GERMANY

16. Agreement for avoidance of double taxation and prevention of fiscal evasion with Germany

Whereas the annexed Agreement between the Government of the Republic of India and the Government of the Federal Republic of Germany for the avoidance of double taxation with respect to taxes on income and capital has been concluded ;

And whereas the aforesaid Agreement was brought into force on the 26th day of October, 1996 after the completion by both the Contracting States to each other of the procedure required under their laws in accordance with article 28 of the said Agreement ;

Now, therefore, in exercise of the powers conferred by section 90 of the Income-tax Act, 1961 (43 of 1961) and section 44A of the Wealth-tax Act, 1957 (27 of 1957), the Central Government hereby directs that all the provisions of the said Agreement shall be given effect to in the Union of India.

Notification : *No. SO 836(E), dated 29-11-1996.*[*]

ANNEXURE

AGREEMENT BETWEEN THE REPUBLIC OF INDIA AND THE FEDERAL REPUBLIC OF GERMANY FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME AND CAPITAL

Whereas the Government of the Federal Republic of Germany and the Government of the Republic of India desire to conclude an Agreement for the avoidance of double taxation with respect to taxes on income and capital and for promoting their mutual economic relations ;

Now, therefore, it is hereby agreed as follows :

ARTICLE 1 - *Personal scope* - This Agreement shall apply to persons who are residents of one or both of the Contracting States.

ARTICLE 2 - *Taxes covered* - *1.* This Agreement shall apply to taxes on income and on capital imposed on behalf of a Contracting State, of a land or a political sub-division or local authority thereof, irrespective of the procedure in which they are levied.

2. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, and the pay roll tax.

3. The existing taxes to which this Agreement shall apply are in particular :

(*a*) in the Federal Republic of Germany :

the Einkommensteuer (income-tax),

the Korperschaftsteuer (corporation-tax),

the Vermogensteuer (capital tax), and

the Gewerbesteuer (trade tax)

(hereinafter referred to as "German tax");

(*b*) in the Republic of India,

the income-tax including any surcharge tax thereon (Einkommensteuer, einschl, darauf entfallender Zusatzsteuern), and the wealth-tax (Vermogensteuer)

(hereinafter referred to as "Indian tax").

4. This Agreement shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of changes of importance which have been made in their respective taxation laws.

ARTICLE 3 - *General definitions - 1.* For the purposes of this Agreement, unless the context otherwise requires,—

(*a*) the term "Federal Republic of Germany" means the area in which the tax law of the Federal Republic of Germany is in force including the area of the sea-bed, its sub-soil and the superjacent water column adjacent to the territorial sea, insofar as the Federal Republic of Germany exercises their sovereign rights and jurisdiction in conformity with international law and its national legislation ;

(*b*) the term "Republic of India" means the territory of the Republic of India and includes the territorial sea and airspace above it. For the purposes of this Agreement the term shall also cover any other maritime zone in which the Republic of India has sovereign rights, other rights and jurisdictions, according to the Indian law and in accordance with international law in particular as laid down in the UN Convention of the Law of the Sea ;

(*c*) the terms "a Contracting State" and "the other Contracting State" mean the Federal Republic of Germany or the Republic of India as the context requires ;

(*d*) the term "person" includes an individual, a company and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States ;

(*e*) the term "company" means any body corporate or any entity which is treated as a company or body corporate under the taxation laws in force in the respective Contracting States ;

(*f*) the term "immovable property" has the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property ;

(*g*) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State ;

(*h*) the term "national" means,—

(*i*) in respect of the Federal Republic of Germany any German within the meaning of Article 116, paragraph (1), of the Basic Law for the Federal Republic of Germany and any legal person, partnership and association deriving its status as such from the law in force in the Federal Republic of Germany ;

(*ii*) in respect of the Republic of India any national of the Republic of India and any legal person, partnership and association deriving its status as such from the law in force in the Republic of India ;

(*i*) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise which has its place of effective management in a Contracting State except when the ship or aircraft is operated solely between places in the other Contracting State ;

(*j*) the term "competent authority" means in the case of the Federal Republic of Germany the Federal Ministry of Finance, and in the case of the Republic of India the Central Government in the Ministry of Finance (Department of Revenue) or its authorised representative ;

(*k*) the term "fiscal year" means,—

(*i*) in relation to Indian tax, the previous year as defined in the Income-tax Act, 1961 ;

(*ii*) in relation to German tax, the calendar year ;

(*l*) the term "tax" means German tax or Indian tax as the context requires but shall not include interest or penalty imposed in relation to such taxes.

2. As regards the application of this Agreement by a Contracting State any term not defined therein shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which this Agreement applies.

ARTICLE 4 - *Resident* - *1.* For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any criterion of a similar nature. But this term does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows :

(*a*) he shall be deemed to be a resident of the State in which he has a permanent home available to him, if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests) ;

(*b*) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode ;

(*c*) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national ;

(*d*) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the State in which its place of effective management is situated.

ARTICLE 5 : *Permanent establishment* - *1.* For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially,—

(*a*) a place of management ;

(*b*) a branch ;

(*c*) an office ;

(*d*) a factory ;

(*e*) a workshop ;

(*f*) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources, including an installation or structure used for the exploration or exploitation ;

(*g*) a warehouse or sales outlet ;

(*h*) a farm, plantation or other place where agricultural, forestry, plantation or related activities are carried on ; and

(*i*) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities continue for a period exceeding six months.

3. An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if it provides services or facilities in connection with, or supplies plant and machinery on hire used for or to be used in the prospecting for or extraction or exploitation of mineral oils in that State.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include,—

(*a*) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise ;

(*b*) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery ;

(*c*) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise ;

(*d*) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise ;

(*e*) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character ;

(*f*) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (*a*) to (*e*), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 6 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if this person,—

(*a*) has and habitually exercises in that State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise ;

(*b*) has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise ; or

(*c*) habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business and in their commercial and financial relations to the enterprise no conditions are agreed or imposed which differ from those usually agreed between independent persons.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

ARTICLE 6 - *Income from immovable property* - *1.* Income derived by a resident of a Contracting State from immovable property situated in the other Contracting State may be taxed in that other State.

2. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

3. The provisions of paragraphs 1 and 2 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of independent personal services.

ARTICLE 7 - *Business profits* - *1.* The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it

might be expected to make, if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions, expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere, and according to the domestic law of the Contracting State in which the permanent establishment is situated.

4. Insofar as in a Contracting State and in exceptional cases the determination of the profits to be attributed to a permanent establishment in accordance with paragraph 2 is impossible or gives rise to unreasonable difficulties, nothing in paragraph 2 shall preclude the determination of the profits to be attributed to a permanent establishment by means of either apportioning the total profits of the enterprise to that permanent establishment or estimating on any other reasonable basis; the method of apportionment or estimation adopted shall, however, be such that the result shall be in accordance with the principles contained in this Article.

5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

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

ARTICLE 8 - *Shipping and air transport - 1.* Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

2. If the place of effective management of a shipping enterprise is aboard a ship, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship is a resident.

3. For the purposes of this Article, interest on funds connected with the operation of ships or aircraft in international traffic shall be regarded as profits derived from the operation of such ships or aircraft, and the provisions of Article 11 shall not apply in relation to such interest.

4. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

ARTICLE 9 - *Associated enterprises* - Where

(*a*) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

(*b*) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

ARTICLE 10 : *Dividends* - *1.* Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends, the tax so charged shall not exceed 10 per cent of the gross amount of the dividends.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means—

(*a*) dividends on shares including income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, and

(*b*) other income which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base, situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

ARTICLE 11 - *Interest* - *1.* Interest 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 interest may also be taxed in Contracting State in which it arises and according to the laws of that State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 per cent of the gross amount of the interest.

3. Notwithstanding the provisions of paragraphs 1 and 2—

(*a*) interest arising in the Federal Republic of Germany and paid to the Government of the Republic of India, the Reserve Bank of India, the Industrial Finance Corporation of India, the Industrial Development Bank of India, the Export-Import Bank of India, National Housing Bank and Small Industries Development Bank of India shall be exempt from German tax;

(*b*) interest arising in the Republic of India and paid to the Government of the Federal Republic of Germany, the Deutsche Bundesbank, the Kreditanstat fur Wiederaufbau or the Deutsche Investitions-und Entwicklungsgesellschaft (DEG) and interest paid in consideration of a loan guaranteed by HERMES-Deckung shall be exempt from Indian tax.

4. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from 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.

5. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

6. Interest shall be deemed to arise in a Contracting State when the payer is that State itself, a land or political sub-division, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall

remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

ARTICLE 12 - *Royalties and 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 laws of that State, but if the recipient is the beneficial owner of the royalties, or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or the fees for technical services.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.

4. The term "fees for technical services" as used in this Article means payments of any amount in consideration for the services of managerial, technical or consultancy nature, including the provision of services by technical or other personnel, but does not include payments for services mentioned in Article 15 of this Agreement.

5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

6. Royalties and fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a land or a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for technical services was incurred, and such royalties or fees for technical services are borne by such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

7. Where, by reason of special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of royalties or fees for technical services paid exceeds the amount which would have been paid in the absence of such

relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

ARTICLE 13 - *Capital gains* - *1.* Gains derived by a resident of a Contracting State from the alienation of immovable property situated in the other Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.

3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. Gains from the alienation of shares in a company which is a resident of a Contracting State may be taxed in that State.

5. Gains from the alienation of any property other than that referred to in paragraphs 1 to 4 shall be taxable only in the Contracting State of which the alienator is a resident.

ARTICLE 14 - *Independent personal services* - *1.* Income derived by an individual who is a resident of a Contracting State from the performance of professional services or other independent activities of a similar character shall be taxable only in that State except in the following circumstances when such income may also be taxed in the other Contracting State :

(*a*) if he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities, in that case, only so much of the income as is attributable to that fixed base may be taxed in that other State ; or

(*b*) if his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 120 days in the relevant fiscal year; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.

2. The term “professional services” includes independent scientific, literary, artistic, educational or teaching activities, as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants.

ARTICLE 15 - *Dependent personal services* - *1.* Subject to the provisions of Articles 16, 18, 19 and 20, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable in the other Contracting State only if the employment is exercised there.

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 fiscal year concerned,

(*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 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 may be taxed in the Contracting State of which the enterprise operating the ship or aircraft is a resident.

ARTICLE 16 - *Directors' fees* - Directors' fees and similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

ARTICLE 17 - *Artistes and sportspersons* - *1.* Notwithstanding the provisions of Articles 7, 14 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsperson in his capacity as such accrues not to the entertainer or sportsperson himself but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.

3. However, such income shall not be taxed in the State mentioned in paragraph 1 if the said activities are exercised during a visit to that State by a resident of the other Contracting State and where such visit is financed directly or indirectly by that other State, a land, a political sub-division or a local authority thereof or by an organisation which in that other State is recognised as charitable organisation.

ARTICLE 18 - *Non-Government pensions* - Subject to the provisions of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.

ARTICLE 19 - *Government service* - *1.* (*a*) Remuneration other than a pension, paid by a Contracting State, a land, a political sub-division or a local authority thereof to an individual in respect of services rendered to that State, Land, sub-division or authority shall be taxable only in that State.

(*b*) However, such remuneration shall be taxable only in the other Contracting State, if the services are rendered in that State and the individual is a resident of that State who :

(*i*) is a national of that State ; or

(*ii*) did not become a resident of that State solely for the purpose of rendering the services.

2. (*a*) Any pension paid by a Contracting State, a Land, a political sub-division or a local authority thereof to an individual in respect of services rendered to that State, Land, sub-division or authority shall be taxable only in that State.

(*b*) However, such pension shall be taxable only in the other Contracting State if the individual is a resident of and a national of that other State.

3. The provisions of Articles 15, 16 and 18 shall apply to remuneration and pensions in respect of services rendered in connection with a business carried on by a Contracting State, a Land, a political sub-division or a local authority thereof.

4. The provisions of paragraph 1 shall likewise apply in respect of remuneration paid, under a development assistance programme of a Contracting State, a Land, a political sub-division or a local authority thereof, out of funds exclusively supplied by that State, Land, political sub-division or local authority, to a specialist or volunteer seconded to the other Contracting State with the consent of that other State.

ARTICLE 20 - *Teachers, students and trainees - 1.* An individual who visits a Contracting State at the invitation of that State or of a university, college, school, museum or other cultural institution of that State or under an official programme of cultural exchange for a period not exceeding two years solely for the purpose of teaching, giving lectures or carrying out research at such institution and who is, or was immediately before that visit, a resident of the other Contracting State shall be exempt from tax in the first-mentioned State on his remuneration for such activity during the period of the first year from the date of his arrival and in the next year the exemption will be only in respect of remuneration derived by him from outside that State.

2. An individual who is present in a Contracting State solely :

(*a*) as a student at a university, college or school in that Contracting State,

(*b*) as a business apprentice (including in the case of the Federal Republic of Germany a "Volontar" or a "Praktikant"),

(*c*) as the recipient of a grant, allowance or award for the primary purpose of study or research from a religious, charitable, scientific or educational organisation, or

(*d*) as a member of a technical cooperation programme entered into by the Government of that Contracting State, and who is, or was immediately before visiting that State, a resident of the other Contracting State, shall be exempt from tax in the first-mentioned Contracting State in respect of—

(*i*) remittances from abroad for the purposes of his maintenance, education or training, and

(*ii*) remuneration from employment in that other State, in an amount not exceeding DM 7,200 (seven thousand two hundred Deutsche Mark) or its equivalent in Indian currency during any fiscal year, as the case may be provided that such employment is directly related to his studies or is undertaken for the purpose of his maintenance.

ARTICLE 21 - *Other income* - *1.* Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

3. Notwithstanding the provisions of paragraph 1, if a resident of a Contracting State derives income from sources within the other Contracting State in the form of lotteries, crossword puzzles, races including horse races, card games and other games of any sort or gambling or betting of any form or nature whatsoever, such income may be taxed in the other Contracting State.

ARTICLE 22 - *Capital* - *1.* Capital represented by immovable property, owned by a resident of a Contracting State and situated in the other Contracting State, may be taxed in that other State.

2. Capital represented by movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or by movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, may be taxed in that other State.

3. Capital represented by ships and aircraft operated in international traffic and by movable property pertaining to the operation of such ships or aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. All other elements of capital of a resident of a Contracting State shall be taxable only in that State.

ARTICLE 23 - *Relief from Double taxation* - *1.* Tax shall be determined in the case of a resident of the Federal Republic of Germany as follows :

(*a*) Unless foreign tax credit is to be allowed under sub-paragraph (*b*), there shall be exempted from German tax any item of income arising in the Republic of India and any item of capital situated within the Republic of India, which, according to this Agreement, may be taxed in the Republic of India. The Federal Republic of Germany, however, retains the right to take into account in the determination of its rate of tax the items of income and capital so exempted.

In the case of dividends exemption shall apply only to such dividends as are paid to a company (not including partnerships) being a resident of the Federal Republic of Germany by a company

being a resident of the Republic of India at least 10 per cent of the capital of which is owned directly by the German company.

There shall be exempted from taxes on capital any shareholdings the dividends of which are exempted or, if paid, would be exempted, according to the immediately foregoing sentence.

(*b*) Subject to the provisions of German tax law regarding credit for foreign tax, there shall be allowed as a credit against German tax payable in respect of the following items of income arising in the Republic of India and the items of capital situated there, the Indian tax paid under the laws of the Republic of India and in accordance with this Agreement on :

(*i*) dividends not dealt with in sub-paragraph (*a*) ;

(*ii*) interest ;

(*iii*) royalties and fees for technical services ;

(*iv*) income in the meaning of paragraph 4 of Article 13 ;

(*v*) directors' fees ;

(*vi*) income of artistes and sports persons.

(*c*) For the purpose of credit referred to in letter (*ii*) of sub-paragraph (*b*), the Indian tax shall be deemed to be 10 per cent of the gross amount of the interest, if the Indian tax is reduced to a lower rate or totally waived according to domestic law, irrespective of the amount of tax actually paid.

(*d*) The provisions of sub-paragraph (*c*) shall apply for the first 12 fiscal years for which this Agreement is effective.

(*e*) Notwithstanding the provisions of sub-paragraph (*a*) items of income dealt with in Articles 7 and 10 and gains derived from the alienation of the business property of a permanent establishment as well as the items of capital underlying such income shall be exempted from German tax only if the resident of the Federal Republic of Germany can prove that the receipts of the permanent establishment or company are derived exclusively or almost exclusively from active operations.

In the case of items of income dealt with the Article 10 and the items of capital underlying such income the exemption shall apply even if the dividends are derived from holdings in other companies being residents of the Republic of India which carry on active operations and in which the company which last made a distribution has a holding of more than 25 per cent.

Active operations are the following; producing or selling goods or merchandise, giving technical advice or rendering engineering services, or doing banking or insurance business, within the Republic of India.

If this is not proved, only the credit procedure as per sub-paragraph (*b*) shall apply.

2. Tax shall be determined in the case of a resident of the Republic of India as follows :

Where a resident of the Republic of India derives income or owns capital which, in accordance with the provisions of this Agreement, may be taxed in the Federal Republic of Germany, the Republic of India shall allow as a deduction from the tax on such income of that resident an

amount equal to the income-tax paid in the Federal Republic of Germany, whether directly or by deduction, and as a deduction from the tax on such capital of that resident an amount equal to the capital tax paid in the Federal Republic of Germany. Such deduction in either case shall not, however, exceed that part of the income-tax or capital tax (as computed before the deduction is given) which is attributable, as the case may be, to the income or the capital which may be taxed in the Federal Republic of Germany.

3. The laws in force in either of the Contracting States shall continue to govern the taxation of income and capital in the respective Contracting States except where express provision to the contrary is made in this Agreement.

ARTICLE 24 - *Non-discrimination* - *1.* Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances and under the same conditions are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

2. The taxation of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as preventing a Contracting State from charging the profits of a permanent establishment which a company of the other Contracting State has in the first-mentioned State at a rate of tax which is higher than that imposed on the profits of a similar company of the first-mentioned Contracting State, nor as being in conflict with the provisions of paragraph 3 of Article 7 of this Agreement. Further, this provision shall not be construed as obliging Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes which it grants only to its own residents.

3. Except where the provisions of Article 9, paragraph 7 of Article 11, or paragraph 7 of Article 12, apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State. Similarly, any debts of an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned State.

4. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

ARTICLE 25 - *Mutual agreement procedure* - *1.* Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance

with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of this Agreement.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with this Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.

4. The competent authorities of the Contracting States may establish by mutual agreement the mode of application of the provisions of this Agreement regarding the exemption or reduction of taxes.

5. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.

ARTICLE 26 - *Exchange of information* - *1.* The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Agreement. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation :

(*a*) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State ;

(*b*) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State ; and

(*c*) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

ARTICLE 27 - *Diplomatic and Consular Privileges* - Nothing in this Agreement shall affect the fiscal privileges of members of a diplomatic mission, a consular post or an international organisation under the general rules of international law or under the provision of special agreements.

ARTICLE 28 - *Entry into force* - *1.* The Government of the contracting States shall notify to each other that the legal requirements for the entry into force of this Agreement have been complied with.

2. This Agreement shall enter into force one month after receipt of the latter of the notifications referred to in paragraph 1 and shall have effect :

(*a*) in the Federal Republic of Germany :

(*i*) in the case of taxes withheld at source on dividends, interest, royalties and fees for technical services, in respect of amounts paid on or after the first day of January of the calendar year next following that in which this Agreement enters into force ;

(*ii*) in the case of other taxes, in respect of taxes levied for periods beginning on or after the first day of January of the calendar year next following that in which this Agreement enters into force ;

(*b*) in the Republic of India :

(*i*) in respect of income arising in any fiscal year beginning on or after the first day of April following the calendar year in which this Agreement enters into force ;

(*ii*) in respect of capital which is held on the last day of any fiscal year beginning on or after the first day of April following the calendar year in which this Agreement enters into force.

3. Upon the entry into force of this Agreement, the Agreement between the Government of the Federal Republic of Germany and the Government of India for the Avoidance of Double Taxation of Income signed on 18th March, 1959 and the Protocol amending the Agreement between the Government of the Federal Republic of Germany and the Government of India for the Avoidance of Double Taxation of Income signed on 28th June, 1984, along with the Exchange of Notes of the same date shall expire and shall cease to have effect as from the date on which the provisions of this Agreement commence to have effect.

ARTICLE 29 - *Termination* - This Agreement shall continue in effect indefinitely but either of the Contracting States may, on or before the thirtieth day of June, in any calendar year beginning after the expiration of a period of five years from the date of its entry into force, give the other Contracting State, through diplomatic channels, written notice of termination and, in such event, this Agreement shall cease to have effect :

(*a*) in the Federal Republic of Germany :

(*i*) in the case of taxes withheld at source on dividends, interest, royalties and fees for technical services, in respect of amounts paid on or after the first day of January of the calendar year next following that in which notice of termination is given ;

(*ii*) in the case of other taxes, in respect of taxes levied for periods beginning on or after the first day of January of the calendar year next following that in which notice of termination is given,

(*b*) in the Republic of India :

(*i*) in respect of income arising in any fiscal year beginning on or after the first day of April following the calendar year in which the notice of termination is given ;

(*ii*) in respect of capital which is held on the last day of any fiscal year beginning on or after the first day of April following the calendar year in which the notice of termination is given.

In witness whereof the undersigned being duly authorised thereto, have signed the present Agreement.

Done at Bonn on June 19th, 1995 in two originals, each in the German, Hindi and English languages, all three texts being authentic. In case of divergent interpretation of the German and the Hindi texts, the English text shall prevail.

PROTOCOL

The Republic of India and the Federal Republic of Germany have agreed at the signing at Bonn on 19th June, 1995 of the Agreement between the two States for the avoidance of double taxation with respect to taxes on income and capital upon the following provisions which shall form an integral part of the said Agreement.

With reference to Article 7

1. (*a*) In the determination of the profits of a building site or construction, assembly or installation project there shall be attributed to that permanent establishment in the Contracting State in which the permanent establishment is situated only the profits resulting from the activities of the permanent establishment as such. If machinery or equipment is delivered from the head office or another permanent establishment of the enterprise (situated outside that Contracting State) or a third person (situated outside the Contracting State) in connection with those activities or independently therefrom there shall not be attributed to the profits of the building site or construction, assembly or installation project the value of such deliveries.

(*b*) Income derived by a resident of a Contracting State from planning, project, construction or research activities as well as income from technical services exercised in that State in connection with a permanent establishment situated in the other Contracting State, shall not be attributed to that permanent establishment.

(*c*) In respect of paragraph 1 of Article 7, profits derived from the sale of goods or merchandise of the same or similar kind as those sold, or from other business activities of the same or similar kind as those effected, through that permanent establishment, may be considered attributable to that permanent establishment if it is proved that :

(*i*) this transaction has been resorted to in order to avoid taxation in the Contracting State where the permanent establishment is situated, and

(*ii*) the permanent establishment in any way was involved in this transaction.

(*d*) It is understood that the deductions in respect of the head office expenses as referred to in paragraph 3 of Article 7 shall in no case be less than those allowable under the Indian Income-tax Act as on the date of entry into force of this Agreement.

(*e*) No deduction shall be allowed in respect of amounts paid or charged (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of :

(*i*) royalties, fees or other similar payments in return for the use of patents or other rights ;

(*ii*) commission for specific services performed or for management ; and

(*iii*) interest on moneys lent to the permanent establishment except in case of a banking institution.

With reference to Article 8

2. For the purposes of Article 8, income from the operation of ships includes income derived from the use, maintenance or rental of containers (including trailers and related equipment for the transport of containers) in connection with the transport of goods or merchandise in international traffic.

With reference to Article 10

3. For the purpose of taxation in the Federal Republic of Germany, the term dividends includes income derived by a sleeping partner ("stiller Gesellschafter") from his participation as such and distributions on certificates of an investment fund or investment trust. For the purpose of taxation in the Republic of India, any income of a similar kind will be treated alike.

With reference to Articles 10 and 11

4. Notwithstanding the provisions of these Articles, dividends and interest may be taxed in the Contracting State in which they arise, and according to the law of that State,

(*a*) if they are derived from rights or debt claims carrying a right to participate in profits (including income derived by a sleeping partner from his participation as such, from a "partiarisches Darlehen" and from "Gewinnobligationen" within the meaning of the tax law of the Federal Republic of Germany) and

(*b*) under the condition that they are deductible in the determination of profits of the debtor of such income.

With reference to Article 13

5. In view of the position confirmed on behalf of the Government of the Federal Republic of Germany that the Deutsche Investitionsund Entwicklungsgesellschalt (DEG) is wholly owned by the Government of the Federal Republic of Germany and is exempted from paying income-tax in Germany, it is agreed that the long-term capital gains arising to the DEG due to alienation of shares in Indian companies will be exempt from taxation in India.

With reference to Article 23

6. (*a*) The exemption provided for in sub-paragraph (*a*) of paragraph 1 of Article 23 is granted irrespective of whether the income or capital concerned is effectively taxed in the Republic of India or not.

(*b*) Where a company being a resident of the Federal Republic of Germany distributes incomes derived from sources within the Republic of India paragraph 1 of Article 23 shall not preclude the compensatory imposition of corporation tax on such distributions in accordance with the provisions of German tax law.

(*c*) The Federal Republic of Germany shall avoid double taxation by a tax credit as provided for in paragraph (1b) of Article 23, and not by a tax exemption under paragraph (1a) of Article 23,

(*aa*) if in the Contracting States income is placed under differing provisions of the Agreement or attributed to different persons (other than under Article 9) and this conflict cannot be settled by procedure pursuant to Article 25 and

(*i*) if as a result of such placement or attribution the relevant income would be subject to double taxation ; or

(*ii*) if as a result of such placement or attribution the relevant income would remain untaxed or be subject only to inappropriately reduced taxation in the Republic of India and would (but for the application of this paragraph) remain exempt from tax in the Federal Republic of Germany ; or

(*bb*) if the Federal Republic of Germany has, after due consultation and subject to the limitations of its internal law, notified the Republic of India through diplomatic channels of other items of income to which it intends to apply this paragraph in order to prevent the exemption of income from taxation in both Contracting States or other arrangements for the improper use of the Agreement.

In the case of a notification under sub-paragraph (*bb*), the Republic of India may, subject to notification through diplomatic channels, characterise such income under the Agreement consistently with the characterisation of that income by the Federal Republic of Germany. A notification made under this paragraph shall have effect only from the first day of the calendar year following the year in which it was transmitted and any legal prerequisites under the domestic law of the notifying State for giving it effect have been fulfilled.

With reference to Article 26

7. (*a*) It is also understood that in relation to the Agreement, the term "information" shall include documents. It is further understood that the German tax law provides for the transmission of information in terms of paragraph 3 of Article 117 of the Fiscal Code (Abgabenordnung) - upon request - and it would be possible to furnish information to the competent authority in the Republic of India under these provisions irrespective of this Article.

(*b*) If personal data is exchanged under this Article, the following additional provisions shall apply subject to the domestic laws of each Contracting State :

(*i*) The data supplying Contracting States shall be responsible for the accuracy of the data they supply. If it emerges that inaccurate data or data which should not have been

supplied have been communicated, the receiving State shall be notified of this without delay. That State shall be obliged to correct or destroy said data;

(*ii*) The Contracting States shall be obliged to keep official records of the transmission and receipt of personal data ;

(*iii*) The Contracting States shall be obliged to take effective measures to protect the personal data communicated against unauthorised access, unauthorised alteration and unauthorised disclosure ;

(*iv*) Upon application, the person concerned shall be informed of the information stored about him and of the use planned to be made of it. There shall be no obligation to give this information if on balance it appears that the public interest in withholding if outweighs the interest of the person concerned in receiving it. In all other respects, the right of the person concerned to be informed of the data stored about him shall be governed by the domestic law of the Contracting State in whose sovereign territory the application for the information is made.

Done at Bonn on 19th June, 1995 in two originals, each in the German, Hindi and English languages, all three texts being authentic. In case of divergent interpretation of the German and the Hindi text, the English text shall prevail.

JUDICIAL ANALYSIS

See the following cases dealing with old agreements :

■ Words 'subject to the provisions of paragraph (3)' in article III(1) of Double Taxation Avoidance Agreement (between Federal Republic of Germany and India) would indicate that while 'industrial or commercial income' of the foreign enterprise are not taxable in India, the rents, royalties, interests, dividends, etc., derived by the foreign enterprise from sources in India are taxable - *CIT* v.*Visakhapatnam Port Trust* [1983] 144 ITR 146 (AP).

■ Words 'any other form of indebtedness' from sources in the other territory could only mean interest arising or accruing as a separate 'source' of income -*CIT* v.*Visakhapatnam Port Trust* [1983] 144 ITR 146 (AP).

■ Mere supply of a plant by a foreign company whose assembly and erection are undertaken by purchaser under supervision of engineer deputed by supplier does not amount to foreign company having a 'permanent establishment' - *CIT* v.*Visakhapatnam Port Trust* [1983] 144 ITR 146 (AP).

■ A sub-contractor cannot be treated as an agent within meaning of article II(1)(*i*)(*dd*) of Double Taxation Avoidance Agreement between Federal Republic of Germany and India - *CIT* v.*Visakhapatnam Port Trust* [1983] 144 ITR 146 (AP).

■ Where supplier of machinery had a permanent establishment in Germany where press was manufactured and certain services were rendered in connection with setting up of that press in India, this could not be treated as personal service in any way even if agreement for rendering

service was embodied in a separate agreement; as such in view of agreement for avoidance of double taxation between Germany and India, tax was not deductible at source from amount paid to German company for such services - *Andrew Yule & Co. Ltd.* v. *CIT* [1994] 207 ITR 899 (Cal.).

■ Fees for technical services is industrial or commercial profit and, therefore, would be entitled to exemption as per article III of DTA between India and Germany - *AEG Telefunken* v. *CIT* [1998] 233 ITR 129/101 Taxman 109 (Kar.).

■ In case of a non-resident, who is a resident of Germany, income arising to him in India by way of royalties or technical charges could be taxed in India—*Dy. CIT* v. *UHDE GmbH* [1996] 54 TTJ (Bom. - Trib.) 355.

■ Expression 'laws in force' occurring in Article XVI, para 1 of Agreement for Avoidance of Double Taxation between India and Federal German Republic, must mean the laws in force at the time the construction of a term is to be done and the term is not restricted to the law in force at the time of execution of the Agreement—*ITO* v. *Leonhardt Andra UND Partner* [1987] 21 ITD 607 (Cal. - Trib.).

■ Where assessee German resident had adopted calendar year for his assessment in Germany, for purpose of assessment of his income in India also, same should be taken as previous year in view of article II(1)(*g*) of Agreement for Avoidance of Double Taxation between Germany and India and financial year could not be taken as previous year on ground that he did not maintain accounts—*M.G.K. Blum* v. *Second ITO* [1984] 7 ITD 643 (Bang. - Trib.).

■ Where assessee was not concerned with actual installation of plant but mere supervision of same, which was not same thing as installation of project, assessee could not be said to be having a permanent establishment in India within the meaning of article II(1)(*h*)(*cc*) of AADT between Germany and India—*UDHE GmbH* v. *Dy. CIT* [1997] 57 TTJ (Mum. - Trib.) 447.

■ Where under supply and service agreement with Indian company for establishing a fertiliser project, assessee, a West German company, purchased bulk material for Indian company and charged from Indian company cost *plus* 4 per cent as procurement fee, procurement fee was not assessable as royalty and fee for technical services but was to be treated as industrial and commercial profit which was not taxable in view of Double Taxation Agreement between India and West Germany—*Linde A.G.* v. *ITO* [1997] 62 ITD 330 (Mum. - Trib.).

■ There is no merit in contention that only that amount of royalty that was derived from the operation of a mine, quarry, or any other extraction of natural resources as stated in article IX of the Double Taxation Avoidance Agreement alone was to be excluded from industrial and commercial profits and there being no provision for exclusion of other kinds of royalties, any other receipt of royalty was not subject to taxation. As provided in article XVI(I), the law of respective States shall apply unless contrary is provided in the DTA. It means that if there was no provision for the treatment to be given to the royalty, other than the royalty under Article IX of the DTA, the same would be subject to Indian taxation and taxable in India under section 9(1)(*viii*) of the Act. DTA does not provide that any receipt, which does not fall in any of the

clauses, would be taxable under the Income-tax Act or would be excluded from the purview of Indian taxation—*G.U.J. Jaeger GmbH* v. *ITO* [1991] 37 ITD 64 (Bom. - Trib.).

■ The contention that the consideration pertaining to the provision of recurring know-how would also be a part of industrial and commercial profits has no force. It would be in the nature of royalty and there being a specific exclusion of royalty from the definition of "industrial and commercial profits", by Article III(3) of DTA, it would not enjoy the exemption on the ground that the assessee had no permanent establishment in India—*G.U.J. Jaeger GmbH* v. *ITO* [1991] 37 ITD 64 (Bom. - Trib.).

■ Rendering of consultancy service in India by non-resident in connection with industrial project would not amount to doing industrial or commercial activity within meaning of Double Taxation Avoidance Agreement between Federal Republic of Germany and India so as to make section 195 inapplicable to payments made by assessee to non-resident—*Gujarat Narmada Valley Fertilisers Co. Ltd.* v. *ITO* [1982] 2 ITD 515 (Ahd.).

■ Under no circumstances executive authority can make an item of income as of taxable nature with retrospective effect if the same is not provided in the protocol - *Tata Iron & Steel Co. Ltd.* v. *Dy. CIT* [1990] 100 Taxman 51 (Mag.)/62 TTJ (Mum.) 17.

■ Words 'subject to the provisions of paragraph (3)' in article III(1) of Double Taxation Avoidance Agreement (between Federal Republic of Germany and India) would indicate that while 'industrial or commercial income' of the foreign enterprise are not taxable in India, the rents, royalties, interest, dividends, etc., derived by the foreign enterprise from sources in India are taxable—*CIT* v. *Visakhapatnam Port Trust* [1983] 144 ITR 146 (AP).

■ Words 'any other form of indebtedness' from sources in the other income could only mean interest arising or accruing as a separate 'source' of income—*CIT* v. *Visakhapatnam Port Trust* [1983] 144 ITR 146 (AP).

■ Mere supply of a plant by a foreign company whose assembly and erection are undertaken by purchaser under supervision of engineer deputed by supplier does not amount to foreign company having a 'permanent establishment'—*CIT* v. *Visakhapatnam Port Trust* [1983] 144 ITR 146 (AP).

■ A sub-contractor cannot be treated as an agent within meaning of article II(I)(*i*)(*dd*) of Double Taxation Avoidance Agreement between Federation Republic of Germany and India—*CIT* v. *Visakhapatnam Port Trust* [1983] 144 ITR 146 (AP).

■ Where supplier of machinery had a permanent establishment in Germany where press was manufactured and certain services were rendered in connection with setting up of that press in India, this could not be treated as personal service in any way even if agreement for rendering service was embodied in a separate agreement; as such in view of agreement for avoidance of double taxation between Germany and India, tax was not deductible at source from amount paid to German company for such services—*Andrew Yule & Co. Ltd.* v. *CIT* [1994] 207 ITR 899 (Cal.).

■ Amendment to 1959/60 DTAA between India and Federal Republic of Germany by GSR No. 680(E), dated 26-8-1985 could not be made effective from 1-4-1984—*Tata Iron & Steel Co. Ltd.* v. *Dy. CIT* [1998] 100 Taxman 51 (Mum. - Trib.) (Tax. Mag.).

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