FOREIGN TECHNICIANS IN INDIA : LIABLITY TO TAX

[Whether remuneration payable to a foreign technician for services rendered in India under a Technical Collaboration / Assistance Agreement is liable to tax in India U/S 9(1)(ii) of the Income-Tax Act]

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1. Introduction

Of late, the issue regarding the taxability of the remuneration and living allowance, etc. payable to a foreign technician on deputation in India under a Technical Collaboration or Assistance Agreement, has become quite controversial. At the root of this controversy, are the provisions of S. 9(1)(ii) of the Income-Tax Act, 1961 (the Act). Section 9 of the Act deals with "**Income deemed to accrue or arise in India**". The main part of S.9 is S. 9(1), under which certain types of incomes are deemed to accrue or arise in India. S. 9(1) contains seven clauses, namely clauses (i), (ii), (iii), (iv), (v), (vi) and (vii). A plain reading of S. 9(1) makes it clear that it enumerates various categories of income and directs that income falling under each of the clauses and sub-clauses shall be deemed to accrue or arise in India. The income dealt with in each clause is distinct and independent. Besides, S.9 is not a mere machinery section but a charging provision – **CIT Vs. Little's Oriental Balm and Pharmaceuticals Ltd., 18 ITR p.849 (Mad.)**.

If, as pointed out earlier, S.9 is a charging provision and income dealt with in each clause of S. 9(1) is distinct and independent; then if certain income is held as taxable under certain clause of S.9 (1), the same cannot be held as taxable under any other clause of S. 9(1) of the Act.

Under this Article, we are dealing with the provisions of S. 9(1)(ii) of the Act. S. 9(1)(ii) reads as follows:

"**S. 9(1)** – The following incomes shall be deemed to accrue or arise in India -

(i) all income accruing……

(ii) income, which falls under the head "Salaries", if it is earned in India.

[Explanation - For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for –

(a) service rendered in India; and

(b) the rest period or leave period, which is preceded and succeeded by services rendered in India and forms part of the service contract of employment,

shall be regarded as income earned in India.]

Initially, there was no Explanation to S. 9(1)(ii). However, the Finance Act, 1983 inserted an Explanation to S.9(1)(ii) w.e.f. 1.4.1979, retrospectively. The Explanation inserted was as follows:

"Explanation – For the removal of doubts, it is hereby declared that income of the nature referred to in this clause payable for service rendered in India shall be regarded as income earned in India;"

Thereafter, the Finance Act, 1999 has substituted the aforesaid Explanation with the present Explanation w.e.f. 1.4.2000. The first Explanation was inserted in order to overcome the adverse judgements of a number of High Courts, which held that salary payable to a foreign technician by his employer outside India was not taxable in India. The part (b) of the Explanation has been inserted to overcome the adverse judgements of certain High Courts regarding the taxability of the rest or leave period salary of the foreign technicians, payable to them as per service contract of employment.

However, though the Explanation to S. 9(1)(ii) has been added for the removal of doubts, yet doubts continue to hover around the meaning of S. 9(1)(ii) of the Act. To be very frank, much controversy has been generated regarding interpretation of the aforesaid Explanation itself.

2. Deputation of foreign technicians to India

Presently, technology transfer, mainly from foreign countries to India, is very common. For such purpose, technical collaboration agreements are entered into between the foreign and the Indian enterprises. For further assistance and training of the personnel of the Indian concern, normally Technical Assistance Agreements are entered into. Payment in respect of the technical assistance may be paid in two ways, viz.

(i) The Indian enterprise makes the payment to the foreign enterprise in the form of technical service fees. The remuneration is payable to the foreign technician abroad by his employer (the foreign enterprise), whereas the living allowance, either directly or in the form of reimbursement of the lodging and boarding expenses; is payable to the foreign technician by the Indian enterprise;

(ii) Under the agreement, the remuneration along with living allowance is payable to the foreign technician by the Indian enterprise, and no separate fees, etc., are payable to the foreign enterprise.

It may, however, be mentioned here that most of the Technical Assistance Agreements are of the first type.

The main purpose of this Article is to examine the tax-treatment of the remuneration and living allowance, etc. payable to such foreign technician while on deputation in India.

At the outset, it may be safely stated that if the remuneration is payable to the foreign technician by the Indian enterprise, the same would be liable to tax in India, in view of Explanation (a) to S.9(1)(ii), as the services are rendered in India.

The real controversy arises in a case where the remuneration to the foreign technician is not paid by the Indian enterprise, but the same is paid abroad by the foreign enterprise (the employer of the technician).

In order to get a definite answer to the aforesaid query, one has to examine the relevant pronouncements made by the various High Courts, the Apex Court and the various Benches of the ITAT.

3. Judgements of the High Courts and the Supreme Court

Some of the important and relevant judgements of the High Courts and the Supreme Court, are examined / discussed, as follows:

(i) **CIT Vs. S.G. Pgnatale, 124 ITR p.391 (Guj.)**

In this case, there was an agreement between the Indian company and the foreign company for provision of services by the foreign company. As per this agreement, the employee of foreign company rendered services in India. The salary of the employee was payable by the foreign company outside India. The assessment year (AY) involved was 1972-73.

Under the aforesaid facts and circumstances, it was held that the salary payable by the foreign company to its employee outside India was not assessable as salary earned in India under the provisions of S.9(1)(ii) of the Act. Further, it was held that the living allowance was nothing but reimbursement of necessary expenses and therefore, the same was not a taxable perquisite.

Though the aforesaid judgement relates to AY 1972-73, which was not covered under the Explanation inserted by the Finance Act, 1983 w.e.f. 1.4.1979 retrospectively or the present part (a) of the Explanation; the Hon. High Court has made some very important observations, which may apply even to AY 1979-80 and subsequent AYs. These observations are to be found on p.401 of the Report. The same are reproduced, as follows:

"In our opinion, in view of the clear indication given by the legislature itself by using a different phraseology in cl. (iii) as compared with cl. (ii) with which we are concerned in this case and in view of the passage from **E.D. Sassoon's case [1954] 26 ITR 27 (SC)**, it is clear that the words 'earned in India' in S.9(1)(ii) must mean arising or accruing in India."

And

"…….For the reasons set out hereinabove it is clear to us that the words 'earned in India' occurring in cl. (ii) must be interpreted as 'arising or accruing in India' and not from 'service rendered in India'. **So long as the liability to pay the amount under the head 'Salaries' arises in India, cl. (ii) can be invoked. If the liability to pay arises out of India and the amount is payable outside India, cl. (ii) cannot be invoked."** (Emphasis supplied).

From the above observations, one may safely conclude that, if the liability to pay the amount under the head "Salaries" arises out of India and the amount is payable outside India, S. 9(1)(ii) cannot be invoked.

(ii) **CIT Vs. S.R. Patton & Others, 193 ITR p.49 (Ker.)**

In this case, the AYs involved were 1973-74 and 1976-77 and therefore, it was held that the clarification or declaration, vide Explanation to S.9(1)(ii) would only apply to AY for and from the AY 1979-80. However, it has been reiterated, following the judgement of Gujarat High Court in **CIT Vs. S.G. Pgnatale, 124 ITR p.391 (Guj.)** ; that so long as the liability to pay the amount under the head "Salaries" arises in India, clause (ii) of S.9(1) can be invoked; but if the liability to pay arises out of India, and the amount is payable outside India, clause (ii) cannot be invoked.

The relevant observations of the Hon. High Court are to be found on pp. 55 & 56 of the Report and the same are reproduced, as follows:

"Kanga and Palkhiwala in their book **The Law and Practice of Income-Tax, 7th edition (1976)** at page 207, stated the scope of section 9(1)(ii) of the Act read with sub-section (2) as follows:

'Clause (ii) of sub-section (1) provides an artificial place of accrual for income taxable under the head 'Salaries'. It enacts that income chargeable under the head 'Salaries' (section 15) is deemed to accrue or arise in India if it is earned in India, i.e., if the services under the agreement of employment are or were rendered in India, the place of receipt or actual accrual of the salary being immaterial for this purpose.'

A similar view was expressed by other authors also. These views were noticed when the matter was considered by the Bench of the Gujarat High Court in **S.G. Pgnatale's case [1980] 124 ITR 391**. Even so construing section 9(1)(ii) of the Act, in the light of other sections – particularly section 9(1)(iii) of the Act – the Bench held that, in view of the clear indication given by the Legislature itself by using different phraseology in clause (iii) as compared with clause (ii), the words occurring in clause (ii), 'earned in India', must be interpreted as 'arising or accruing in India' and not from service rendered in India. So long as the liability to pay the amount under the head 'Salaries' arises in India, section 9(1), clause (ii), can be invoked. If the liability to pay arises outside India and the amount is payable outside India, clause (ii) aforesaid cannot be invoked. The court also held that a mere reimbursement of a necessary disbursement would not amount to a perquisite since a perquisite should be something which arises by reason of a personal advantage.**"**

Further, as per the observations on p.56 of the Report, the observations of the Gujarat High Court, in the case of **CIT Vs. S.G. Pgnatale, 124 ITR p.391 (Guj.)** on p.401 of the Report, have been reproduced and followed.

Thus, the Kerala High Court in the aforesaid judgement has also held that if the liability to pay the amount under the head 'Salaries' arises out of India and the amount is payable outside India, clause (ii) of S.9(1) cannot be invoked.

The aforesaid judgement of the Kerala High Court has been affirmed by the Apex Court in the case of **CIT Vs. S.R. Patton, 233 ITR p.166 (SC)**.

(iii) **Morgenstern Werner Vs. CIT, 233 ITR p.751 (All.)**

This was a case of a foreign technician, who received, daily allowance in India. The A.Ys. involved were 1990-91 and 1991-92. Salary was paid in foreign country by the foreign concern. It was held –

(i) That admittedly, as the petitioner had not stayed in India during the preceding nine years, the petitioner was "not ordinarily resident" in India and therefore, he would be governed by the proviso to S.5(1)(c) of the Act. Hence, the petitioner's salary received by him in Germany was not taxable in India as the same could not included in the total income to be assessed in India; and

(ii) The amount of Rs. 1,11,264/- received by the petitioner as daily allowance was also not taxable in the hands of the petitioner.

In this case, it was assumed by the Hon. High Court that as the petitioner's salary was received by him in Germany, the same was not taxable in India and therefore, the same could not be included in the total income to be assessed in India.

The relevant observations of the Hon. High Court are to be found on p.755 of the Report and the same are reproduced, as follows:

" Considering the aforesaid provisions of law, I find that a person is 'not ordinarily resident' in India if in nine out of the ten preceding years he had stayed outside India. Admittedly, it is nobody's case that the petitioner had stayed in India during the preceding nine years. In that view of the matter, I have no doubt in my mind that the petitioner is "not ordinarily resident" in India and will be governed by the proviso to section 5(1)(c) of the Act. The aforesaid proviso makes it abundantly clear that the income of a person 'not ordinarily resident in India' within the meaning of section 6(6) of the Act, being accrued outside India, shall not be taxed and would not come within the scope of the total income within the charging section 4 of the Income-tax Act. In that view of the matter, I hold that the petitioner's salary received by him in Germany was not taxable in India and the same could not be included in the total income to be assessed in India."

(iv) **CIT Vs. Goslino Mario & Others, 241 ITR p.314 (Gau.)(Appex.)**

In this case, the AY involved was 1976-77 and therefore, Explanation (a) to S.9(1)(ii) was not applicable to the same.

However, in this judgement also, the Hon. High Court has followed the judgement of Gujarat High Court in the case of **CIT Vs. S.G. Pgnatale, 124 ITR p.391 (Guj.),** wherein reliance was placed on the decision of the Supreme Court in the case of **E.D. Sassoon & Co. Ltd. Vs. CIT, 26 ITR p.27 (SC).**

The relevant observations of the Hon. High Court are to be found on p.317 of the Report and the same are reproduced, as follows:

"It was, therefore, concluded that in view of the above and different phraseology used in clauses (ii) and (iii), it was clear that the words 'earned in India' in section 9(1)(ii) were used to mean accruing or arising in India. Thus, so long as the liability to pay the amount arises in India, clause (ii) could be invoked; but if the liability to pay arises outside India and the amount was payable outside India, clause (ii) could not be invoked.

We are in respectful agreement with the aforesaid reasons given above. As in the present case the liability to pay salary to the assessees arose outside India in view of the contract between the FCI and Technimont, and as the salary was payable outside India, section 9(1)(ii) did not apply."

From the aforesaid observations also, it is clear that if the liability to pay the amount under the head "Salaries" arises out of India and the amount is payable outside India, clause (ii) of S.9(1) cannot be invoked.

The aforesaid judgement of Gauhati High Court has been affirmed by the Apex Court in the case of **CIT Vs. Goslino Mario and others, 241 ITR p.312 (SC)**.

(v) **CIT Vs. H. Link, 244 ITR p.93 (Guj.)**

The assessee, a foreign technician, was an employee of a German company. He was provided rent-free accommodation by the Indian company. He was paid salary in Germany and he was given daily allowance and rent-free accommodation during his stay in India.

It was held that as the living allowance was given as a re-imbursement, the same was not a perquisite, which could be subjected to tax. It was further held that the rent-free accommodation could be a perquisite only when it was provided by the employer to the employee and as the assessee was the employee of the Germany company, the rent-free accommodation provided to him by the Indian company could not be treated as perquisite.

The relevant observations of the Hon. High Court are to be found on pp.94 & 95 of the Report. The same are reproduced as follows:

"So far as the assessee is concerned, the Division Bench of this Court in the case of **CIT v. H. Fink (ITR No. 294 of 1982 decided on July 11, 1985**) considered the question, i.e. of retention remuneration, living allowances and rent-free accommodation as salary or perquisite. Considering the provisions of the Act and on the facts of the case the court held that the retention remuneration was not salary earned in India within the meaning of section 9(1)(ii) and similarly living allowance cannot be said to be personal advantage and, therefore, would not constitute perquisite, which can be subjected to tax. The court further held that the perquisite which can be taxed under section 17(2) of the Act which may be in the nature of rent-free accommodation can be only those perquisites which are provided by the employer to his employee and in as much as the assessee was found to be an employee of Linde, A.G., West Germany, and the employee was deputed to India with Gujarat

Narmada Valley Fertilizer Co. Ltd., Broach, which provided the rent-free accommodation to him, it cannot be said that it would constitute a perquisite within the meaning of section 17(2) of the Act. Thus, the court answered the question in favour of the assessee and against the Revenue. Accordingly, in this case also the answer must be in favour of the assessee and against the Revenue and answered accordingly, i.e. in favour of assessee and against the Revenue. No order as to costs."

From the aforesaid observations, it is clear that the retention remuneration was held as not a salary earned in India within the meaning of S. 9(1)(ii) and similarly, living allowance and rent-free accommodation were also held as not liable to tax.

(vi) **CIT Vs. L.A. Rosemann, 245 ITR p.716 (Bom.)**

The Assessee was an employee of a foreign company deputed to work in India under Technical Assistance Agreement with an Indian company. Boarding and lodging expenses were reimbursed to the assessee by the Indian company. His period of stay in India was from April to June, 1987, and from October, 1987 to March, 1988 and the AY involved was 1988-89.

It was held in this case that there was nothing to indicate that the place of duty or employment of the assessee was in India. In the circumstances, the provisions of S .2(24) were not attracted. Moreover, the daily allowance was relatable to the extra expenditure, the assessee was required to incur on food, etc., which was necessary for the performance of duties and such reimbursements stood excluded from the purview of the Act.

(vii) **CIT Vs. Marco Brandolin, 249 ITR p.43 (Mad.)**

In this case, the assessee, a foreign technician, was an employee of an Italian company, with which the Indian company entered into an Agreement. No payments were made by the Indian company to the assessee. The Indian company deducted tax at source from all the payments made to the Italian company, under the terms of the Agreement, under the provisions of S.195 of the Act. The ITO construed the remittances to Italy as indicating the payment of tax-free salary to the assessee. On that basis, the ITO grossed-up the salary and demanded tax from the assessee. The relevant part of the judgement to be found on pp.44 and 45 of the Report, is reproduced as follows:

"On the facts as found by the Tribunal, it is amply clear that the assessee was not an employee of the Indian company, and he had not been paid any salary by the Indian company. He was a technician, who had been sent by his Italian employer pursuant to an agreement between that employer and the Indian company with regard to the expansion of the pulp plant of the Indian company. The Indian company under the terms of that agreement was only required to pay the Italian company the amounts specified in the Agreement. The payment of the technician's salary was to be made by the Italian company in Italy. The Indian company was required to, and did comply with S.195 of the Income-tax Act by deducting the tax at source on all the amounts paid by it to the Italian company. These facts did not in the least warrant the view taken by the Income-tax Officer that the Indian company had paid a tax-free salary by having remitted the tax-free salary to the technician sent by the Italian

company. The view taken by the Income-tax Officer was perverse, and was rightly reversed in appeal by the Commissioner, and that reversal again rightly upheld by the Tribunal."

4. Judgements of the ITAT

There are a number of judgements on the issue rendered by the various Benches of the ITAT. Some of these important and relevant judgments are examined / discussed, as follows:

(i) **Hobi Guido Vs. ITO, 33 TTJ p.239 (Ahd.-T)**

In this case, under an agreement between an Indian company 'G' and a foreign company 'I', the foreign company along with all its obligations to supply know-how to 'G' for the production of certain goods, had also undertaken to send technical personnel of various grades to India, for which 'G' was to pay at certain fixed rates. The assessee-technicians contended that S.9(1)(i) or 9(1)(ii) was not applicable to them, as there was no employer – employee relationship between 'G' and the foreign personnel and therefore, 'retention remuneration' received by the assessees from 'I' in the foreign country, was not taxable in India.

Under the aforesaid facts and circumstances, it was held that Explanation to S. 9(1)(ii) was fully applicable to this case. The issue under consideration has two limbs, one is that it must be payment in the nature of salary and secondly that it must be for services rendered in India. Both these conditions were satisfied. The technicians have rendered their services in India and the payments have been made for their services to them. It was not necessary that there should be master and servant relationship between the Indian company and the technicians.

It may be noted here that as per the agreement, remuneration to the technicians are payable by the Indian company and no other payment in the form of technical service fees was payable to the foreign company.

(ii) **Flores Gunther Vs. ITO, 22 ITD p.504 (Hyd.-T)**

In this case, the AYs involved were 1979-80 and 1980-81. A number of technicians were deputed by the foreign company to the Indian company. Payments were made by the Indian company to such foreign technicians in foreign currency for the absence of technicians from their ordinary place of work (foreign country). In terms of an Agreement between BHEL, the Indian company and the foreign company, foreign experts (assessees) were deputed to India to train the BHEL personnel and to provide general assistance. As per the terms and conditions of the Agreement, the assessees were paid their salary in foreign currency, daily allowance in Indian rupees and certain perquisites by way of facilities like free accommodation, transport etc.

In the light of the aforesaid facts, it was held that a reading of the agreement with the foreign company would show that the payment to it was made towards fee for imparting technical know-how. BHEL did not treat these personnel as its employees and did not deduct tax at source while making advances to them. In fact the advances made by BHEL to these technicians were to be adjusted

against the bill. There was no privity of contract between the technocrats sent by the foreign company on the one hand and the BHEL on the other. Unless there was an employer-employee relationship between the technicians on the one hand and the BHEL on the other, the assessees could not be stated to be receiving salaries. The assessees' case fell U/S 9(1)(vi) / (vii) and not U/S 9(1)(ii).

It may be noted here that, as per the agreement between the Indian company (BHEL) and the foreign company, payment was made to the foreign company towards the fees for imparting technical know-how. No payment of remuneration was required to be made by the Indian company to the foreign technicians. The remuneration to the foreign-technicians was payable by the foreign company in foreign currency abroad. It was, therefore, rightly held that the payment to the foreign company was in the nature of royalty / technical service fees and, therefore, the assessee's case was covered U/S 9(1)(vi) / (vii) and not U/S 9(1)(ii).

(iii)**Earl W. Tallent Vs. Second I.T.O., 20 ITD p.512 (Bom.-T)**

The assessee was an employee of an American company. An Indian company had entered into a technical agreement with the American company and as per the agreement, the assessee was sent to India on 1.12.1981 to work as Construction Superintendent. He remained in India from 1.12.1981 to 28.2.1983. During this period, he received salary as per the aforesaid agreement with the American company in America only. For the AY 1982-83, the assessee filed a 'Nil' return. However, the ITO brought to tax the entire salary received by him in America as well as the living expenses etc. He also added the tax payable by the Indian company as per the agreement, as part of the assessee's income.

On the basis of the aforesaid facts, it was held that the Explanation to S. 9(1)(ii) introduced with retrospective effect from 1.4.1979 uses the expression "services rendered in India". Thus, in the light of this amendment, the salary credited to the assessee in America would be taxable in India. As regards the other allowances and reimbursements, the term "salary" would embrace salaries, perquisites and any payment in lieu of salaries and therefore, the same were also taxable in India.

In this case also, it may be seen that as per the technical agreement, no technical fees are paid to the foreign company. On the other hand, the salary was payable to the assessee, as per the aforesaid agreement. Thus, one thing is clear that any payment under a Technical Collaboration / Assistance Agreement would be liable to tax in India either in the form of royalty / technical service fees U/S 9(1)(vi) / (vii) or as salary U/S 9(1)(ii) of the Act. As a corollary, if a payment is taxed U/S 9(1)(vi) / (vii), the same cannot be again taxed U/S 9(1)(ii) of the Act.

(iv) **Luigi Reghetti Vs. ITO, 32 ITD p.348 (Hyd.-T)**

In this case, the AYs involved were 1980-81 and 1981-82. Under different collaboration agreements, duly approved by the Government of India, certain foreign companies sent their technicians to render technical services to an Indian company viz. BHEL and charged fees from the latter. During the relevant previous year, the foreign technicians received from their respective foreign employers, salaries and allowances for the period they worked in India with the Indian company, while the

foreign company charged the Indian company more than what they paid to their technicians, for the services rendered by them. The number of days, during which the foreign technician worked in India varied between seven and eighteen days. The ITO, after making standard deduction, brought to tax the payment received by the technicians, as salaries and allowance from their employer. On appeal, the assessee-employees contended before the AAC, inter alia, that the amount was paid by the Indian company to the collaborator t0owards technical fees rendered by the personnel of the collaborators, and therefore, it should not be considered as salary paid individually to any of the assessees. The AAC, however, dismissed the appeal.

On the basis of the aforesaid facts, it was held by the ITAT that the foreign technicians were sent by their employer to the industrial sites of the Indian company in India. The Indian company was under no obligation to pay their salaries. On the other hand, the Indian company had to make payment to the collaborators, as per collaboration agreements, towards fees for technical assistance rendered and, therefore, once the payment is made under the terms of a collaboration agreement, no part of such fees could be termed as having been earned towards salary, as per Explanation to S.9(1)(ii) of the Act.

Here also, it may be observed that the amount paid as per the terms of collaboration agreement, was in the form of technical assistance fees, which could be brought to tax in India U/S 9(1)(vii) of the Act and once the amount is taxed U/S 9(1)(vii), the same could not be brought to tax again by way of salary U/S 9(1)(ii) of the Act.

(v) **ITO Vs. R.T. Lawrence, 15 ITD p.490 (All.-T)**

The AYs involved in this case were 1978-79 and 1979-80. An Indian company 'I' had entered into an agreement with a foreign company 'K', under which 'K', inter-alia, was to provide in India necessary service of engineer cell and other persons required for the performance of work. In accordance with the aforesaid agreement, certain expatriate personnel (assessees) came to India and rendered services for a specific period. Under the agreement, the Indian company had to reimburse the foreign company, inter-alia, of all costs, charges and expenses including salaries of said persons. The ITO held that the assessees were in the permanent employment of the foreign company and had created a debt in its favour by rendering services in India. He, thus, held that the salaries, though payable to the assessees outside India, were liable to tax in India in view of the provision of S. 5(2)(b) read with S. 9(1)(ii) of the Act.

On the basis of the aforesaid facts, the ITAT, following the decision in the case of **CIT Vs. S.G. Pgnatale, 124 ITR p.391 (Guj.)**, held that the salary which was payable to the assessees by the foreign company outside India and for which a debt had been raised in their favour outside the country, could not be treated to have been "earned in India", so as to be deemed to accrue or arise in India as per the provisions of S.9(1)(ii). The salaries were, therefore, held as not liable to tax U/S 4 read with S. 5(2) of the Act.

(vi) **ITO Vs. Peter Rasenak, 27 TTJ p.113 (Ahd.-T)**

The AY involved in this case was 1979-80. The assessee was a foreign technician and under the terms of an agreement between the Indian company and his foreign employer, the assessee was entitled to receive daily allowance during his stay in India. His remuneration was to be payable by his foreign employer outside India. The ITO brought to tax the daily allowance. **It is important to note that the ITO did not tax the remuneration payable to the assessee abroad.**

It was held that the daily allowance was not a perquisite and therefore, it was not a salary. The Hon. ITAT followed the judgement of the Gujarat High Court in the case of **CIT Vs. S.G. Pgnatale, 124 ITR p.391 (Guj.)**, though the AY involved was 1979-80 to which the Explanation to S.9(1)(ii) applied.

5. Conclusion on the basis of the aforesaid judgements.

From the aforesaid discussion, it may be safely concluded that the amount payable under a Technical Collaboration / Assistance Agreement, is liable to tax in India, either by way of royalty U/S 9(1)(vi) or by way of technical service fees U/S 9(1)(vii) or by way of salaries U/S 9(1)(ii). But one thing is important to be noted in this context, that once the amount payable under the aforesaid agreement is taxed as royalty / technical service fees under S.9(1)(vi) / (vii), then the same cannot be brought to tax again under the head 'Salaries' U/S 9(1)(ii) of the Act.

6. The Double Taxation Avoidance Agreement with the relevant foreign country will be very relevant in this context.

India has already entered into Double Taxation Avoidance Agreements (DTAA) with most of the countries of the world and such DTAAs definitely cover the issue whether the payment made under a Technical Collaboration / Assistance Agreement is liable to tax in India or abroad. It would, therefore, be very relevant to examine the relevant Article of the DTAA entered between India and the country of the relevant company or technician.

For example, one may look into the DTAA between the Government of India and that of the USA, vide Notification: No. GSR 990(E), dated 20th December, 1990. **Article 16 – "Dependent Personal Services"** covers the taxability of salaries, wages and other similar remuneration derived by the resident of USA, in India. The aforesaid Article 16 reads as under:

"Article 16 – Dependent Personal Services

(1) Subject to the provisions of Articles 17 (Directors' Fees), 18 (Income Earned by Entertainers and Athletes), 19 (Remuneration and Pensions in Respect of Government Service), 20 (Private Pensions, Annuities, Alimony, and Child Support), 21 (Payments Received by Students and Apprentices) and 22 (Payments Received by Professors, Teachers and Research Scholars), salaries, wages, and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the

employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

(2) Notwithstanding the provisions of paragraph (1), remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if :

(a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the relevant taxable year;

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and

(c) the remuneration is not borne by a permanent establishment or a fixed base or a trade or business, which the employer has in the other State.

(3) Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a Contracting State may be taxed in that State.**"**

From Article 16 (2), remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if :

(a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the relevant taxable year;

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and

(c) the remuneration is not borne by a permanent establishment or a fixed base or a trade or business, which the employer has in the other State.

We may examine the aforesaid provisions of Article 16(2) of the DTAA with USA, in the context of the remuneration and other allowances payable to an American technician. From the aforesaid conditions, it is clear that if all the aforesaid conditions are fulfilled in the case of the American technician, then his remuneration will be taxable in USA only.

If under the Technical Collaboration / Assistance Agreement, royalty or fees are payable to the American enterprise and remuneration to the technician is payable in USA by his employer, then his remuneration would not be liable to tax in India. As far as the living allowances etc., are concerned, the same would also not be taxable, being reimbursement of expenses incurred for the performance of duties.

If on the other hand, under the Technical Collaboration / Assistance Agreement, no royalty or fees are payable to the American enterprise but remuneration is payable to the technician in USA, then also the remuneration payable to the technician, may not be liable to tax in India, if –

(i) the technician is present in India for a period or periods not exceeding in the aggregate 183 days in the relevant financial or taxable year, or

(ii) the stay of the technician in India exceeds 183 days, but on account of his arrival in India, after the month of September of the financial year or taxable year, his stay gets divided into two financial or taxable years and thus, his stay in India, in none of the two financial or taxable years, exceeds 183 days.

In view of the aforesaid reasons, it would be very relevant for any tax-planner or the tax-advisor to take into consideration, the relevant provisions of the DTAA entered into between the Indian Government and the Government of the country to which the foreign technician belongs.

The technician will, however, have a choice regarding his tax liability either under the Indian Income-Tax Act or as per the provisions of the relevant DTAA, whichever is more beneficial to him. – S.90(2).

7. Provisions of S. 90(2) are also relevant in this context.

As per S. 90(2) of the Income-Tax Act, 1961, where the Central Government has entered into an agreement with the Government of any country outside India U/S 90(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 the Act shall apply to the extent they are more beneficial to that assessee.

Thus a foreign technician has a choice either to get his income taxed under the Indian Income-Tax Act or as per the provisions of the relevant DTAA, whichever is more beneficial to him.

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