

Income Tax Appellate Tribunal - Chennai

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The Income Tax Officer, T.D.S. - ... vs Raj Television Network Ltd., ... on 30 October, 2001

Bench: G Veerabhadrapa, B Saini, J Member

ORDER

Bhavnes Saini, (Judicial Member)

1. These four appeals were filed by both the Department and the assessee, i.e., Appeal Nos. 1827 & 1828/Mds/1998 are filed by the Revenue against the common order of the CIT (Appeals) dated 30.7.1998 for the Asst. Year 1996-97 under Section 201(1) and 210(1)(1) of the I.T. Act and Appeal No.1503/Mds/99 and No. 200/Mds/2001 are filed by the assessee against the order of the CIT (Appeals) dated 19.1.99 under Section 201(1) & 201(1)(a) and against the order of the CIT (Appeals) dated 30.1.2001 under Section 143(3) of the I.T.Act, respectively, both for the Asst. year 1997-98.

2. Since all the aforesaid appeals are connected with each other, and as common questions are involved and are based on the same facts and circumstances and parties being the same in all three appeals, these appeals were clubbed together, heard together and are being disposed of by this common consolidated order for the sake of convenience.

3. Before proceeding to deal with these appeals, it would be appropriate to bring out brief facts of the case. The brief facts as taken from the orders of the CIT(Appeals) are that the assessee was in the business of telecasting programmes in India and abroad via satellite in the name and style of Raj TV. In order to enable the telecasting of programmes, the assessee company (RAJ) entered into an agreement with Reuter Television Ltd., (RTV), having its Registered Office at 85, Fleet Street, London on 27.10.95 for availing the services of transponder and unlinking. In the Asst. year 1996-97, in consideration of RTV providing space segments and unlinking services to the assessee (RAJ), Raj TV made following payments during the Financial Year ending 31.3.1996:--

Date of Payment Amount

01.02.1996 Rs. 2,02,12,500

27.03.1996 Rs. 1,02,54,000

Total ... Rs. 3,04,66,500

Thus, the total payment was made in a sum of Rs. 3,04,66, 500/=. According to the Revenue, while making this payment, Raj TV should have deducted tax under Section 195 of the I.T. Act but did not do so. The ITO., (TDS) issued Show Cause Notice for treating the assessee in default under Section. 201(1) of the I.T.Act. The ITO held that the amount paid by RAJ TV to RTV is an income that arose and accrued in India to RTV, England and that the provisions of Section 195 of the I.T. Act will be attracted because of the reasons that RTV has rendered service in Indian Territory by beaming signals across the taxable territory in India which are utilised by the local channels. Further, there was a continuity of business connection between the assessee company and RTV which was effective from 15.11.95. Also, the foreign company has received the transponding hire charges only due to its business connection in India.

4. The assessee was treated as an assessee in default to the extent of Rs. 17,73,183/- under Section 201(1) of the I.T. Act and since the assessee failed to deduct tax, the provisions of Section. 201(1)(A) of the I.T. Act were also invoked and the ITO charged interest of Rs. 4,06,169/- under Section 201(1)(A) of the Act from the date on which tax was deductible to the date mentioned in the order. The assessee being aggrieved with the order of the I.T.O., (TDS), filed an appeal before the CIT (Appeals).

5. The learned Authorised Representative the assessee submitted before the CIT (Appeals) that beaming to the singles etc., for treating the assessee in default and further, there was no continuity of business as held by the I.T.O., because the agreement was terminated in September 1997 and thereafter, with effect from 13.8.97, RAJ TV has entered into an agreement for services in transponder and unlinking with Shinawatra Satellite Public Company Ltd., Thailand and also submitted that RTV never owned a transponder and satellite through which the programmes were beamed. Intersputnik, a Russian Company actually owned the satellite with whom RAJ TV has no agreement.

6. The learned CIT (Appeals) considered all the facts and circumstances of the case and also considered that there was an agreement for Avoidance of Double Taxation in force between India and United Kingdom of Great Briton which was notified vide Notification No. GSR-91(E) dated 11.2.1994 and held that RTV was not having any permanent establishment situated in India and as such, with reference to Article 7 of DTAA., the profits of an enterprise of a contracting state shall be taxable only in that state unless the enterprise carries on business in other contracting state through a permanent establishment situated therein.

7. The learned CIT (Appeals) further held that the profits of RTV cannot be taxed in India because of DTAA., between India and U.K. He relied upon the decision of the Karnataka High Court in the case of CIT v. R.M. Muthiah (202 ITR 508) in favour of the assessee. Therefore, the CIT (Appeals) concluded in this appeal that the profits of RTV are not liable to be taxed in India, under the provisions of the IT Act, 1961, and hence no tax is deductible under Section 195 of the I.T. Act and, therefore, the assessee should not be treated as assessee-in-default under Section 201(1) of the I.T. Act and no interest consequent to that under Section 201(1A) is chargeable. The Revenue being aggrieved against the order of the CIT (Appeals), has filed ITA Nos. 1827 & 1828/Mds/98 before this Tribunal.

8. I.T.A. No. 1503 (Mds)/1999 is filed by the assessee against the order of the CIT (Appeals). The facts pertaining to this appeal are that in this case, the assessee has neither deducted the tax under Section 195 of the I.T. Act nor paid the same to the Govt., on the same facts and circumstances of the earlier appeals, stated above. Therefore, the CIT (Appeals) held that the appeal cannot be said to be an appeal under Section 248 of the I.T. Act and thus dismissed the appeal of the assessee as 'not maintainable'. The assessee filed this appeal against this order of the CIT (Appeals) before us.

9. In respect of the same Asst. year, the Assessing Officer passed order under Section 143(3) of the I.T. Act against the assessee and the transponder hire charges and production expenses were disallowed under Section 40(a)(i) of the I.T. Act. On the same facts and circumstances as mentioned above in other appeals, as the assessee failed to deduct TDS., in respect of payment made to RTV under Section 195 of the I.T. Act, the Assessing Officer passed an order against the assessee with regard to small issues regarding payments relating to earlier years and advertisement receipts. The assessee being aggrieved with that order of the Assessing Officer, filed an appeal before the CIT (Appeals) which was dismissed with regard to the first issue concerning disallowance under Section 40(a)(i). The CIT (Appeals), however, remitted the remaining two issues to the file of the Assessing Officer to re-examine the same and decide on merits, after considering the submissions of the assessee.

10. We may add here, that with regard to the disallowance under Section 40(a)(i) of the Act, the assessee claimed a sum of Rs. 6,61,29,754/- as transponder higher charges under the head 'Production Expenses' for the relevant years. However, in the month of March 1997, some TDS were deducted and deposited with the Department. A reference was also made in the order of the ITO (TDS), but the ITO(TDS) has also simultaneously proceeded against the assessee for not deducting tax as required under Section 195 of the I.T. Act and passed an order under Section 201(1) and 201(1A) of the I.T. Act and held that the assessee is in default, for which ITA No. 1503/Mds/99 is pending before us, after dismissal by the CIT (Appeals) as 'not maintainable'.

11. The learned CIT (Appeals) considered all the materials available on record and also the question whether on the facts and circumstances of the case, the income of RTV cannot be said to accrue or arise in India or in other words, whether the payments, in question, arise to RTV in India. The learned CIT (Appeals) held that RTV does not appear to have a permanent establishment in India and also held that on the facts and circumstance of the case, business profits of RTV do not accrue or arise in India within the meaning of Article 7 of D.T.A.A. These findings were similar to that of the CIT (Appeals) which is the subject matter in the appeals of the Revenue before us in ITA Nos. 1827 & 1827/Mds/98. The learned CIT (Appeals), however, gone to the extent of examining Article 13 of DTAA whether the said payment to RTV would be considered as within the terms 'Royalty' or 'Fees for Technical Services'. The CIT (Appeals), after considering all the facts formed an opinion that the payments, in question, are consolidated lump-sum payments for Royalty falling under the provisions of Article 13(3)(b) and fees for Technical Services falling under the provisions of Article 13(4)(b) of DTAA. The CIT (Appeals) also discussed with regard to applicability under D.T.A.A., and held that DTAA, prevails over I.T. Act. Therefore, he concluded that the payments upon which no TDS was deducted can be disallowed under Section 40(a)(i) of the I.T. Act and directed the Assessing Officer to give benefit to certain payments for which TDS was actually deducted and paid. The assessee being aggrieved with the impugned order dated 30.1.2001 of the CIT (Appeals), filed ITA No.200/MDs/2001 for the Asst. Year 1997-98 before us which is under consideration before this Tribunal.

12. After going through all the facts and circumstances of the case and conclusions of the CIT (Appeals) in different Asst. years and different impugned orders, the points for consideration and determination before us mainly would be:-

- 1) Whether the assessee is liable to deduct T.D.S. under Indian Income Tax Act.
- 2) If the assessee is liable, then whether it is liable by D.T.A.A., or by the normal provisions of the I.T. Act with regard to the rate of tax.
- 3) If tax is to be paid, according to DTAA, whether the normal TDS is payable under Section 195 of the I.T. Act and also whether the payment upon which TDS is not deducted can be disallowed under Section 40 of the I.T. Act. or alternatively, whether Section 40 of the I.T. Act would be applicable in the case of the assessee in view of the facts and circumstances mentioned above.

13. Before going into all the grounds of appeal, it would be appropriate if the main issue mentioned above with regard to disallowance under Section 40 of the I.T. Act and payment of TDS and its default is considered by us which is connected with the I.T.A. Nos. 1827 & 1828(Mds)/1998 and 200(Mds)/200

14. The learned Departmental Representative has taken the ground of appeal in ITA No. 1827 & 1828/Mds/1998 that the CIT (Appeals) has erred in holding that the assessee is not liable to deduct tax at source on the payment made to RTV and cancelling the demand raised under Section 201(1) and 2001(1A) of the I.T. Act. He argued that the CIT (Appeals) should have appreciated that the Income has accrued to M/s. RTV and hence the assessee is liable to deduct tax at source.

15. In these appeals, the learned Departmental Representative also filed additional ground of appeal as under:-

- 1) The CIT (Appeals) failed to consider the term 'Royalties' as defined under Article 13(3)(b) and 'Fee for technical services' as defined under Article 13(4)(b) of the DTAA as the payments for the use of the Satellite should be held as consideration for the use of 'industrial, commercial or scientific equipment', since the satellite has been put in space through a rocket and is being maintained in a particular orbit by an earth station belonging to the Russian Company so that it can be used as part of the system of Satellite TV broadcasting. For maintenance of the satellite and the transponders therein, technical personnel in each station of the Russian Company are necessary. Thus, the payments in question are consolidated lump sum payments for 'Royalties' under Article 13(3)(b) and 'Fees for technical services' under Article 13(4)(b) of the DTAA.

2) The CIT (Appeals) failed to appreciate that as per Article 13(2)(b) of the DTA Agreement between India and UK, 'Royalty' payments under 13(3)(b) and 'Fees for technical services' under 13(4)(b) "may be taxed in the contracting state in which they arise (India) and according to the law of that State; but if the beneficial owner of royalties and fees for technical services is a resident of other contracting State (UK) the tax so charged still not exceed 10% of the gross amount of royalties and fees for technical services." Thus, the appellant being responsible for payments of Indian taxes on the payment in question' as per Clause 4.2 of its agreement with RTV dated 27.10.1995 should have deducted and paid 10% of the payment as TDS. Since it failed to do so, the Assessing Officer was right in applying the provisions of Section 201(1) and 201(1A) and raising the demand under these provisions.

16. These grounds were taken by the learned Departmental Representative, because these grounds were the main grounds for dismissal of the appeals by the CIT (Appeals) for the Asst. Years 1997-98.

17. It was fairly stated by the learned Departmental Representative that these points were not considered by the CIT(Appeals) for the Asst. years 1996-97 and even the Department has not raised these grounds in its appeal for the Asst. year 1996-97 in ITA Nos. 1827 & 1828/Mds/1998 which are pending before the Tribunal. Since these grounds are raised subsequently, the learned D.R., prayed that he may be permitted to raise these grounds in these appeals and admit them accordingly.

18. The learned D.R., has taken us minutely through the orders of the CIT(Appeals) and argued that the assessee was liable to deduct tax as per Section 195 of the I.T. Act. He relied upon the decision of the Supreme Court in the case of Transmission Corporation of A. Ltd. and Anr. v. CIT (239 ITR 587) and argued that on safe side the assessee should see an order in Section 195(2) of the I.T. Act. The Id. Departmental Representative further argued that the payment to RTV is covered by the definition of Royalty and Fees for Technical services as per Article 13 of the DTAA. He has also referred to Section 44D of the I.T. Act and argued that RTV is liable to pay tax. Therefore, RAJ TV (Assessee) was liable to deduct tax.

19. The Id. DR, however, did not dispute that RTV has no permanent establishment in India. The Id. DR further argued that both the Assessing Officer and the CIT(Appeals) have dealt with in detail and as such the appeals of the assessee for the Asst. year 1997-98 is liable to be dismissed and further prayed that the appeals of the Revenue for the Asst. year 1996-97 may be allowed. The learned D.R., also relied upon the decision of Calcutta High Court in the case of Cit v. Davy Ashmore India Ltd., (190 ITR 626), in which it was held that DTAA will over-ride the provisions of I.T. Act. The learned Departmental Representative also argued that Section 40(a)(i) is applicable and the authorities below have rightly disallowed the payments against the assessee, upon which no TDS was deducted.

20. The learned DR., also placed reliance on Section 5 and Section 9 of the I.T. Act and argued that the same are applicable to this case also. The learned DR., filed a paper book containing records to show that No Objection Certificate under Section. 195 of the I.T. Act was issued in favour of the assessee which was cancelled and the assessee was directed to deduct TDS and subsequently, the assessee also filed Indemnity Bond before the authorities and subsequently for some period, as was mentioned in the Order of the CIT (Appeals), the assessee deposited TDS on certain payments and, therefore, argued that the assessee was, therefore, under obligation to deduct TDS as per Section 195 of the I.T. Act and since it was not deducted, the assessee is liable to be proceeded against accordingly. The learned DR., also relied upon the Board's Circular No. 152 dated 27.11.74, Circular No. 742 dated 2.5.96 and Circular No. 765 dated 15.4.98 and also relied upon the decisions of various Courts in the cases reported as under:-

1) 44 ITR 720 - in the case of Raghava Reddy and Anr. v. CIT - (Supreme Court)

2) 108 ITR 335 (SC) - Carbonadum Co. v. CIT

3) 144 ITR 145 (AP) - CIT v. Vishakhapatnam Port Trust

4) 190 ITR 626 (Cal) - CIT v. Davy Ashmore India Ltd.

5) 202 ITR 508 (Kar) - CIT v. R.M. Muthiah

Copies of the above decisions are placed on record.

21. The learned counsel for the assessee, on the other hand, argued that the assessee is not liable to deduct TDS according to the Income-tax Act and further argued that Section 40 of the I.T. Act has been wrongly invoked in this case. He also argued that the payment, in question, to RTV would not fall within the terms "Royalty" and "Fees for Technical Services" as per the I.T. Act and as such Section 40 of I.T. Act would not be applicable in this case. Alternatively he argued that Section 40 of the I.T. Act is applicable only for the payments made under Chapter XII-B. The taxability under DTAA are covered under Chapter IX of the I.T. Act. According to him, DTAA does not contemplate tax deduction and further argued that a plain reading to tax chargeable. According to him, since the payment, in question, was not in the nature of Royalty and Fees for Technical Services, Section 40 of the I.T. Act was wrongly invoked in this case. He alternatively argued that even if according to Article 13 of DTAA., the tax was charged, it shall not exceed 10% of the gross amount of Royalty and Fees and Technical Services and since there is no provision under DTAA., the question of deduction and thereby disallowance under Section 40(a)(i) of the I.T. Act does not arise. He further argued that as per Section 90 of the I.T. Act, the provision of I.T. Act should be applied to the extent they are more beneficial to the assessee. He submitted that in case any liability is imposed by I.T. Act, then the question of restoring to the applicability of the DTAA would arise. He contended that these payments were mainly in the nature of hire charges for using transporter and would not come under the definition of 'Royalty' or 'Fees or Technical Services'. According to him, RTV has no permanent establishment in India and hence the payment made to the said company cannot be held to be taxable in India. He also submitted that no services were rendered by the RTV as per explanation.

22. The learned counsel for the assessee argued that by amendment in I.T. Act with effect from 01.04.2001, new term for 'Royalty' has been inserted, which could at the most, would cover the case of the Revenue in view of the facts and circumstances of the case, but this is not applicable retrospectively to the case of the assessee.

23. The learned counsel for the assessee further submitted that the case law reported in 239 ITR 587 (supra) is not applicable to the facts of the present case throughout he learned DR, has relied upon the same as at that time, DTAA was not applicable. He further argued that agreement with RTV was terminated in September 1997 and no further business was being pursued and hence no continuity was maintained. He also relied upon certain portions of the agreement between the assessee and the RTV and submitted that the same would show that the payments, in question, never arose in India. According to the learned counsel for the assessee, the TDS was paid for some time from 1989 in pretext and as such, the assessee cannot be held liable for this admission.

24. The learned counsel for the assessee further argued that Section 40(a)(i) of the I.T. Act was not applicable to the term 'Royalty' as per existing definition of Royalty given in Section 9 of the I.T. Act and further argued that since the payment, in question, to RTV was not in the nature of Royalty, the disallowance under Section 40(a)(i) of the I.T. Act was wrong. The ld. Counsel for the assessee also argued that additional ground for the Asst. Year 1996-97 should not be considered by the Tribunal as it was never the case of the Revenue before the authorities below. So no new point should be considered by the Tribunal.

25. The learned counsel for the assessee relied upon the decision of the I.T.A.T., Delhi Bench in the case of ACIT v. INTEROCEAN Shipping (I)(P) Ltd., (51 ITD 582); decision of the Karnataka high Court in the case of CIT v. R. M. Muthiah (202 ITR 508); decision of the ITAT., Delhi Bench in the case of ACIT v. Introcean Shipping (I) Pvt. Ltd., (226 ITR 63); in the case of Horizontal Drilling International S.A., v. CIT (237 IT 142(A.A.R)); decision of the Madras High Court in the case of CIT v. Neyveli Lignite Corporation Ltd., (243

ITR 459) and the decision of the I.T.A.T., Bombay Bench in the case of Atlas Copco AB of Sweden v. DCIT (53 ITD 293). The learned counsel for the assessee also filed on record the definition of the term 'Royalty' as mentioned in various Dictionaries.

26. We have heard the rival submissions and perused the material on record minutely and carefully gone through the case laws relied upon both the parties. We have very carefully considered the Paper Books filed by both the learned counsel for the assessee and the learned Departmental Representative alongwith certain CBDT Circular and case laws. We have bestowed our careful consideration to the submissions made by the rival parties.

27. In this case, the relevant provisions for consideration would be the definition for 'Royalty' and 'Fees for Technical services' as provided and Expln. 2 to Section 9(1)(6) & (7) of the I.T. Act, defining the term 'Royalty' and 'Fees for Technical Services' which are reproduced hereunder:-

"ROYALTY" DEFINITION UNDER EXPLANATION" TO SECTION 9(1) (vi) OF I.T. ACT:

Royalty means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head 'Capital Gains' for:

- i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;
- ii) the imparting of the any information concerning the working of, or the use of patent, invention, model, design, secret formula or process or trade mark or similar property;
- iii) the use of patent, invention, model, design, secret formula or process or trade mark or similar property;
- iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;
- v) the transfer of all or any rights (including the granting of licence) in respect of any copy rights, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting but not including consideration for the sale, distribution or exhibition of cinematographic films; or
- vi) the rendering of any services in connection with the activities referred to in Sub-clauses (1) to (V).

TECHNICAL FEES are defined in Explanation 2 to Section (1) (vii) of I.T.A. ACT:

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

Another section relevant is Section 40(a)(i) of I.T. Act:

40. Amounts not deductible. Notwithstanding anything to the contrary in Section 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head 'profits and gains of business or profession',-

(a) in the case of any assessee--

(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable outside India, on which tax has not been paid or deducted under Chapter XVII-B:

Provided that where in respect of any such sum, tax has been paid or deducted under Chapter XVII-B in any subsequent year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid or deducted.

Explanation : For the purposes of this sub-clause,--

A) "royalty" shall have the same meaning as in Explanation 2 to Clause (vi) of Sub-section(1) of Section 9.

B) "fees for technical services" shall have the same meaning as in Explanation 2 to Clause (vii) of Sub-section (1) of Section 9.

#### SECTION 90, CHAPTER IX OF I.T. ACT:

90. ((1)) The Central Government may enter into an agreement with the Government or any country outside India:-

(a) for the granting or relief in respect of income on which have been paid both income-tax under this Act and income-tax in that country, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country, or investigation of cases of such evasion or avoidance, or

(d) for recovery of tax under this Act and under the corresponding law in force in that country,

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.)

((2) Where that Central Government has entered into an agreement with the Government of any country outside India under Sub-section(1) for granting relief of tax, or as the case may be, avoidance of double taxation, the, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.)

Other Sums.

#### SECTION 195(1), CHAPTER XVII-B:

195. ((1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest on securities) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head 'Salaries' shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force S:

#### ARTICLE 7 OF D.T.A.A. -- BUSINESS PROFITS:

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprises carries on business in the Other Contracting State through a permanent establishment situated therein. if the enterprises carries on business as aforesaid, the profits of the enterprise may be taxed in the other State, but only so much them as is directly or indirectly attributable to that permanent establishment.

2. ....

9. Where profits include items of income which are dealt with separately in the other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

#### ARTICLE 13 OF DTAA BETWEEN INDIA & U.K- ROYALTIES & FEES FOR TECHNICAL SERVICES:

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

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

(a) in the case of royalties within paragraph 3(a) of this article, and fees for technical services within paragraphs 4(a) and (c) of this Article:

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

(aa) 15 per cent of the gross amount of such royalties or fees for technical services when the payer of the royalties or fees for technical services is the Government of the First mentioned Contracting State or a political sub division of that State, and

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

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

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

3. For the purpose of this Article, the term, "Royalty" means

(a) payment of any kind received as a consideration for the use of or the right to use any copyright of a literary, artistic or scientific work, including cinematography films or work on films, tape or other mens of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design, or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and

(b) payments of any kind received as consideration for the use of or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a contracting State from the operations of ships or aircrafts in International traffic.

4. For the purpose of paragraph 2 of this Article, and subject to paragraph 5 of this Article, the term "Fees for Technical services" means payments of any kind of any person in consideration for the rendering of any technical or consultancy service (including the provision of services of technical or other personnel) which:

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

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

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

Further, the definition of the term 'Royalty' taken from various Dictionaries are also incorporated hereunder:-

= As per Random House Dictionary and Webster's New World Dictionary, "Royalty" was defined, inter alia as (a) payment by lessee to the owner of the land for privilege of working mine; (b) the amount paid to a patents for the use of his patent; (c) payment made to author for books, etc., sold.

= As per chambers English Dictionary, Cambridge U.K., 'Royalty' - has been defined as a payment made to oil companies, etc., to the owner of the mineral rights, in the area in which they operate; payment to author, composer etc. for every copy sold or for every public performance.

= In Encyclopedia Britannica, the word "Royalty" is accepted to be:

"The payment made to the owners of certain types of rights by those who are permitted by the owners to exercise the rights. The rights concerned are literary, musical and artistic copyright, rights in inventions and designs and rights in mineral deposits including oil and natural gas."

28. Since both the parties relied upon the Judgment of the Karnataka High Court reported in 2002 ITR 508 (supra), it would e necessary to mention the ratio of this case before deciding the points for consideration and for determination. It was held in this case that:-

"The effect of an "agreement" entered into by virtue of Section 90 of the Act would be: (i) If no tax liability is imposed under this Act, the question of resorting to the agreement would not arise. No provision of the agreement can possibly fasten a tax liability where the liability is not imposed by this Act; (ii) if a tax liability is imposed by this Act, the agreement may be resorted to for negating or reducing it; (iii) in case of difference between the provisions of the Act and of the agreement, the provisions of the agreement prevail over the provisions of this Act and can be enforced by the appellate authorities and the Court. To the same effect is the circular issued by the Central Board of Direct Taxes as per Circular No.333 dated April 2, 1982, which reads thus:

"It has come to the notice of the Board that sometimes effect to the provisions of double taxation avoidance agreement is not given by the assessing officers when they find that the provisions of the agreement are not in conformity with the provisions of the Income-tax Act, 1961.

2. The correct legal position is that where a specific provision is made in the double taxation avoidance agreement, that provisions will prevail over the general provisions contained in the Income-tax Act, 1961. In fact the Double Taxation Avoidance Agreements which have been entered into by the Central Government under Section 90 of the Income-tax Act, 1961, also provide that the laws in force in either country will continue to govern the assessment and taxation of income in the respective country except where provisions to the contrary have been made in the Agreement.

3. Thus, where the Double Taxation Avoidance Agreement provides for a particular mode of computation of income,. the same should be followed, irrespective of the provisions in the Income-tax Act, where there is no specific provision in the agreement, it is the basic law, i.e., the Income-tax Act, that will govern the taxation

of income.

29. This case law in our considered view, is applicable to the identical facts of the case under consideration by us for arriving at a rightful decision in all the appeals. Now, let us examine the appeals on their merits.

30. As per Article 7 of the D.T.A.A., which is reproduced above, the profit of an enterprise of Contracting State shall be taxable only in that State, unless the enterprise carried on business in the other Contracting State, through a permanent establishment situated therein. It is the finding of fact by the learned CIT(Appeals) in both the impugned orders dated 30.7.98 and 30.1.2001 for the Asst. years 1996-97 and 1997-98 that RTV has no permanent establishment in India. This point was also not challenged in India. This point was also not challenged by the Department before us nor before any other authority. From the findings of the learned CIT(Appeals), it is clearly proved that RTV has no permanent establishment in India. hence, Article 5(2)(k) of D.T.A.A., would not support the case of the revenue. Therefore, the assessee would not be liable to deduct TADS in accordance with Article 7 of D.T.A.A., between India and U.K.

31. For the Asst. year 1996-97, The ITP (TADS) disallowed the payments made to RTV as there was business connections between the assessee and the RTV (U.K.). However, the fact remains that the agreement between then was entered into on 19.11.95 and was terminated in September 1997. From August 1997, the assessee entered into an agreement with M/s. Shinwatra Satellite Thailand. Therefore, there was no continuity of business relations with RTV. The findings of the Assessing Officer were, therefore, incorrect. In our considered view, by beaming of signals itself would not create tax liability in India because RTV has not done anything within the territory of India.

32. The agreement between the assessee (RAJ) and RTV was mainly for hiring of transponder only. It was not disputed before us that RTV never owned transponder and Satellite through which programmes were beamed. The Russian company by name "Intersputnik" was stated to have owned the Satellite but the assessee has no agreement. Even as per agreement dated 27.10.95, it was provided in column (b) at page 1 thereof that "RTV is an international television news organisation with access to satellite transponder space and uplink facilities from time to time", which clearly shows that RTV never owned transponder in question. Explanation (a)(i) of Section 40 of the I.T. Act defines that amount not to be deductible in computation of the income, in case of an assessee -- interest, royalty, fees for technical services or other sum chargeable under this Act, which is payable outside India, on which tax has not been paid or deducted under Chapter XVII-B; and the definition of Royalty and Fees for technical services shall have same meaning as defined in Explanation (2) to Clause (6) & (7) of Sub-section (1) of Section 9 of the I.T. Act.

33. After going through the definitions which are reproduced above for 'Royalty' and 'Fees for technical service', it is clear that these payments do not fall within the meaning of payment for hire charges of transponder.

34. A perusal of the definition of the term 'Royalty' as per I.T. Act reveals that only the payments for use or right to use certain specified intellectual property rights or payment for imparting any industrial, commercial or scientific information are regarded as Royalties. The payment in the case of the assessee for hire of transponder or up-linking services are not for use as specified in the definition of Royalties under I.T. Act. Since the definition of Royalty does not cover payment for hire of transponder, the lower authorities have wrongly disallowed the same under Section 40(a)(i) of the I.T. Act even does not include payment for the use of an industrial, commercial or scientific equipment which is generally regarded as Royalty under D.T.A.A. Moreover, as stated above, RTV never owned transponder from which telecast was done, clearly rules out the element of Royalty.

35. We have also considered the ordinary Dictionary meaning of 'Royalty'. As pointed out earlier and after going through the entire facts and circumstances of the case, we are unable to accept that payment of RTV in this case at all in the nature of Royalty. Fees for technical services as defined in Explanation (2) to

Sub-section. (i)(6) mentioned above clearly proves that it is not applicable in this case as Raj TV's agreement would clearly show that no service, what-so-ever, was intended either technically or otherwise. The assessee is entitled to the use of the transponder which was a satellite in orbit of space. The material to be broadcast was recorded on tapes and sent by the assessee to the up-linking station abroad. The transponder receives signals and send them back for telecasting. Therefore, these things are not done by any technical expert or any person who was rendering technical advise to the assessee. In our view, the assessee was not getting any technical support for this arrangement, except if at all, to use the satellite which was located outside Indian territory. The Contract as in the case of the assessee should be taken only as a business agreement. Hence, the payments made to RTV towards transponder hire charges cannot be brought under the head "Fees for technical services". There was also no attempt on the part of the Revenue to treat such payments as 'fees for technical services' in this case.

36. Section 40(a)(i) of the I.T. Act says with regard to payments made for interest, Royalty or fees for technical services as defined under I.T. Act. However, it does not detail with any provision of D.T.A.A. Since Section 9 of I.T. Act is not applicable in this case, Section 5 of the I.T. Act cannot be pressed in favour of the Revenue.

37. According to the details available on record, as filed by both the parties, the RBI and other concerned Departments of the Ministries had give approval for the payment to RTV towards transponder hire charges and up-linking service and not for technical services as mentioned by the Assessing officer in the Assessment Orders. The assessee has made the payments after obtaining No Objection Certificate from the Assessing Officer, having jurisdiction over the matter and whenever application for No Objection Certificate was rejected, the assessee has deducted tax under protest to keep its business continuing. The NOC was issued by ACIT., Company Circle-IV(5), Chennai on 23.1.96, which is available on record, for payment of transponder and up-linking hire charges of \$ 2.2 million. This certificate would absolve the assessee from the obligation of tax deduction under Section 195 of the I.T. Act. Sometimes, the assessee deducted tax and paid to the Department under pretext. But in our considered view, the same cannot be held as admission on the part of the assessee as these even happened subsequently when earlier order dated 23.1.1996 under Section 195 of the I.T. Act was withdrawn. The assessee made these payments under protest to the Revenue. We may observe here that the assessee could have avoided these entire legal exercises if it would have challenged the subsequent order under Section 195 of the I.T. Act. The assessee cannot be put to a disadvantage situation if it is otherwise entitled to the relief under the law. It seems that the assessee has once obtained NOC as and when the payments towards transponder hire charges were made. Whenever the NOC was not granted, the assessee deducted the tax under protest and never withheld any information. A copy of the letter dated 16.9.96 in this regard is available on record which was filed by the assessee before the ACIT., Co. Circle.

38. Sub-section (2) of Section 90 of the I.T. Act which is reproduced above mentions that where the Central Govt. has entered into an agreement with the Govt. of another country outside India under Sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee. We are of the considered view that what is laid down under Section 90 of the I.T. Act can be applied so long as they benefit the assessee.

39. We may examine the above question involved in this case from another angle and refer here that Finance Bill 2001 was introduced recently in Explanation (2) of Section 9(iva), according to which in Section 9 of the I.T. Act, Sub-section (1), Clause (iv) under Explanation (2), the following clause has been inserted in the definition of 'Royalty':

(iva) "The use or the right to use any industrial, commercial or scientific equipment."

This shall be effective from 01.4.2002. This amendment in Section 9 of the I.T. Act clearly proves that till that date, even the equipment was not covered in the definition of Royalty in I.T. Act. At present, these payments

are not included in the definition of Royalty in Explanation (2) of Section 9 of the I.T. Act. Therefore, such payments are taxable in the Contracting State (U.K.) as business income only. Consequently, there was no withholding of the tax on such payments by the assessee as the definition of the term 'Royalty' as provided under the I.T. Act was more beneficial to the assessee in these appeals. The aforesaid amendments as mentioned above will be effective from 1.4.2002 and, therefore, it would be applicable in relation to the Asst. Year 2002-2003. Accordingly, Section 40(a)(i) would not be applicable to these appeals as Section 9 of the I.T. Act with regard to the definition of Royalty was not applicable to the payment in question.

40. We may further add here that if the payment towards use of equipment such as transponder falls within the existing definition of Royalty, then there was no need to amend the definition of Royalty in the proposed amendment by Finance Bill 2001 by which new clause has been inserted. At the cost of repetition, we may also add that Section 40(a)(i) would be applicable if the tax is not deducted and paid as per Chapter XVII-B on Royalties, fees for technical services and for that claim Royalty and fees for technical services shall have meaning as defined under Section 9(1)(6) & (7) Explanation (2) of the I.T. Act. Chapter XVII-B deals with Section 195 of the I.T. Act, but Chapter IX of the I.T. Act deals with Double Taxation relief under Section 90 of the I.T. Act. Hence, Section 40(a)(i) of the I.T. Act would be applicable to payment made outside India and is covered by the definition of Section 9(1)(6) & (7) of Explanation (2) of the I.T. Act. Since there is no applicability of these definitions under the I.T. Act, qua, the payment in question provisions of Section 40(a)(i) of the I.T. Act would not be applicable in this case. Similarly, Chapter-IX which deals with D.T.A.A., under Section 90 of the I.T. Act is not found mentioned under Section 40(a)(i) of the I.T. Act.

41. Therefore, in view of the facts stated, it is conclusively proved on record that the payment made by the assessee to RTV is not covered by the definition of Royalty or Fees for technical services under the I.T. Act. We may remind here that D.T.A.A., cannot fasten that liability where the liability is not imposed by the I.T. Act and if tax liability is imposed by the I.T. Act, the D.T.A.A., may be resolved to have negating or reducing it.

42. We are fortified in our view by the Judgments of the Hon'ble Karnataka High Court reported in 202 ITR 508 (supra). This case was decided against the Revenue and consequently is applicable to the case of the assessee and would also advance the case of the assessee. Article 7 of the D.T.A.A., clearly provides that an enterprise of Contracting State shall be taxable only in that State (U.K.) and Article 13 of D.T.A.A., has to be construed harmoniously with Article

7. It was so held by the Authority for Advance Ruling in the case reported in 237 ITR 142 (supra) has held that since French company has no permanent establishment in India, is not taxable in India. It was further held that 'Construed literally and in isolation, Article 13 may be capable of that interpretation, but the authority is of the view that it is not the proper way to harmonise the provisions of Article 7 and 13. It was also held that "It seems to the Authority that it would not be correct to charge such profits under Article 13 in cases like the present where there is an establishment of the nature envisaged in Article 5, only chargeability under Article 7 fails because the duration of such establishment does not extend beyond the period stipulated in Article 5(3). To read the clauses thus would result in an anomaly that the business profits of a non-resident which are intended to be chargeable only where the non-resident has a permanent establishment in India would become chargeable to tax even where it has no permanent establishment, merely by labelling them as consideration for technical services."

43. In this case, Article 7 of D.T.A.A., provides to avoid double taxation. It provides relief over I.T. Act and not to fasten liability if the assessee is not liable to deduct tax under I.T. Act. It is so provided under Section 90(2) of the I.T. act also that the provisions of this Act (I.T. Act) shall apply to the extent they are more beneficial to the assessee. The tax-payer can avail of the benefit of the D.T.A.A., if the same is more beneficial to him to that of the I.T. Act.

44. We are fortified, in our view, by the decision of the Bombay Bench of the I.T.A.T., in the case of Atlas Copco AB of Sweden v. DCIT (53 ITD 293) in which it has held:-

"Section 90 has been enacted with the intention to provide relief where assessee has paid taxes in India as well as in other country and for avoidance of double taxation income under the IT Act and corresponding law of the other foreign country. This presumes to be an accrual of income in the hands of the assessee under the IT Act. If the income is not liable to tax in India then the question of resorting to the provisions contained in DTAA WOULD NOT ARISE. DTAA do not fasten any liability on the assessee. The provisions of DTAA can be resorted only for negating or reducing the liability under the IT Act. If the assessee succeeds on this aspect, then there will be no necessity of deciding the other issues."

45. The Hon'ble Madras High Court in the case of CIT v. Neyveli Lignite Corporation Ltd., (243 ITR 459) has dealt with the meaning of Royalty as under:-

"Meaning of Royalty. Deduction of tax at source. Assessee entering into a contract with a foreign company for design and engineering equipment. Amounts paid to foreign company under contract not "Royalties". Contract did not refer to any patent owned by supplier which the buyer was permitted to exploit. No transfer or licence of any patent, invention, model or design. No accrual of income to foreign supplier in India."

#### WORDS AND PHRASES - MEANING OF "ROYALTY"

"The term "royalty" normally connotes the payment made by a person who has exclusive right over a thing for allowing another to make use of that thing which may be either physical or intellectual property or thing. The exclusivity of the right in relation to the thing for which royalty is paid should be with the grantor of that right. Mere passing of information concerning the design of a machine which is tailor-made to meet the requirement of a buyer does not by itself amount to transfer of any right of exclusive user, so as to render the payment made therefore being regarded as "royalty".

"The contract between the assessee and the manufacturer did not anywhere refer to any specific patent owned by the supplier which the buyer was permitted to exploit."

... ..

"There was no transfer or licence of any patent invention, model or design. The design referred to in the contract was only the design of the equipment required to be manufactured by the supplier abroad and supplied to the purchaser."

46. The Delhi Bench of the I.T.A.T., in the case of ACIT v. Introcean Shipping (I) Pvt. Ltd., (226 ITR 63) (Tribunal Order) has held that:

"Assessee entering into contract with a foreign company for hire of ship to assist in construction of an off-shore platform for oil exploration. Assessing Officer directing assessee to deduct tax from amount payable to non-resident. Tribunal setting aside order on the basis of its finding that vessel which had been hired charges were not taxable in India."

47. The Delhi Bench of the I.T.A.T., IN THE case of ACIT v. Introcean Shipping (I) (P) Ltd., (51 ITD 582) has held that:

"We are of the opinion that the hire charges paid to NR would be liable to be taxed in UK in view of the provisions contained in Article 7 of DTA. Since, the hire charges are not subjected to Indian Taxation, question of deducting any tax from the hire charges payable to NR does not arise."

48. These authorities are directly applicable to the facts of this case and would fortify our views as taken above.

49. On the contrary, the learned Departmental Representative relied upon the decision of the Supreme Court in the case of Transmission Corporation of A.P. Ltd. and Anr. v. CIT (239 ITR 587). In this case, the Assessment year involved was 1966-97. At that time, D.T.A.A., was not in existence as it was notified on 11.2.1994. It was decided in this case as to how much tax has to be deducted. According to the aforesaid Judgment, in case of any doubt, authorities resorted to proceeding under Section 195 of the I.T. Act and then they should deduct TDS according to the order under Section 195 or otherwise on gross payment.

50. We respectfully opine that this case is distinguishable and is not applicable to the facts and circumstances of the case under consideration by us.

51. The learned Departmental Representative further relied upon the decision of the Karnataka High Court reported in 202 ITR 508 cited supra. This case, as discussed above, is against the Revenue and would not advance the case of the Departmental Representative further relied upon the decision of Calcutta High Court in the case of CIT v. Devy Ashmore India Ltd., (190 ITR 626) in which the Calcutta High Court has decided the issue whether the payment to foreign party as consideration for outright sale of drawing, design was not Royalty liable to tax. It was held that consideration paid for outright sale of drawings, designs by the non-resident company cannot be termed as royalty. This issue was decided by the Calcutta High Court in favour of the assessee. We do not know how this case would advance the case of the Department.

52. The learned D.R., further relied upon the decision of the Supreme Court in the case of Carborandum cited supra in which the dispute that arose was whether the agreement entered into with the Indian company for supply of technical information and know-how etc., found business connection in India and the fees received for such services accrued or arose in India. The ratio of this Judgment would not support the case of the Department at all, but would rather advance the case of the assessee, as it was held in this case that in order to rope in with the income of non-resident under deeming provision, it must be shown that some of the operations were carried out in India in respect of income sought to be assessed. This case, in our view, under no circumstances would support the case of the Revenue as in this case also nothing has been done or carried out by RTV in India for the assessee.

53. The learned D.R., also relied upon the decision of A.P. High Court in the case of CIT v. Visalakshmi Achi (144 ITR 146). This case pertains to the issue that tax has not been deducted or belated interest payment made towards purchase of Equipment/material. It was concluded by the Andhra Pradesh High Court that tax was not payable in view of the Indo-German Double Taxation Avoidance Agreement and the industrial or commercial profits of Germany company are not liable to tax under Section 9 of the I.T. Act, except to the extent permitted by Article 3. The mere supervision made by Germany Engineers does not amount to the German company having a permanent establishment in India. We fail to understand, how this case will support the case of the Revenue.

54. The learned Departmental Representative further relied upon the decision of the Supreme Court in the case of Raghava Reddy and Anr. v. CIT (44 ITR 720). This case pertains to the Asst. years 1948-49 and 1949-50. In this case, the payment of commission was credited to the account of non-resident and this case is not directly relevant to the appeals under consideration by us and again, Explanation (1) to Section 5(2)(b) of the I.T. Act specifically provides that mere credit will not tantamount to accrual of income. This case would also not advance the case of the Revenue in any manner. The learned D.R., further relied upon the Circular No. 152 (supra) which deals with deduction of tax at source under Section 195 of the I.T. Act, from the payments to non-resident which are chargeable under the provisions of the I.T. Act. Circular No. 742 and Circular No. 765 (supra) deals with taxation of foreign telecasting fees, guidelines for computation of income etc. But in this case, the payment was not chargeable under the I.T. Act and the assessee in an Indian Telecasting Company and as such, these Circulars are not applicable to the facts of the case on hand.

55. Keeping in view the above discussions and various case laws, we are of the considered view that the payment made by the assessee to RTV is only hire charges for use of transponder and satellite services which would not fall within the definition of 'Royalty' or 'Fees for technical services' as provided under Section 9 of the I.T. Act. Therefore, the assessee is not liable to deduct TDS under the I.T. Act on such payments. Accordingly, Section 40(a)(i) of the I.T. Act cannot be invoked in the case of the assessee. As pointed out, RTV never owned transponder which is used by the assessee in this case. Therefore, the assessee's case would not fall under Article 13 of the D.T.A.A. Moreover, Article 7 and 13 of the D.T.A.A. have to be construed harmoniously and to be read together. All points raised are answered accordingly.

56. We have heard arguments in detail connected with each and every aspect raised in these appeals, but keeping in view the above observations, we do not feel it appropriate to allow the additional grounds raised by the Revenue in ITA No. 1827 & 1828 (Mds)/1998 as it is only an academic exercise now. Accordingly, we reject the additional grounds so raised by the Department.

57. Consequently, we up-hold the impugned orders of the CIT (Appeals) dated 30.7.1998 in ITA No. 1827 & 1828/Mds/1998 for the Asst. Year 1996-97.

58. In the result, the appeals in the preceding paragraph, filed by the Department are dismissed.

59. I.T.A. No. 200(Mds)/2001 for the Asst. Year 1997-98 filed by the assessee is allowed on the first ground and the orders of the authorities below are hereby set aside with regard to the payment made by the assessee to RTV. The disallowance of payment made to RTV under Section 40(a)(i) is deleted. The Assessing Officer is directed to give appropriate effect on this.

60. The remaining two grounds in ITA No. 200/Mds/2001 relate to payments made for the earlier year (prior period receipts) and advertisement receipts (discrepancy in accounting). It was argued that the receipt amounting to Rs. 3,37,872/- has been duly accounted for in the books of accounts and explained in the statement given in the grounds of appeal would very clearly reveal that the difference of Rs. 13,719/- is the TDS amount.

61. We have carefully considered both the grounds of appeal. The learned CIT (Appeals) has already directed the Assessing Officer to examine these issues and decide on merits and further directed the Assessing Officer to examine all the submissions of the assessee and in case discrepancy is not fully explained, sustain the addition to the extent of discrepancy.

62. The learned Departmental Representative very fairly stated that both the issues can alternatively be verified by the Assessing Officer. Therefore, we do not feel it necessary to go into the details of these grounds of appeal as the same have already been remitted to the file of the Assessing Officer by the CIT(Appeals). However, we also, remitting the same to the Assessing Officer, direct him to verify the claim of the assessee as per books of accounts and details furnished in this regard. The Assessing Officer shall give reasonable opportunity of being heard to the assessee in the matter. No other ground is urged or argued before us.

63. In the result, the first ground of appeal is allowed and the remaining two grounds of appeal are allowed for statistical purpose as directed above.

64. I.T.A. No. 1503(Mds)/99 - A.Y. 1997-98:

This appeal was filed by the assessee against the order of the CIT (Appeals) dated 19.1.1999. This is a case of failure on the part of the assessee to deduct TDS on the payments made to RTV towards hire charges. The ITO invoked the provisions of Section 201(1) and 201(1A) of the I.T. Act and raised a demand towards tax and interest due. The assessee filed an appeal before the CIT (Appeals). The learned CIT (Appeals) dismissed the appeal on technical ground, as according to Section 248 of the I.T. Act, with effect from 1.10.1998, the

appeals can be preferred under this Section only, when the deduction is made under the provisions of Section 195 of the I.T. Act and the amount has been paid under the provisions of Section 200, by way of tax by the person deducting it. Since the assessee has not deducted the tax, the ITO has passed an order under Section 201(1) and 201(1A) of the I.T. Act. Therefore, the CIT (Appeals) held that the aforesaid orders of the ITO are not appealable under Section 248 of the I.T. Act. The assessee denied its liability but still Section 248 of the I.T. Act was applicable. However, as per the amended provision of Section 246A(1)(ha) of the I.T. Act, with effect from 1.6.2000, the order under Section 201(1) and 201(1A) of the I.T. Act are appealable. According to Section 246A(1)(a), every appeal filed by the assessee in default against the order under Section 201 of the I.T. Act on or after 1.10.98, but before 1.6.2000 shall be deemed to have filed under this Section.

65. In this case, appeal was filed on 17.12.98 as per details mentioned in the impugned order. In view of this, the learned Departmental Representative submitted that he has no objection for the matter to be remanded back to the file of the CIT (Appeals) for disposal according to law as this appeal is appealable under Section 246A(1)(ha) of the I.T. Act. Since the appeal of the assessee falls within the same period, the impugned order is set aside. Since the CIT (Appeals) has not decided this appeal on merit but dismissed only on technical ground, the appeal is remitted back to the file of the CIT (Appeals) for deciding according to merits of the case, after giving the assessee reasonable opportunity of being heard in the matter.

66. In the result, I.T.A. No. 1503/Mds/99 filed by the assessee is allowed for statistical purpose.

67. To consolidate the results of all the appeals dealt with in this Order, ITA Nos. 1827 & 1827(Mds)/1998 filed by the Revenue are dismissed, ITA No. 200/Mds/2001 filed by the assessee is partly allowed for statistical purpose and ITR No. 1503/Mds/1999 filed by the assessee is allowed for statistical purpose.