITR 587 (SC);*
- *Timken India Ltd. 273 ITR 67 Authority for Advance Ruling;*
- *Danfoss Industries (P) Ltd. 268 ITR 1 (AAR)*

95. The agreement provides the basis for ascertaining the amounts to be paid to M/s LLAH. In case the payments are held as fee for technical services then income in the hands of recipient is to be taxed as per provisions of section 115A of the I T Act. The rate of tax is a percentage of fees for technical services. Hence, if payments are for the technical services then computation of such fees with reference to cost becomes not relevant as one has to ascertain the income in the hands of recipient because income by way of fee for technical services is the amount payable. Under such circumstances, one has to apply the decision of Hon'ble Apex Court in the case of Transmission Corporation of India 239 ITR 587. Hence, we cannot accept the contention of the learned AR that no tax was required to be deducted on the ground that payments were reimbursement of expenses. However, if the payments were to be assessed in the hands of recipient as business income then one is required to ascertain the income in the hands of recipient and in case the non resident is getting reimbursement of expenses, then there is no income element and TDS is not required to be deducted.

96. As per Indo-Singapore Treaty, fee for technical services is taxable in India if such services make available

technical knowledge, experience, skill, know how or processes which enable the person acquiring the services to apply the technology contained therein. For interpreting the word 'make available' it has been held by the Calcutta Bench in the case of DCIT v ITC Ltd. 82 ITD 239 that interpretation in similar situation under the agreement entered into between the two countries can be followed while interpreting the same word in respect of DTAA between other two countries. The Special Bench, in the case of Mahindra and Mahindra Ltd. v DCIT 313 ITR 263 had an occasion to consider the meaning of the word 'make available' with reference to DTAA between India and UK.

97. The Special Bench, Mumbai in the case of Mahindra and Mahindra Ltd. v DCIT (Mumbai) (SB) 313 ITR 263 (AT), had an occasion to consider the meaning of the word 'make available' with reference to DTAA between India and UK, wherein the Tribunal at page 329 observed as under:-

> *"We have considered the rival submissions in the light of material placed before us and precedents relied upon. We find that clauses (1) and (2) of article 13 in the DTAA with the UK clearly provide that the fees for technical services are taxable in India. Now we have to consider the meaning of the term 'fees for technical services' as employed in this article. As noted above clause (4) of article 13 defines the meaning of the term 'fees for technical services'. The entire quarrel is about the applicability of otherwise of sub-*

clause (c) of clause 4 of article 13 as per which fees for making available of the technical knowledge, experience, skill etc. is included in the definition of this sub-clause. In other words, the technical knowledge, experience or skill etc. must be made available to the assessee so as to be covered within its scope and mere providing of such services without making them available to the assessee will not serve the purpose and hence will be outside the ambit of article. The assessee has ab initio contended before the authorities below that even if the services rendered by the lead managers were held to be technical services but those were not 'made available' to the assessee. "Rendering of any technical or consultancy services" is followed by "which make available technical knowledge, experience, skill, know-how". In this context it becomes imperative to understand the meaning of the expression 'make available' as used in this article. Make available means to provide something to one, which is capable of use by the other. Such use may be for once only or on a continuous basis. In our context to make available the technical services means that such technical information or advice is transmitted by the non-resident to the assessee, which remains at its disposal for taking the benefit therefrom by use. Even the use of such technical services by the recipient for once only will satisfy the test of making available the technical services to the assessee. If the non-resident uses all the technical services at its own end, albeit the benefit of that directly and solely flows to the payer of the services, that cannot be characterized as

the making available of the technical services to the recipient".

The Special Bench thereafter held that management and selling commission cannot be taxed in India as Article 13 of the DTAA with UK does not apply. In the instant case, the facts are paramateria with the facts which were before the Special Bench.

98. The Authority for Advance Ruling in the case of Intertek Testing Services India P. Ltd. 307 ITR 418 had an occasion to consider as to whether an expression interpreted in the MoU relating to the India-US Treaty can be applied to the Indo-UK Treaty when the same expression is found to be used. The Authority for Advance ruling observed at page 434 as under:-

"True, the MOU relating to the India-US Treaty in terms does not apply to the Indo-UK Treaty but when a similar expression found in another Treaty is interpreted and explained in a particular manner consistent with one shade of meaning that can be attributed to it, there is no reason why that interpretation shall be eschewed. In our view, the explanatory memorandum becomes a valuable aid in interpreting the phrase "make available". It reflects the Government of India's viewpoint on the true connotation of the expression. It stands on a higher pedestal than the principle of contemporanea expositio applied in several cases. Hence, the interpretation given in the MOU can be

usefully adopted while dealing with a provision similarly worded".

99. Various Benches of the Tribunal in a series of decisions interpreted the expression 'make available' in tune with the Memorandum to the India-US DTAA. The decisions are as under:-

- *Raymond Limited v DCIT 86 ITD 791 (Mum.);*
- *CESC Ltd. v DCIT 275 ITR (AT) 15 (Del.);*
- *NQA Quality System Ltd. v DCIT 92 TTJ 446 (AT);*
- *Mckinsey & Co. Inc. (Philippines) v Assistant Director of Income-tax (International Taxation) 284 ITR (AT) 227 (Mum.)*

100. The Bangalore Bench in the case of ITO v M/s Cepha Imaging P. Ltd. in ITA No.1180/Bang/2008 vide order dated 24th July,2009 has held that the meaning of the expression 'make available' in MoU between India and USA can be considered to be applicable for the interpretation of the same word as appearing in Indo-UK Treaty. Following the decision of the Bangalore Bench and other decisions referred to above, we hold that the interpretation of the word 'make available' as given in MoU between India and USA Treaty can be applied in the instant case

101. Hence, in the instant case, we have to see as to whether the requirement of 'make available' is satisfied in this case. The appellant is receiving various services. In respect of

assistance in the operation of the business, it has been made clear that LLAH will provide education and training including the training material for the staff of the appellant company on or offshore. In respect of majority of services, it has been mentioned that it will provide assistance. Thus, LLAH is providing assistance for various services and as per the agreement, it has to provide education and training to the employees of the appellant company. The word 'make available' only refers to the willingness of the provider of the services and does not refer the acceptance of the receiver of the services.

102. The dictionary meaning of assistance is to help or support. It does not mean to provide. When one is going to help or support then he is making the other person to do the same in future. The word Assistance is defined in Lax Lexicon by Venkataramaiya as:

> "The word 'assistance' as used in the section implies that the party who assists is doing something which in ordinary circumstances the party assisted could do for himself." – Ramaya Naoka I.L.R. 26 Mad 419 at p.421.

From the agreement, it is clear that LLAH was to provide assistance for the services and hence it will mean that LLAH is also making available the skill, experience to the recipient.

103. The dictionary meaning of the word 'make available' is 'able to use or obtain'. It does not mean that the recipient should equally use the technology. In a case like this where group owns a number of companies and certain companies provides services to the companies belonging to the group then it becomes the policy of the group to get services of that company though other group companies might be able to perform the same functions on the basis of the services already provided to them. Therefore, in the instant case, section 195 will be applicable because reimbursement of expenses relates to fee for technical services. Hence, we hold that the authorities below were justified in holding that tax was not required to be deducted on the ground that the appellant company reimburse the expenses as the amounts payable were to be taxed in the hands of recipient as fees for technical services as per DTAA.

104. The jurisdictional High Court in the case of Jindal Thermal Power Company v DCIT had an occasion to consider the taxability of income deeming to accrual and arising in India as mentioned in section 9(1)(vii). The Hon'ble High Court has considered the explanation introduced in section 9(2) of the I T Act. Before the Hon'ble High Court it was argued that the ratio of Supreme Court in Ishikawajma Harima Heavy Industries Ltd. v Director of Income Tax 288 ITR 408 regarding twin criteria of rendering of services and its utilization in India has not been done away with by the incorporation of Explanation to section

9(2). It was also argued that the objects and reasons stated in introducing explanation are only external aids to be used only when the text of the law is ambiguous. After considering the submission, the Hon'ble High Court held that "however, in respect of technical services, the rendering of services being purely of-shore and outside India, the remuneration whatever paid towards technical services does not attract tax liability". In the instant case, from the perusal of the certificate from the auditor, it is clear that services have been provided offshore. Hence, in view of the decision of the jurisdictional High Court, the appellant will not incur any liability to deduct tax towards the amount paid in respect of the services. Hence, it is held that the appellant was not required to deduct tax at source in respect of the payments.

105. Since we have given a finding that the appellant was not required to deduct tax at source u/s 195 of the I T Act and therefore, the assessee cannot be treated as an assessee in default and no interest is leviable u/s 201(1A). However, in case it is finally held that the assessee was required to deduct the tax at source then interest u/s 201(1A) will be leviable from the date of credit till the date of receipt of certificate u/s 197 because after receipt of certificate u/s 197, the assessee could not have been treated as an assessee in default.

106. In the result, the appeals filed by the assessee are allowed.

Pronounced in the open court on 28thAugust, 2009.

Sd/-	Sd/-
(GEORGE GEORGE K)	(N L KALRA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated:28/8/2009

Copy to :- 1. The Assessee 2. The Revenue 3. The CIT(A) concerned. 4. The CIT, concerned. 5. The DR 6. GF 7. GF, ITAT, Delhi Bench

By Order

MSP/21/8/ Assistant Registrar, ITAT, Bangalore.