INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI H. S. SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 6461 & 6462/Del/2015
(Assessment Year: 2009-10 and 2010-11)

Lease Plan India Pvt. Ltd, Ground Floor, C4C/332, Janakpuri, New Delhi	Vs.	DCIT, Circle-4(1), New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Ajay Vohra, Sr. Adv Shri Aditya Vohra, Adv
Revenue by:	Shri Rajat Kumar Kuneel, Sr. DR
Date of Hearing	29/01/2020
Date of pronouncement	15/06/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are two appeals filed by the assessee against the order of the ld CIT(A)-5, Delhi dated 04.09.2015 for the Assessment Year 2009-10 and 2010-11 wherein disallowance made by the learned assessing officer under section 40 (a)(i) on account of non-deduction of tax at source on guarantee commission paid to lease plan Corporation NV Netherland is confirmed holding it to be payment in nature of 'Fees For Technical Services' as well as 'Interest' as per the article 11 and 12 of The Double Taxation Avoidance Agreement [DTAA] between India and Netherland.

2. The assessee has raised the following grounds of appeal for Assessment Year 2009-10:-

1. That the Commissioner of Income-tax (Appeals) erred on facts and in law in confirming the disallowance of guarantee commission of Rs. 1,19,88,958/-, on account of non-deduction of tax at source there from, invoking provisions of section 40(a)(i) of the Income-tax Act, 1961 ('the Act').

2. That the Commissioner of Income-tax (Appeals) erred on facts and in law in holding that the situs of services rendered by way of the issuance of guarantee by Lease Plan Corporation NV was in India and therefore, the same was income of the non-resident in terms of section 9 of the Act.

3. That the Commissioner of Income-tax (Appeals) erred on facts and in law in holding that guarantee commission being an income from a debt claim in the hands of Lease Plan Corporation NV is in the nature of 'interest',

covered under Article 11 of the Double Taxation Avoidance Agreement entered into between India and Netherlands.

4. That the Commissioner of Income-tax (Appeals) erred on facts and in law in alternatively holding that guarantee commission paid to Lease Plan Corporation NV represents payment made in consideration for rendering a service that is ancillary and subsidiary to the application or enjoyment of a right and therefore is in the nature of "fees for technical services" as per paragraph 5 of Article 12 of the Double Taxation Avoidance Agreement between India and Netherlands.

4.1. That on the facts and circumstances of the case, the CIT(A) erred in law in holding that guarantee commission is paid by the appellant to Lease Plan Corporation NV for providing consultancy services arid the same are taxable as "fees for technical services".

5. That the Commissioner of Income-tax (Appeals) erred on facts and in law in failing to appreciate that the aforesaid guarantee commission was not chargeable to tax in India under the Act or the Double Taxation Avoidance Agreement between India and Netherlands and therefore, the appellant was not required to deduct tax at source there from.

6. That the CIT(A) erred on facts and in law in confirming charging of interest under section 234D and withdrawing interest under section 244A of the Act.

3. Identical grounds of appeal raised for assessment year 2000 – 11 wherein disallowance is of Rs. 1,16,79,244/–.

4. Briefly, the facts show that assessee is a company engaged in the business of leasing of motor vehicles, financial services and fleet management. It filed its return of income for assessment year 2009 – 10 on 30/9/2009 at ₹ 86,71,804/–.

5. During assessment proceedings, learned AO noted that assessee has paid guarantee charges to its associated enterprise based in Netherland and in tax audit report same is disallowed for non-deduction of tax at source. The assessing officer asked for the details of such payment.

6. The assessee submitted that lease plan Corporation NV is Netherland-based company to whom reimbursement of guarantee charges of ₹ 1 1988958/– has been made. The contention of the assessee was that it is a reimbursement against actual expenses and therefore is not chargeable to tax in India and hence no tax is deductible as source.

7. The learned assessing officer held that tax is required to be deducted at source on the above payment under section 195 of The Income Tax Act [The Act]. In para number 3.2 while raising a show cause notice to the assessee the AO was of the view that the sums were paid by way of an expenses to a non-resident third parties who had rendered services to the assessee and those payments fall within the purview of section 9 (1) (vii) and therefore are taxable in India as 'fees for technical

services'. However, while disallowing ,in para number 3.11 the learned assessing officer merely referred to the fact that tax should have been deducted on the amount of reimbursement made under section 195 of the income tax act and therefore the sum is disallowable. Accordingly, he passed an assessment order under section 143 (3) of the act disallowing a sum of ₹ 1,19,88,958/– on account of guarantee charges paid to a non-resident without deduction of tax at source.

8. The above assessment order was challenged by the assessee before the learned CIT – A.

9. The assessee submitted that that appeal on similar issue has been filed before the tribunal for the assessment year 2006 – 07 to 2008 – 09 and therefore the matter may be kept pending till the outcome of those appeals. However, on merits, assessee submitted that appellant for the purpose of its business has obtained a corporate guarantee from an overseas company based in Netherland. The said corporate guarantee was pursuant to an agreement dated 21 March 2004 entered into with LEASE PLAN CORPORATION, which provided guarantee at the fee at the rate of 1/8 percentage per annum. During the year the appellant has made payment of Rs. 11988958/- towards fees for guarantee to the above company and such guarantee charges are not chargeable to tax in India and therefore tax was not deducted at source there from. Assessee submitted that it is not at all in the nature of 'fees for technical services' as it does not involve any element of technical, consultancy or advisory services.

10. The learned CIT – A dealt with the issue for assessment year 2009 – 10 and 2010 – 11 by a common order dated 4/9/2015 wherein, first in paragraph number 4.1, he noted that similar issue has been decided by his predecessor for assessment year 2006 – 07 to 2008 – 09 wherein the above payment have been held to be a 'fees for technical services". Subsequently the learned and CIT – A for the impugned year noted the facts of the case in para number 4.2 wherein he held that the above payment is 'Interest" and falls under article 11 of DTAA, as it is income from a "debt claim" of every kind as "interest" defined under clause 6 of article 11 as under :-

> "4.2 During the course of the present proceedings, the AR was requested to furnish the sample copy of the guarantee given by lease Corp NV to the banks and furnish a brief note on the demand and manner of furnishing of the guarantee under the agreement between the assessee and lease plan Corporation

NV. So far as the facts are concerned, it may be reiterated that following an agreement dated 23 March 2004 between the appellant and lease plan Corporation NV (hereinafter referred to as LP corp.), the appellant avail the services of LP corp. who had obtained formal bank status under the Dutch law for obtaining guarantee in respect of bank loans, leasing transaction and/or funding arrangements to issue of debentures or otherwise. Thus for any bank loan availed by the appellant, LP corporations is a guarantor for the appellant. The guarantee agreement signed with the LP Corporation is legally binding tripartite agreement between the banks (credit), the principal debtor (appellant) and the surety (LP Corporation) and under the said agreement, the guarantor agrees to pay any amount due on a loan instrument in the event of default by the borrower. Since as per section 128 of the Indian contract act, the liability of a surety/guarantor coexists with that of the principal debtor, the surety/guarantor is liable to pay the amount in case of default by the principal debtor. The perusal of the simple guarantee agreements filed during the present proceedings shows that the appellant was having credit facilities with the banks in India and the holding company LP Corporation agreed to stand in as surety in favour of the bank by way of a security for the proper discharge by the appellant of all obligations owed to the bank. The corporate guarantee given by the LP Corporation is maintained until the repayment of entire loan to the bank. The guarantee has to be renewed every year if the facility with the bank is renewed and it replaces the previous corporate guarantees submitted to the bank, by default. Only when all the loans are paid off, the original guarantee is returned back to LP Corporation, although the appellant has not included the details as to how the actual corporate guarantee charges are computed in the note for, it is apparent that the same comprises a certain percentage of the amount of credit facility that is extended by the bank or alternatively, it is dependent on the maximum limit that is

payable to the bank under the guarantee in case the credit defaults on the payment.

4.3 Territorial nexus for the purpose of determining the tax liability is an internationally accepted principle. An endeavor should, thus, be made to construe the taxability of a non-resident in respect of income derived by it. Having regard to the internationally accepted principle and the DTAA, no extended meaning can be given to the words “income deemed to accrue or arise in India” as expressed in section 9 of the act. Section 9 incorporates various heads of income on which taxes are to be levied by the Republic of India. Whatever is payable by a resident to non-resident by way of a fees for services, thus, would not always come within the purview of section 9 (1) (vii) of the act. It must have sufficient territorial nexus with the India so as to furnish a basis for imposition of tax. Whereas a resident would come within the purview of section 9 (1) (vii) of the act, and non-resident would not, as services of a non-resident to resident utilized in India may not have much relevant in determining whether the income of a non-resident accrues or arises in India. It must have a direct link between the services rendered in India. When such a link is established, the same may again be subjected to any relief under the provisions of DTAA. The guarantee commission has been paid to the holding company in pursuance of the agreement extended by it to various banks in India and in case of any default by the appellant as payable in India. The situs of the services that have been rendered is thus in India and is income of the non-resident as per section 9 of the income tax act. To my mind, therefore, the guarantee fee received by LP Corporation would fall under article 11 of the DTAA, as it is income from ‘debt claim of every kind’ , as mentioned in clause 6 of article 11 which defines the term ‘interest’. The appellant’s reliance on Delhi High Court in case of cargil global trading private limited and AAR decision in case of ABC international incorporation (supra) are misplaced as these are related to payment to non-resident towards bill discounting

charges. In that context it was held that the discounting charges are not in respect of any debt incurred or money borrowed but merely represented discount on sale consideration when goods are sold."

11. Further strengthening the finding of the learned AO that the guarantee commission would fall within the ambit of Fees for technical services, he held as under:-

> "4.4 Alternatively, guarantee commission paid could fall within the ambit of fees for technical services, as held by the AO as it represents payment made in consideration for rendering a service that is ancillary or subsidiary to the application or enjoyment of right. Clause 5 of article 12 of the DTAA, in my view, would cover the guarantee fee paid as it is a payment in consideration for the guarantee service which enables the appellant to enjoy unrestricted and easy access to credit in India. Moreover, the fees are payable in respect of services utilized in the business carried on in India and for the purposes of earning income in India. It is not the appellant's case that the loans have been raised outside India since the bulk of the assets owned by the appellant are in the nature of vehicles under operating lease. The appellant had availed of unsecured loans totaling to ₹ 611.94 crores as on 31/3/2009, which stands reduced to Rs 490.86 crores as on 31/3/2010. In terms of the loan repayment schedule (Schedule '7' of notes to accounts), the principal repayment during the financial year 2009 – 10 in respect of short-term loan is ₹ 132.50 crores and in respect of long-term loans, the repayment is to the tune of ₹ 144.10 crores. The interest burden on fixed loan seems to be very heavy at ₹ 68.42 crores and ₹ 59.13 crores respectively for assessment year 2009 – 10 and 2010 – 11 respectively. The entire business model of appellant is built around heavy capital investment in vehicles financed through the bank loans and in such a scenario; the role of the guarantor is of the utmost importance. Since LP Corporation which is itself a

recognized bank under Dutch law, its role as a guarantor is of immense value to the appellant company and the services provided by LP Corporation are able to enjoy hassle free loans, which are unsecured."

12. Thereafter, the learned CIT – A referred to the decision of the Honourable Karnataka High Court in case of United breweries Ltd (211 ITR 256) and the decision of the coordinate bench in 126 ITD 488 and 54 SOT 140. He also referred to the decision of the Honourable Madras High Court in case of sky cell communications limited 251 ITR 53 and held that the honourable High Court was interpreting the term 'technical services" for the use of the mobile communication services and it had no occasion to deal with the meaning of the phrase 'managerial or consultancy' services. He therefore held that the terms 'managerial or consultancy services' are not defined in The Income Tax Act and held to be understood in the context of common parlance. He relied on the decision of the AAR in 242 ITR 208 wherein it has been held that the category of consultancy services also includes advisory services whether or not expertise in technology is required to perform it. He further relied upon the decision of CIT versus Bharti cellular Ltd 319 ITR 139 wherein the honourable Delhi High Court discussed meaning of the word 'consultancy". He also referred to the decision of the Honourable Supreme Court in GVK industries Private Limited (371 ITR 453) where the word "consultation" has been defined as an act of asking the advice or opinion of someone. Therefore in the factual metrics of the case, he held that certain managerial and consultancy services have been offered by the holding company by way of executing the guarantee agreement in which it has undertaken to bind itself as a surety to and in favour of the bank for the proper discharge of subsidiary company's obligation to the bank. Under this guarantee, it has undertaken to pay all sums dues to the bank in the event of the failure on the part of appellant to pay the bank, the aggregate of all sums owed to it, including interest, cost and expenses. The nature of services referred by the LP Corporation can be said to certainly come within the ambit and sweep of the term 'consultancy services' and therefore it has rightly been held by the AO that the tax at source should have been deducted as the same amount paid as Guarantee Fees could be taxable under the head Fees For Technical Services. In the end, he held that in accordance with Section 5 (2), section 9 (1)(i) and section 90 (2), the payments to LP Corporation represent income of the non-resident which has accrued / arise in

India, on which tax needed to be deducted at source. Thus he confirmed the disallowance made by the learned assessing officer.

13. There is no difference in the facts and circumstances of the case for assessment year 2009-10 and assessment year 2010 – 11 except the amount of corporate guarantee fees.

14. Assessee being aggrieved with the order of the learned that CIT Appeal has preferred these appeals. The learned authorised representative, Shri Ajay Vora, Sr. Advocate, first took us to the page number 63 – 64 of paper book where the copy of guarantee fee agreement between the assessee and Lease plan Corporation NV is entered into. He thereafter referred to the copy of loan agreement between the assessee and Standard Chartered bank placed at page number 65 – 71 of the paper book. He also referred to the copy of guarantee agreement in respect of credit facility granted by Standard Chartered bank to the assessee placed at page number 7 to 74 of his paper book. He thereafter referred to the Double Taxation Avoidance Agreement between India and Netherland. He referred to article 11 of the agreement and took us to clause 6 where the term 'interest' has been defined. He submitted that the guarantee commission paid by the assessee to Lease Plan Corporation does not fall into the definition of "interest" and therefore the article 11 does not apply. He then took us to the article 12 of the DTAA and stated that by giving a corporate guarantee to the assessee, there is no 'technical' or 'consultancy' services are rendered. He even otherwise referred to clause 5 (b) of article 12 of DTAA to submit that even to satisfy the conditions of chargeability of fees for technical services such services should have been 'made available' to the assessee. He therefore submitted that the above payment does not fall into either the definition of 'interest' or 'fees for technical services'. He submitted that this income of a non-resident entity is not chargeable to tax in India and therefore no tax deduction at source obligation can arise on the assessee. He referred to the decision of the honourable Supreme Court in case of GE India technology (P) Ltd versus CIT 327 ITR 456. He further referred to the decision of the Honourable Supreme Court in case of CIT versus Kotak securities Ltd reported in 383 ITR 1 to show us that what is the scope of fees for technical services. He further relied upon the several decisions relating to the fees for technical services to show that when such services are not 'made available' to the assessee appellant, they cannot be held to be a fees for technical services chargeable to tax in India in terms of article 12 of the DTAA. He further referred to the decision of the coordinate bench in case of Idea Cellular Ltd

Versus Additional Director Of Income Tax (International Taxation) 172 TTJ 540 and Capagemini SA versus Asst Commissioner of Income Tax (International Taxation) in ITA number 7198/2012 dated 28th of March 2016, the decision of Neo-Sports Broadcast Private Limited Versus Commissioner Of Income Tax (TDS) Mumbai 159 ITD 136 & circular number 202 dated 5/7/1976 to submit that guarantee commission is neither an interest and nor a fees for technical services. He further referred to the international jurisprudence on the issue of the guarantee charges where it has been held that they are not in the nature of interest. For this proposition he relied on the decision of the Container Corporation Versus Commissioner of Internal Revenue 134 United States Tax Court Reports (122). He also referred to the decision of the coordinate bench reported in 88 taxman.com 127 in Johnson Mathey public limited company versus Deputy Commissioner Of Income Tax (International Taxation) New Delhi dated 6 December 2017 to submit that while interpreting the DTAA between India and United Kingdom, the coordinate bench has held that where assessee provided guarantee to various banks to extend credit facilities to its Indian subsidiaries, guarantee fees charged by it would not fall within the expression of 'interest' and in view of clause 3 of article 23 of the India UK tax treaty, in absence of any specific provision dealing with corporate/bank guarantee recharge, same had to be taxed in the India as 'income from other sources". However, he submitted that in the present case same is also not chargeable under the head income from other sources, as there is no article of " Other income " in India Netherland DTAA and also the guarantor is a engaged in banking business in Netherlands, as well as not chargeable as interest. He relied upon this decision only for the proposition that guarantee fees; commission paid by the assessee is not Interest.

15. With respect to the fate of the order of the learned Commissioner of income tax (Appeals) for AY 2006-07 to 2008-09, which were followed by the learned CIT – A while deciding these impugned appeals, he submitted that,

    a. For assessment year 2006 – 07 assessee paid guarantee fee of ₹ 5 365057/– which was disallowed by the learned assessing officer for non-deduction of tax at source and confirmed by the learned and CIT – A. On appeal before the coordinate bench as per order dated 21/4/2017 the matter is been remanded back to the file of the learned and CIT – A with a direction to examine the additional evidences filed by the appellant and re-adjudicate the issue of taxability of guarantee fee. Those documents were guarantee agreements entered into by the appellant and holding company and loan

agreement entered into by the appellant with Standard Chartered bank. He submitted that this issue is still pending before the learned CIT – A.

b. Four assessment year 2007 – 08 the assessee paid a guarantee fee of ₹ 1 0120369/– which was similarly disallowed by the learned assessing officer and matter reached to the coordinate bench. As per the common order dated 21/4/2017 the coordinate bench remanded the issue to the file of the AO with a direction to examine the additional evidence filed by the appellant and readjudicate the issue of taxability of guarantee fee. He submitted that assessing officer as per order dated 31/10/2018 or gain disallowed the guarantee fee on account of non-deduction of tax at source holding the same to be in the nature of interest and fees for technical services. The assessee has filed the appeal before the learned CIT – A on 23/1/2019 and the same is also pending before him.

c. Four assessment year 2008 – 09 the assessee has paid the guarantee fee of ₹ 1 0129277/– and on the identical circumstances with a common order dated 21/4/2017 the coordinate bench remanded back to the file of the learned assessing officer with the similar direction. On the basis of those directions the AO has framed the assessment order on 31/10/2018 disallowing once again as reasons given by him for assessment year 2007 – 08. The assessee has filed the appeal before the learned CIT – A on 23/1/2019 and which is pending before the learned CIT – A for disposal.

16. He submitted copies of the assessment order as well as the copy of the order of the coordinate bench for all those earlier years along with form number 35 filed by the assessee before the learned CIT – A for the above mentioned years.

17. The learned departmental representative vehemently supported the orders of the lower authorities and submitted that the guarantee fees paid by the assessee to its associated concern based in Netherlands is chargeable to tax as per the Indian income tax act and as per the Double Taxation Avoidance Agreement as interest income and fees for technical services. He reiterated the same arguments which were given by the lower authorities. He therefore submitted that there is no infirmity in the order of the lower authorities in making the about disallowance. He also submitted that as the identical issues are pending before the learned CIT – A, any decision by the coordinate bench now, will also effectively decide the issue before the learned CIT – A for the earlier years. Therefore the matter should go back to CIT (A) for these years also.

18. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly in this case the assessee has obtained a corporate guarantee from its Netherland based associated enterprise for a fee. There is no dispute between the parties that the above sum is chargeable to tax as per the domestic law. It is not also in dispute that the recipient of the income is entitled to invoke the provisions of Double Taxation Avoidance Agreement. Now the issue is whether the corporate guarantee fee paid by the assessee to the non-resident entity is chargeable to tax as Fees for Technical Services under Article 12 of the Double Taxation Avoidance Agreement or under article 11 of the Double Taxation Avoidance Agreement, if at all it is chargeable to tax in India. Apparently, if the above sum is not chargeable to tax in India as per the provisions of Double Taxation Avoidance Agreement, assessee is not obliged to deduct tax at source under section 195 of the income tax act and therefore there cannot be any disallowance under section 40 (a) (i) of the income tax act. On the appreciation of the facts available before us, it is apparent that identical issue arose in the case of the assessee for assessment year 2006 – 07 to 2008 – 09 wherein the coordinate bench has set aside the whole issue back to the file of the learned CIT – A for assessment year 2006 – 07 and for assessment year 2007 – 08 and 2008 – 09, by the same order to the file of the learned Assessing Officer, for considering the additional evidence submitted by the assessee. Based on that for assessment year 2007 – 08 and 2008 – 09, the learned assessing officer has once again held that assessee should have deducted tax at source under section 195 of the income tax act as the sum paid by the assessee to the non-resident entity is in the nature of interest and fees for technical services. The appeal of the assessee for both these years i.e. assessment year 2007 – 08 and 2008 – 09 are pending before the learned CIT – A. For assessment year 2006 – 07, the coordinate bench set aside the same issue back to the file of the learned CIT – A with a direction to consider the additional evidence submitted before him. Thus for assessment year 2006 – 07 to 2008 – 09, the issue is pending before the learned CIT – A. Therefore, in the fitness of the things and in the interest of justice, it would not be appropriate for us to decide this issue here for the impugned assessment years before the decision is taken by the learned CIT – A in the earlier years, if the facts and circumstances of the case are similar. We are also conscious of the fact that for all these earlier years, the coordinate bench has set aside the issue to the file of the learned assessing officer as well as to the learned CIT – A for the purpose of consideration of additional evidences in the form

of corporate guarantee agreement, loan agreement et cetera. In the impugned appeals these documents were available before the CIT – A and he has considered the same. Thus we are sure that facts of these two years are similar but circumstances are not. Reason being that in these two years CIT (A) has considered all these documents and decided the issue. Further, on perusal of the reframed assessment orders passed by the learned assessing officer for assessment year 2007 – 08 and 2008 – 09, though they are not in appeal before us at present, it is on similar lines as decided by the CIT appeal in these impugned appeals before us. Thus we do not have option to set aside the issue back to the file of the ld CIT (A), as he has already considered the documents and evidences, which were not examined in earlier years and therefore coordinate bench set it aside.

19. Thus we examine the facts whether the Guarantee Fee paid by assessee to its AE in Netherlands can be considered as 'interest' in terms of Article 11 of the DTAA. It defines interest as

> *"6.* The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage, but not carrying a right to participate in the debtor's profits, and in particular, income from the Government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article."

Broadly, all income earned from the 'provision of capital' by way of 'debt claim' constitutes interest and provision of capital in the 'non debt form', generally, constitutes 'dividend'. Therefore, to consider the income as 'interest', firstly, there should be 'debt' and there should be a 'claim' on that debt and 'form' which income should arise to qualify as 'interest'. Thus, two criteria need to be satisfied:-

(1) 'provision of capital' and

(2) It should be in the form of debt claim.

In the present case apparently, AE has not provided any capital to the appellant on which income is earned. It is a corporate guarantee , being a surety to the lender bank of the appellant that, if in a case, in future, the appellant fails to pay the due amount owed to those lenders, the Netherland Company will pay to those lenders. Thus, there was promise to reimburse the amount to those lenders on happening of an event i.e. failure of payments by the appellant of the dues owed to the lenders and lenders invoking the guarantee issued by the Netherlands company in favour of

those lenders. Therefore it needs to examine whether there is any provision of capital by the Netherland Company to Indian Company appellant, answer is in negative. Further, there should be a “debt claim and ‘form’ such claim income should arise to qualify as ‘interest’. Thus the word ‘debt claim “predicate the existence of debtor – creditor relationship [lender – borrower]. That relationship can arise only when there is a provision of capital. In view of this, we hold that guarantee fee paid by the assessee to Netherlands company, in the above facts, cannot be covered in the definition of interest as per Article 11 of The DTAA. Hon Bombay High court in Commonwealth Development Corporation

20. Further, we have perused decision of the Container Corporation Versus Commissioner of Internal Revenue of United States Tax Court Report [134 T.C. 122 (U.S.T.C. 2010) • 134 T.C. 5 Decided Feb 17, 2010]. On careful consideration of the decision of that court, the issue before the Court was whether the guarantee fee paid towards guaranteeing debt of a subsidiary company is “interest” or a “service”. The court came to conclusion that guarantee are more analogous to services, like services, are produced by the obligee. It further held that in holding the guarantee fee as interest has too many shortcomings, as it does not approximate the interest on a loan. **It is merely a promise to possibly perform a future act and there was no obligation to pay immediately.** Thus, the court held that guarantee fee cannot be considered as an interest. However it was held to be a service. In view of this we hold that in absence of provision of capital and any debt claim between the parties the impugned guarantee fees paid by the appellant to the Netherlands based company cannot be held to be ‘interest” in terms of Article 11 of the DTAA.

21. Now we proceed to examine whether such guarantee fee can be Fees for technical services within compass of Article 12 (5) of the DTAA. The ld CIT (A) has held it to be a ‘Consultancy services’. In fact we are of the view that Provision of Guarantee is a service provided by the Netherlands Company to the assessee. US Court decision relied up on by the ld AR also says that provision of Guarantee is a ‘service”. But is it a consultancy service or not needs to be examined.

22. Article 12 (5) of the DTAA defines Fees For Technical services as under :-

> *5.* For purposes of this Article, "fees for technical services" means payments of any kind to any person in consideration for the rendering of

any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

(*a*)	are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is received; or
(*b*)	make available technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.

23. Looking to the nature of 'Service' provided by the Netherlands company in providing guarantee, it is a financial service and can by no stretch of imagination is called a 'Consultancy services. Even otherwise, it does not cross the threshold of 'make available' in 12 (5) (b) of the DTAA. Therefore we also hold that, provision of Guarantee fees service is not fees for Technical services under article 12 of The DTAA.

24. Ld AR has also said that guarantee Fees is not chargeable to tax under Article 7 in absence of any permanent establishment of the Netherlands company. We fully agree with that as the revenue has not at all invoked article 7 in this case.

25. Now the ld AR has relied up on a decision in case of [2017] 88 taxmann.com 127 (Delhi - Trib.) Johnson Matthey Public Ltd. Company v.
Deputy Commissioner of Income-tax (International Taxation), Circle 2(2)(1), New Delhi* where in the coordinate bench after holding that Guarantee fess commission paid by the assessee is not interest, nor Fees for technical services and also not business income ultimately held it to be chargeable in terms article 23 ' Other income ' as under :-

> "20. Having examined the issue of corporate/bank guarantee recharge with reference to Article 12(5) of the Indo U.K. Treaty and Section 2(28A) of the Act, we are of the considered opinion that the authorities below are perfectly justified in concluding that this payment does not fall within the expression of interest and in view of Clause 3 of Article 23 of the Treaty, in the absence of any specific provision dealing with corporate/bank guarantee recharge, the same has to be taxed in India as per the provisions of the Income tax Act, 1961. We do not find any illegality or irregularity in the reasoning given or conclusions reached by the authorities below. We, therefore, dismiss Ground Nos. 2 to 4 & 10."

26. We have carefully perused the above decision however, on reading it we did not find how the coordinate bench has dealt with the We are dealing with India Netherlands DTAA facts that whether income of Guarantee fess was “dealt with” in the forgoing articles of that convention or not. Whether the Guarantee fee income was ‘not expressly mentioned’ in earlier articles or not. It is also not coming out of the order whether circular no 787 of 2000 was cited and considered. India Netherland Treaty do not have article for ‘Other income.’ Therefore, in the impugned case the revenue authorities have also perhaps not tried to say that Guarantee Fees is “Other income”. The India-Netherlands tax treaty presently does not have an Other Income article. Thus this issue does not arise before us.

27. In view of this, we hold that assessee is not require, Orders of lower authorities are reversed and ld AO is directed to delete the disallowance for both the years.

28. Other grounds of chargeability of interest are consequential in nature and do not need to be adjudicated.

29. We also note that this order is passed beyond 90 days after the date of hearing. However respectfully following the order of coordinate bench in [2020] 116 taxmann.com 860 (Mumbai - Trib.), We proceed to pronounce this order.

In the result, both the appeals are allowed.

Order pronounced in the open court on 15/06/2020.

-Sd/-	-Sd/-
(H.S.SIDHU)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 15/06/2020
A K Keot

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2. Respondent
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