



IN THE INCOME TAX APPELLATE TRIBUNAL, RAJKOT BENCH, RAJKOT

BEFORE DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

AND

SHRI DINESH MOHAN SINHA, JUDICIAL MEMBER

आयकरअपीलसं./ITA No. 29/RJT/2018

निर्धारणवर्ष / Assessment Year: (2012-13)

(Hybrid Hearing)

The DCIT, circle – 3(1), Rajkot Aayakar bhavan, Room No. 114, 1 st floor, race course ring road, Rajkot	Vs.	M/s. Sonpal Exports Pvt. Ltd. Dhari Bagsara Road, Nr. Ice Factory, Amreli PAN No.: AAJCS0177N
(Assessee)		(Respondent)

Assessee by : Shri Kalpesh Doshi, Ld. AR

Respondent by : Shri Praveen Verma, Ld. CIT(DR)

Date of Hearing : 24/06/2025

Date of Pronouncement : 21/08/2025

आदेश / ORDER

Per, Dr. Arjun Lal Saini, AM;

By way of this appeal, the Revenue, has challenged correctness of the order dated 16.11.2017, passed by the learned CIT(A), in the matter of assessment under section 143(3) of the Income Tax Act 1961, for the assessment year 2012-13. Grievances raised by the Revenue, which are interconnected and will be taken up together, are as follows:

“1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 13,96,33,023/- holding that provision of section 195 will not be applicable.

2. On the facts of the case and in law, the Ld. C.I.T. (A) erred in ignoring the facts that the assessee has failed to prove the genuineness of foreign commission expenses before the A.O.

3. It is, therefore, prayed that the order of the C.I.T. (A) may be set aside and that of the A.O. be restored to the above extent.



4. Any other grounds that the Revenue may raise before the Hon'ble ITAT during the hearing proceedings."

2. Additional grounds of appeal raised by the Revenue are as follows:

"(i) The Learned CIT(A) has erred both on facts and in law by admitting the additional evidence submitted by the assessee, which was not part of the assessment record.

(ii) The Learned CIT(A) erred in accepting the additional evidences without calling for a remand report from the assessing officer to examine the additional evidences/grounds, thereby violating the provisions of Rule 46A of the Income Tax Rules, 1962.

(ii) The Learned CIT(A) has erred in ignoring the provisions of Rule 46A of the Income Tax Rules, 1962, which mandates that the CIT(A) shall not admit any additional evidence unless the assessing officer has been allowed a reasonable opportunity to examine the evidence or to produce any evidence in rebuttal of such additional evidence.

(iv) In view of the above, the Hon'ble Tribunal may set aside the impugned order and restore the matter to the Learned CIT(A) with directions to comply with the provisions of Rule 46A by providing the assessing officer an opportunity to examine and comment on the additional evidence submitted by the assessee."

Facts of the assessee's case

3. The relevant material facts, as culled out from the material on record, are as follows. The assessee is engaged in the business of Hulled Sesame seeds Manufacturing and Trading of Hulled and natural sesame seeds. The return of income was filed by M/s Sonpal Exports Pvt Ltd (hereinafter referred to as "assessee") for assessment year (AY) 2012-13, on 30/09/2012, declaring total income of Rs. 1,64,75,250/-. The same was processed under section 143(1) of the Income-tax Act, 1961, as the returned income of Rs. 1,64,75,250/- without any modifications. Later on, the assessee's case was selected for scrutiny through CASS and a notice u/s 143(2) of the Act, was issued to the assessee, on 07-08-2013, which was duly served upon him on 22-08-2013. A notice u/s 142(1) of the Act, was also issued to the assessee, on 07-10-2014 which was duly served upon him. In response to the said notices, Authorized Representative of the assessee, has attended on behalf of the assessee, from time to time and furnished



details and documents such as audit report, confirmation of various parties and sundry debtors and creditors, stock, sale and purchase details, ledger accounts of various expenses etc., which were placed on records. The Books of Accounts along with bills and vouchers were produced by the assessee.

4. During the assessment proceedings, the assessing officer observed that the assessee has debited foreign commission expenses of Rs. 12,13,74,525/- to its Profit & Loss Account for AY 2012-13. Hence, during the course of assessment proceedings, vide notice u/s 142(1) of the Act, dated 07.10.2014, the assessee was asked to furnish the details in respect of all the foreign commission payments and other foreign payments made by him during financial Year (FY) 2011-12. In response to this, the assessee submitted the information in respect of various foreign payments made by it and also submitted the 15CA certificates in their respect. The perusal of the 15CA certificates has shown that all the foreign payments are made for commission expenses. Hence, the entire commission expenses booked by the assessee, during financial year (FY) 2011-12, are even more than Rs. 12,13,74,525/- and are compiled as below:

Sr No	Name of the agent	Country of the agent	Nature of payments	Amount	TDS deducte
1.	Jaya Inc.	Korea	Commission	Rs.12,13,74,525	No
2.	Yuyao Shenghao Intl Co Ltd.	China	Commission	Rs. 80,21,825	No
3.	Baruffi Andrea	Switzerland	Commission	Rs. 10,35,000	No
4.	C & D Logistics Group Co Ltd	China	Commission	Rs. 5,98,740	No
5.	Climus Maxus Ltd	Hong-Kong	Commission	Rs. 6,26,182	No
6.	Hebel Huaxia Enterprise Co Ltd	China	Commission	Rs. 9,58,862	No
7.	Digital Peripherals Solutions Ltd	Hong-Kong	Commission	Rs. 49,19,000	No
8.	Zhehang Galaxy Import and Export Co Ltd	China	Commission	Rs. 8,49,745	No
9.	Kim Sun Gang	Korea	Commission	Rs. 18,894	No



10.	Lacs Co Ltd	China	Commission	Rs. 12,30,250	No
	Total		Commission	Rs. 13,96,33,023	No

5. During the assessment proceedings, the assessee was asked to furnish the copies of agreement with the foreign commission agents mentioning the commission percentage and the terms and conditions. In response to this, the assessee submitted copy of an agreement with "Jaya Inc, Korea". The assessing officer noticed that assessee has not submitted agreement copy for all the other commission agents, further since the assessee had not deducted TDS on the foreign commission payments, assessee was asked, to show cause, why the foreign commission should not be disallowed in computing its total Income.

6. In response, the assessee submitted written submissions, before the assessing officer along with documentary evidences. The assessee submitted that it is engaged in the export business and the assessee has been selling its products outside India with the help of various foreign agents. The assessee has paid commission/brokerage to the non- residents as the export has been done through them. The assessee is not required to deduct TDS u/s 195 of the Act on such remittances. In this regard, the assessee cited the provisions of section 195 of the Act, before the assessing officer and stated that as per section 195 of the I.T. Act, the liability to deduct TDS arises only where the payment made or the amount credited to a non-resident is in respect of any sum chargeable to tax in India. It was submitted that section 195 has to be read along with the charging sections 4, 5 and 9 of the I.T. Act. Therefore, section 195 should not be read to mean that the moment when any amount is credited or remittance is made to a non- resident; the obligation to deduct TDS automatically will arise. If such an Interpretation of the section is to be made, it will mean that on merely when an amount is credited to a non -resident or payment is made, the income would be said to arise or accrue in India. If the tax under section 195 is to be deducted on every credit in the books



to the account of a non -resident or to every remittance that is, made, then the department will be entitled to appropriate even the sums which are not chargeable to tax as there is no provision whereby the payer can claim refund. Therefore, in order to determine the applicability of the provisions of section 195, it is first essential to find out whether the sum credited/paid to non- residents is chargeable to tax as per the provisions of Section 9 of the Act. The provisions of Section 9 states that all income accruing or arising whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of capital asset situate in India shall be deemed to accrue or arise in India. Therefore, in the assessee's case the export commission is payable to the agents for operating in their own countries, no service has been rendered by them in India and hence no income arose in India. Moreover, the agent did not have any business connection or Permanent Establishment in India. Hence, assessee submitted before the assessing officer that the foreign commission paid by the assessee to the non-resident does not fall within the ambit of section 9 of the I.T. Act, as income deemed to accrue or arise in India and hence will not be chargeable to tax in India failing which the provisions of section 195 will not be applicable to the assessee. Further reliance was placed by the assessee on the following decisions:

- (i) GE India Technology Centre (P) Ltd. vs. CIT (SC) 327 ITR 456
- (ii) CIT vs. EON Technology (P) (Ltd) 343 ITR 366 (Delhi HC)
- (iii) DCIT VS. Divi's Laboratories Ltd. (2011)131 ITD 271 (Hyderabad)
- (iv) DCIT vs. Angelique International (2013) 55 SOT 226 (Delhi)
- (v) Adidas Sourcing Limited 150 TTJ 801 (DELHI)
- (vi) SPAHI Projects Pvt. Ltd., 183 Taxman 92 (AAR)
- (vii) Linde A.G. vs Income Tax Officer 62 ITD 330 (Mum.) 2017-17
- (ix) CEAT International S.A. 37 ITR 859 (Bombay HC)
- (x) Mainetti (India) Pvt. Ltd 12 taxmann.com 60 (Chennai)



7. However, the assessing officer rejected the above contention of the assessee and held that from the plain reading of Section 195 of the Act, it is clear that when the assessee considers that no tax is required to be deducted on any payment, he has to apply to the Assessing Officer and get an order to that effect. In the present case, the assessee has not obtained any order u/s 195(2) of the Act. Therefore, it was mandatory for the assessee to deduct tax on such payments u/s 195(1) of the Act. The assessee has failed to deduct tax at source on these payments, therefore, assessing officer, relied on the decision in the case of Poompuhar Shipping Corpn. Ltd. Vs. Income-tax Officer, International Taxation II, Chennai [2007] 109 ITD 226 (CHENNAI) wherein, it was held that:

"Whether as per mandate of section 195, it is obligatory on part of person responsible for making payment to non-resident to deduct tax at source in respect of any sum chargeable under provisions of Act and question as to whether said sum is chargeable to tax or not is to be determined by Assessing Officer; assessee cannot decide it suo motu Held, yes"

The assessing officer also relied on the decision in the case of Cheminor Drugs Ltd. Vs. Income-tax Officer [2001] 76 ITD 37 (HYD.), wherein it was held that:

"Section 195, of the Income-tax Act, 1961- Deduction of tax at source - Payment to non-residents Assessment years 1993-94 and 1994-95- Whether person making payments to a non-resident can take a unilateral decision that payments made by him are not sums chargeable to Income tax and, therefore, he could make payments without deduction of tax at source, without concurrence of Assessing Officer as provided in sub-section (2) of section 195 Held, no Whether procedure provided under sub-section (2) of section 195 is, to be mandatorily followed by person making payment to non-resident and otherwise he is liable to deduct tax at source under provisions of sub-section (1) - Held, yes - Whether liability cast upon a person to deduct tax at source under section 195 is a strict liability and liability cast under section 195(1) can be discharged other than by way of deducting tax only by taking recourse to sub-section (2) or sub-section (3) of that section Held, yes"

8. Therefore, assessing officer observed that in the assessee's case, since the assessee has not deducted tax at source, nor he has taken any approval from the assessing officer, therefore, the payments to non-resident of Rs. 13,96,33,023/-, is not eligible as an allowable expense, in computing the total income of the



assessee, for assessment year (AY) 2012-13, on account of non- deduction of TDS u/s 195 of the Act, as per Section 40(a)(i) of the Act and therefore it should be disallowed in computing the total income of the assessee for AY-2012-13. Accordingly, the entire foreign commission payments of Rs. 13,96,33,023/- was disallowed and added back to the total income of the assessee for AY 2012-13.

Findings of the learned CIT(A)

9. Aggrieved by the order of the assessing officer, the assessee, carried the matter in appeal before the Ld. CIT(A), who has allowed the appeal of the assessee. The ld. CIT(A) noticed that in the assessee's case, the assessee has made payments to agents located in foreign country and the agents had rendered services outside India. The agents are engaged in the services executed outside India and cannot be considered to carry on any business operation in India and therefore provisions of Section 9 (1) (i) will not be applicable. It is also evident that the payments made to foreign agent is sales commission and cannot be deemed, as fee for technical services and thus provisions of section 9 (1) (vii) will also be not applicable. Now, if the payments to the foreign agents are not a receipt (in agent's hand) which is liable to tax in India, then there is no question of deduction of tax at source. The ld. CIT(A) therefore, noted that foreign commissions are not liable to tax in India and therefore provision of section 195 of the Act, will not be applicable and therefore the disallowance made by assessing officer u/s 40(a) (ia) cannot be upheld. The ld. CIT(A) also noted that assessing officer has raised another issues that assessee can make payment to non-resident u/s 195 of the Act, without deduction of tax, only if, it had obtained an order u/s 195(2) from the assessing officer had further opined that no such approval from assessing officer was obtained in present case and therefore the amount payable was not eligible as an allowable deduction. The assessing officer had relied upon the decision of Poompuhar Shipping Corpn. Ltd. Vs. ITO (Int. Tax)-II, Chennai [2007] 109 ITD



226 & Cheminor Drugs Ltd. vs. ITO [2001] 76 ITD 37(Hyd.). The ld. CIT(A) observed that conclusion drawn by assessing officer is totally wrong; in the cited judgments the amount payable to the non-resident was eligible to tax and no TDS was deducted, whereas in the assessee's case, it is apparent that the amount payable was not liable to tax and therefore no TDS was deductible. In assessee's own case in earlier year in respect of same foreign agent, M/s Jaya Inc, no TDS was ruled, to be necessary. Moreover, in the assessee's case, the matter to be decided is whether TDS was required to be deducted and then to decide whether Section 40 (a)(ia) of the Act applicable. This issue is also settled by ITAT Bench Ahmedabad in the case of Deputy Commissioner of Income Tax. (International Taxation), Ahmedabad Vs Welspun Corporation Limited TA No. 249/Ahd/15 and 48/Rjt/15 Assessment year: 2010-11 as under:

"41. We are in considered agreement with the views so expressed by the coordinate bench. In view of these discussions, as also bearing in mind entirety of the case, we uphold well reasoning findings of the learned CIT(A) that the commission payments made to the non-resident agents did not have any taxability in India, even under the provisions of the domestic law i.e. Section 9. Once we come to the conclusion that the income embedded in these payments did not have any tax implications in India, no fault can be found in not deducting tax at source from these payments or, for that purpose, even not approaching the Assessing Officer for order under section 195. In our considered view, the assessee, for the detailed reasons set out above, did not have tax withholding liability from these payments. As held by Hon'ble Supreme Court in the case of GE India Technology Centre Pvt. Ltd Vs CIT ((2010) 327 ITR 456 (SC)), payer is bound to withhold tax from the foreign remittance only if the sum paid is assessable to tax in India. The assessee cannot, therefore, be faulted for not approaching the Assessing Officer under section 195 either. As regards the withdrawal of the CBDT circular holding that the commission payments to non-resident agents are not taxable in India, nothing really turns on the circular, as de hors the aforesaid circular, we have adjudicated upon the taxability of the commission agent's income in India in terms of the provisions of the Income Tax Act as also the relevant tax treaty provisions. 42. In view of these discussions, we uphold the relief"

Therefore, learned CIT(A) held that on both, factual as well as legal counts, the conclusion drawn by the assessing officer are incorrect and hence the disallowance made of Rs. 13,96,33,023/- was deleted by ld CIT(A).

10. Aggrieved by the order of the Ld. CIT(A), the revenue is in appeal before us.



Argument of learned DR for the Revenue

11. Learned DR for the revenue, vehemently argued, on merit, that these expenses are bogus and non-existence and as assessing officer noticed that No-TDS has been deducted and therefore these expenses should not be allowed on technical ground u/s. 40 (a) (ia) of the Act. The ld. DR pointed out that the major foreign commission payment is to M/s Jaya, INC, Korea of the sum of Rs. 12.31 crores. The agreement with this party is on Indian notary paper of Rs. 100 and is notarized in Amreli with Indian witnesses as well as Indian arbitrator. The amount of commission has been linked with the profitability, to be decided by the Indian Bank i.e. assessee, therefore these facts, raised serious doubts. No detail regarding identity of M/s Jaya INC, Korea and its incorporator, Mr. Manish Gupta was provided; and therefore the assessing officer thus concluded that identity of this company, its promoter and two witnesses were not established. The party, M/s. Jaya INC, Korea continued to be in services agreement with the assessee even though the assessee has stopped payment to the said company of the commission pertaining to earlier years as well as current year, therefore, the assessing officer doubted that no prudent businessman like assessee will continue to keep the Korean agent in agency when the export realization had stopped through that agent. Therefore, commissions paid to this party should be treated as bogus. The balance foreign commission has been paid to 9 other parties, however, no sufficient evidences were filed by the assessee, therefore, the findings of the assessing officer stated that the assessing officer has passed detailed order, therefore, order of the assessing officer should be upheld.

12. The Ld. DR also submitted that during the appellate proceedings, before the Ld. CIT(A), the assessee has submitted certain additional evidences, and these additional evidences were submitted, first time before the Ld. CIT(A), which were not sent back to the file of the assessing officer for remand report. Therefore,



Ld. DR for the revenue contended that the matter should be set aside to the file of the ld. CIT(A), with the direction to the ld CIT (A) to call report from assessing officer and adjudicate the issue afresh, in accordance with law.

Arguments of learned Counsel for the assessee.

13. On the other hand, the Ld. Counsel for the assessee, argued on merit that since a remittance is made to a non -resident, the obligation to deduct tax u/s195 does not arise, it arises only when such remittance is a sum chargeable under Act, that is, chargeable under sections 4, 5 and 9 of the Act. The provisions of section 195 of the Act, gets attracted only, when there is an element of 'Income' chargeable to tax in India. When the commission was paid to the non-resident on sales amounts and export contracts procured by the non-resident for the assessee. Income of the non-resident could not be said to have accrued, arisen to or received by Non- Resident in India merely because it was recorded in books of assessee. Since facts found did not make out a case of business connection of Non-resident as stipulated in section 9(1)(i), the commission income could not be said to have accrued in India and therefore assessee was not liable to deduct tax at source from payment of commission. Section 195 of the Act very clearly speaks that unless the income is liable to be taxed in India, there is no obligation to deduct tax. In order to determine whether the income can be deemed to be accrued or arisen in India, section 9 is the basis. This section does not provide scope for taxing such payment because the basic criteria provided in the section is about genesis or accruing or arising in India, by virtue of connection with the property in India, control and management vested in India, which were not satisfied in the instant case of the assessee. The ld. Counsel further stated that no tax is deductible under section 195 of the Act, on commission payments and, consequently, the expenditure on export commission payable to non-resident for services rendered



outside India, becomes allowable expenditure and the same is outside rigors of section 40(a)(ia) of the Act. The Id. Counsel, also relied on the findings of the learned CIT(A) and stated that Id. CIT(A) has passed a detailed and speaking order, considering the factual aspect and considering the various judgements, on the facts, therefore, such detailed and speaking order passed by the Id. CIT(A) may be upheld.

14. The Ld. Counsel for the assessee, also submitted that during the appellate proceedings, before learned CIT(A), the assessee has not filed any additional evidences except supporting new argument to the main evidences, which were already submitted before the assessing officer. The evidences and documents submitted before the assessing officer were enough to adjudicate the issue by Id CIT(A) and even such supporting evidence does not have any impact on the decision of Id. CIT(A), therefore, it should not be treated, as an additional evidence.

Analysis and conclusion

15. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee, along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials brought on record. We note that an important objection of the Ld. DR for the revenue is that during the appellate proceedings, the assessee has submitted additional evidences, therefore, the matter may be remitted back to the file of the assessing officer for fresh adjudication. However, we note that assessee has submitted before Id CIT(A), merely supportive additional new argument to the main evidences. The main evidence and documents were already submitted before the assessing officer by the assessee, therefore to examine the same documents and evidences, second inning should not be given to the assessing officer. The main evidences and documents which



were submitted before the assessing officer should not be treated as additional evidences. We note that the assessee has duly complied with the provision of the law and duly complied with the rules specified under the Act to file the evidences. The additional grounds of appeal filed by the department do not specify which documents filed by assessee, during appeal proceedings are considered as additional evidences. Without such details it cannot be said that Ld. CIT(A) has erred in accepting the additional evidences. We note that assessee has not submitted any additional evidences before Id. CIT(A) except clarification of main evidences. To make the new argument more explicit on the part of assessee, so that genuineness of the transaction can be proved on factual as well as legal terms, are not the new additional evidences. We note that during the course of assessment proceedings, the assessee has duly submitted various documents, as required by department from time to time. The assessing officer has called for specific documents and the assessee has duly complied with the documents called for by the assessing officer. The details and documents filed by the assessee during the course of assessment are: Audit Report, Confirmation of various parties, Sundry creditors and Debtors, Stock, Sale and Purchase Details, Ledger accounts of various expenses etc, and Agency Agreement with M/s Jaya Inc mentioning the commission percentage and terms and condition. The Id. assessing officer has duly mentioned in the assessment order about the details called for and all such details are duly submitted during the course of assessment proceedings, by the assessee. We also note that none of the evidences presented during appeal stage are additional evidence within the meaning of Rule 46A of Income Tax Rules, 1962, rather these are new arguments based on few supporting documents and these are mere clarification of the documents already submitted during the course of assessment proceedings. None of the documents presented is an independent document which requires verification on the part of



assessing officer. Based on these facts and circumstances, we dismiss the additional ground raised by the revenue.

16. Coming to the merits of the case, we note that generally, commission is paid to foreign agents (located outside India) for procuring export orders or facilitating sales. Such foreign agents usually operate outside India, and they do not have: (i) any office in India, (ii) any Permanent Establishment (PE) in India, or (iii) any business connection in India. In such cases, the commission income of the foreign agent is earned and arises outside India. Under section 5(2) and Section 9(1)(i) of the Act, such income is not deemed to accrue or arise in India. Accordingly, it is not taxable in India. For that reliance is placed on the following judgements of the Hon'ble Supreme Court.

(i) CIT v. Toshoku Ltd. (1980) 125 ITR 525 (SC): Commission earned by non-resident agents for services rendered outside India is not taxable in India.

(ii) GE India Technology Centre (P) Ltd. v. CIT (2010) 327 ITR 456 (SC): TDS under section 195 arises only if the payment is chargeable to tax in India.

About the consequence under section 40(a)(ia) of the Act, we note that section 40(a)(ia) of the Act, disallows certain expenditure (like interest, commission, brokerage, professional fees, etc.) if TDS is not deducted but this applies only where TDS is deductible. If the commission paid to a foreign agent is not chargeable to tax in India, then no TDS under section 195 of the Act, is required and therefore, disallowance under section 40(a)(ia) of the Act, also does not apply. Hence, commission paid to a foreign agent for services rendered outside India is not taxable in India, and therefore, not liable to TDS u/s 195 of the Act and no disallowance u/s 40(a)(ia) of the Act, can be made.

17. We find that learned CIT(A) has passed a detailed and speaking order, narrating the facts and narrating the case law, applicable on facts. The assessee,



filed written submission before the Id. CIT(A), along with documents and evidences (which were already submitted before the assessing officer). The Id CIT(A) considered submissions of the assessee, and finding of the assessing officer. **The Id. CIT(A) noticed that first of all, it is a fact that payment to the same foreign agent, M/s Jaya INC, Korea, was allowed in AY. 2011-12.** In that year total foreign commission of 12.94 crores was paid including that to the said foreign agent. Copy of ledger account of the foreign agent pertaining to assessment year (A.Y.) 2011-12, which was submitted during that assessment proceeding was submitted on requisition and it clearly shows that the said party had worked as commission agent for that assessment year wherein total sum paid was Rs. 12.94 Crore. The assessing officer has accepted such expense and it's genuineness was never doubted by the assessing officer in that year. Therefore, there must be some very strong cogent reason to change the view taken in respect of the said foreign agent before terming it as a bogus payment. Incorporation of M/s Jaya Inc. Korea, as a Korean entity, is on record; it is also apparent from the papers submitted that this party is recognized as authorized agent of the assessee with Korean Government Company (Korean Agro fisheries Trade Corporation); the sanitary certificate issued by plant protection organization of India to the plant protection organization of Korea is also on record certifying existence of exports by the assessee through this agent. There is no dispute regarding submission of agency agreement, ledger account, Bank remittance certificates of Korean party, certificate of registration of the Korean party by Korean Authorities, letter of credit issued by the assessee, copy of supplier certificate issued by the assessee to the Korean party, debits notes issued by the Korean party to the assessee.

18. The Id. CIT(A) similarly, noticed in respect of other commission agents, and observed that payments have been made through banking channel, outward remittance certificates are on record, debit notes raised by them on are on record, foreign exchange remittance certificates are on record, Form 15 CA/CB in respect



of such parties are on record. It is also very natural to envisage payment of foreign sales commission (paid to foreign parties) in respect of export sales to the foreign customers. The evidences submitted in respect of these foreign commission agents are real and they could not be rebutted by the assessing officer. The assessing officer has simply raised doubts in respect of certain fact like deficiencies in the agreement (in respect of inadequate safe guard of the interest of the foreign commission party and presumed high rate of commission vis- a -vis the exports and unusual/unlikely name of one of the foreign agent. Doubts and surmises cannot substitute evidences. And in present case the doubts itself are on very weak footings when we notice the fact that payment of Rs. 21.6 crores to M/s. Jaya INC Korea, has been stopped by the assessee and has been reported to the department and to the assessing officer, and doubts and surmises even if strong are no substitute to the real hard evidences. Therefore, Id. CIT(A) did not find any force in the assessing officer's action of treating the said export commission to foreign export commission, as bogus.

19. About the second issue, which is regarding applicability of section 40(a)(ia) of the Act, in respect of these commission payments, the Id. CIT(A) noted that there is no doubt that all these foreign agents are not residents and are not having business connection in India. There is also no doubt that they have rendered services to the assessee, outside India in respect of export of the assessee. It was stated by the assessee that the agent did not have any business connection or PE in India and they have been paid for their service rendered in their countries, that is, outside India and hence their income had not arisen in India and hence no sum chargeable to tax in India was payable to them and accordingly provision of Section 195 of the Act will not be applicable to payments to them. It was also argued that as per Article 7 of the DTAA between India and Korea, the business income is taxable in Korea only. Further, it was also argued that the services rendered by the agent was merely of enabling sales as per the agreement and agent



had no role beyond that and hence the services provided by them cannot be termed as managerial services. Case laws were also cited by the assessee to emphasize that the commission paid to foreign agents cannot be regarded as "Managerial", technical or consultancy. It has also been informed by the assessee that only partial addition on this count (only in respect of one foreign agent) was made in earlier year and that also only because there was no DTAA between India and relevant country, that is, Hongkong, Payment to other foreign agents including M/s Jaya INC Korean, were not disallowed u/s 40(a)(ia) of the Act, in that assessment year(AY) that is, AY 11-12. The Ld. CIT (Appeal) has deleted even that partial disallowance by assessing officer in that year with following ruling:

"I have duly considered the assessment order and written submission filed by the AR of the assessee. The fact as enumerated from the assessment order and also from the written submission is that the assessee has paid commission to foreign agent residing at Hongkong. The foreign agent has provided services for sales carried out at Hongkong and such agent is also liable to recover sales proceeds from the buyer, the services are provided outside India. In this connection the relevant provision is section 9(1)(i) of the I.T. Act. As per section 9(1)(i) of the Act, all income accruing or arising, whether directly or indirectly, through or from any business connection in India or through or any capital asset situate, in India or through the transfer of capital asset situate in India. The provision of section 9(1)(i) has been duly considered by the Hon'ble Supreme court in the case of CIT vs. TOSHOKU Ltd. 125 ITR 0525 (SC), the apex court has held that " clause (a) of the explanation to Cl.(1) of sub-s. (1) of s. 9 provides that in the case of a business of which all the operations are not carried out in India, the Income of the business deemed under that clause to accrue or arise in India shall be only such part of the Income as is reasonably attributable to the operations carried out in India. If no operations of business are carried out in the taxable territories, it follows that the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India. The apex court has further held that the non-resident assessee did not carry on any business operations in the taxable territories; they acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to the operation carried out by the assessee. In India as contemplated by cl.(a) of the Explanation to s. 9(1)(i). The commission amounts which were earned by the non-resident assessee for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India," Similarly, the Delhi High Court in the case of CIT vs. EON Technology (P) (Ltd) 343 ITR 366 (Delhi HC), has held that "when commission was paid to the non-resident on sales amounts and export contracts procured by the non-resident for the assessee. Income of the non-resident could not be said to have accrued, arisen to or received by Non- Resident in India merely because it was recorded in books of assessee in India or was paid by assessee situated in India. Since facts found did not



make out a case of business connection of Non-resident as stipulated in section 9(1)(i), commission income could not be said to have accrued in India and therefore assessee was not liable to deduct tax at source from payment of commission." The assessee further relied on the decision of the Hon'ble Hyderabad ITAT in the case of DCIT Vs. Divi's Laboratories Ltd. (2011)131 ITD 271 (Hyderabad), Hon'ble ITAT "has duly considered the Circular No. 7 dated 22-10-2009, which had withdrawn its earlier Circular Nos. 23 dated 23-7-2009, 163 dated 29-5-1975 and 786 dated 7-2-2000. The Hon'ble ITAT has held that the main thrust is whether the commission made to overseas agents, who are non-resident entities, and who render services only at such particular place, is assessable to tax. Section 195 very clearly speaks that unless the income is liable to be taxed in India, there is no obligation to deduct tax. In order to determine whether the income can be deemed to be accrued or arisen in India, section 9 is the basis. This section does not provide scope for taxing such payment because the basic criteria provided in the section is about genesis or accruing or arising in India, by virtue of connection with the property in India, control and management vested in India, which were not satisfied in the instant cases. Under these circumstances, withdrawal of earlier circulars issued by the CBDT had no assistance to the department, in any way. In disallowing such expenditure, it appeared that an overseas agent of Indian exporter operated in his own country and no part of his income arises in India and his commission is usually remitted directly to him by way of posting of cheques /demand drafts in India and, therefore, the same is not received by him or on his behalf in India and such an overseas agent is not liable to Income-tax in India on those commission payments." Therefore, respectfully following the decisions of Hon'ble Supreme Court and other high courts, I am of the considered view that the provisions of section 9(1)(i) is not applicable to the commission payment outside India in the present case and such income is not liable to tax in India. The Ld. assessing officer has also relied on the decisions of Advance Ruling in the case of SKF Boilers And Driers Pvt. Ltd., 343 ITR 0385 and Rajiv Malhotra, In re (2006) 203 CTR (AAR) 607, both these decisions are authored by Advance Ruling Authority. The decisions of AAR do not have any binding precedents and it can be applicable to the concerned party and respective department officer as held in the case of Cyril Eugene Perelra, IN RE (239 ITR 0650). So far as merit of the decisions are concerned, the Advance Ruling Authority has not considered the decisions of Supreme Court and High Court on the vary subject. It is also further brought to the notice that the various courts have also distinguished these decisions in the said of (i) Rapid Pack Eng. P. Ltd. 151 ITD 0391 (Mumbai), (ii) Trident Exports 149 ITD 0361 (Chennai), (iii) V. DENADAYALAVEL 33 CCH 0322 (Chen Trib), (iv) Modem Insulator LTD. 30 CCH 0193 (Jaipur), (v) Transformers And Electricals Kerala Ltd. 66 SOT 0110 (Cochin), (vi) CLSA Limited 160 TTJ 0001 (Mumbai). Therefore, the decisions relied upon by the assessing officer are distinguishable to the facts of the present case. Therefore, if the income is not chargeable to tax in India, as per section 195 of the Income Tax, the assessee is not required to deduct TDS. In this regards, Hon'ble Supreme Court in the case of GE India Technology Centre (P).Ltd. vs. CIT 327 ITR 456 (SC) has been held that the moment a remittance is to a non-resident, obligation to deduct tax u/s 195 does not arise, it is only when such remittance is a sum chargeable under Act, i.e., chargeable under section 4, 5 and 9. The provisions of Section 195 get wanted when the payments made are composite payments and have an content of income chargeable to tax in India and payer seeks a determination of appropriate proportion of sum chargeable. Therefore, since the income is not chargeable. Therefore, since the income is not chargeable to tax in India and therefore



the assessee is not required to deduct u/s 195 of the IT Act, and therefore there is no case of disallowance u/s 195 of the IT Act. "

20. The Id. CIT(A) observed that in assessee's case the legal issue involved, is whether sale commission/brokerage paid to a non-resident agents without deducting TDS is to be treated as in violation of Section 195 of the Act, so as to activate provisions of section 40(a)(ia) to disallow the said expense. There is no dispute in the fact that the payees are non-resident agents having no business connections in India. The assessing officer has ruled that the obligation to deduct TDS is extended to all the payment made to all persons, resident not and having place of business and businesses connection in any manner whatsoever in India or not. The assessing officer has relied on the decision of the AAR in the case of SK boilers & Dryers Pvt. Ltd AAR No. 9832984 of 2010. Thus, assessing officer has not gone into the issues of nature of the income arisen to the foreign agent and whether that income is covered by section 9 of the Act, to be taxed in India in the hands of the agent. According to the assessing officer, all payments to non-resident, are covered u/s 195 of the Act and assessing officer had ruled that the facts that services are being rendered outside India and payment is being remitted out of India are wholly irrelevant because sources of income to the non-residents agent is situated in India. This approach of assessing officer is very simplistic and it has forgotten that section 195 of the Act, is concerned with interest and any other sum chargeable under the Income Tax Act. The provisions of section 195 stipulates the liability to deduct TDS arises only when the payment is chargeable to tax in India. The assessee has made payment in respect of its foreign agents, services in respect of its foreign sales to the foreign customers, the commission has been paid to the agent for procuring export orders; the question is whether the services rendered by the agent situated outside India can be considered as services rendered in India or services utilized for the business of the assessee conducted in India. Any income of a non-resident will become chargeable to tax only if it is



received or deemed to be received, accrued or arisen or deemed to accrue or arise in India. The Section 9 (1) of the Act, can bring this income in the bracket of sum chargeable to tax in India only if the receipt fulfills the conditions as stipulated in different categories of income in that section like business income with business connection in India or fees for technical services which was utilized in India in any manner.

21. Therefore, learned CIT (A) observed that by no stretch of imagination can one say that the foreign agent had any business connection in India. Thus, there is no possibility of applying section 9 (1) (i) of the Act. So far as application of section 9 (1) (vii) of the Act, is concerned, there is no formal agreement between the foreign party and the assessee which can determine nature of the services rendered by the foreign party. Even if we assume that such services are covered u/s 9(1)(vii), the assessing officer still has to establish that these services were rendered or utilized in India in such manner that led to accrue or arise the income in the hands of the agent of the assessee in India. On the similar facts, in the case of Deputy Commissioner of Income Tax, (International Taxation), Ahmedabad Vs. Welspun Corporation Limited ITA No.249/Ahd/15 and 48/Rjt/15, Hon. ITAT, Ahmedabad had occasion to decide same issue in similar circumstances and it was held as under:

“In substance, the core issue requiring our adjudication is whether or not, on the facts and in the circumstances of the case, the learned CIT(A) was deleting the demands raised on the assessee under section 201 r.w.s 195 in respect of non- deduction of tax at source from certain payments, as detailed above, made on account of commission paid to non-resident "export commission agents". All other issues raised in the above grounds of appeal are simply the arguments in support of this core grievance.....

12 As regards taxability of the amounts so paid to these three entities, the Assessing Officer took note of the contentions of the assessee (a) that Export Commission per se is not a services, (b) that if at all they are being construed as services the same being rendered outside India the same are not taxable in India a per section 5(2) of the Act (c) That, without prejudice to the above since the agents does not have any business connection in India the same are not taxable in India in light of the section of the Act (d) That without prejudice to the above the same is not FTS in light of the section 9(1)(vi) of the Act as the same neither qualifies as Managerial, technical or consultancy



services (e) that further the same does not accrue or arise in India as the same are incurred for earning from a source outside India as per section (v) of the Act (f) That without prejudice to the above the same are even considered as FTS as per the Act the same cannot be treated as FTS in light of India-UAE DTAA and India Thailand DTAA, and (g) that in any case the remittance neither accrues nor arises in India and the same cannot be deemed to accrue or arise in India, the same cannot be taxed in India and accordingly tax was not withheld in the light of section 195 of the Act.

13. The Assessing Officer was of the view that to understand the character of income one has to look at the agreement and appreciate the nature of work done in consideration of which the income is received. He was of the view that the related agreement clearly showed that these were services agreements and the actual consideration for which these services are rendered are rendition of technical services. The responsibilities of the agents, under these agreements, showed that the agents are required to render the technical services, allow the use of information containing industrial, commercial and technical experience which was made available to the assessee, and that the consideration received for these services was nothing but fees for technical services. These payments, according to the Assessing Officer, were taxable under section 9(1)(vi) of the Income Tax Act, 1961. The assessee was, accordingly, held to be responsible for deduction at source from these payments under section 195 of the Act. The assessee's failure to do so, as held by the Assessing Officer, was to be visited with, inter alia, consequences set out in section 201 r.w.s. 195 of the Act. As regards the treaty protection sought by the assessee, the Assessing Officer observed that the assessee has not furnished tax residency certificates. In any event, according to the Assessing Officer, the India Thailand and India UAE tax treaties did not have any specific clause dealing with the fees for technical services, and, in the absence of such a provision, this income was required to be taxed as 'other income' under article 22 of the respective tax treaties, which, in turn, required it to be taxed as per domestic tax law of the jurisdiction in which the income has arisen. As regards, the India Iranian tax treaty, it was noted that it was a limited treaty which did not deal with the fees for technical services, and, accordingly, in this case also the domestic law is to apply. The Assessing Officer thus held the assessee liable to deduct tax at source from these payments @ 20%, and raised tax withholding demands under section 201 r.w.s 195, for not deducting the tax at source.....

21. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

22. So far as the first category of cases are concerned, i.e. payments to the residents of the tax jurisdictions with which Indian has tax treaties.

30. As regards the remaining cases, in category (b) and in category (c) as also in the case of JT-Iran, the provisions of the tax treaties do not come to the rescue of the recipients, and, therefore, the taxability in these cases is to be decided on the basis of the provisions in the domestic law.

31 The scheme of taxability in India, so far as the non- residents, are concerned, is like this. Section 5 (2), which deals with the taxability of income in the hands of a non-resident, provides that "the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which- (a) is received or is deemed to be received in India in such year by or on behalf of such person; or (b)



accrues or arises or is deemed to accrue or arise to him in India during such year". There is no dispute that since no part of the operations of the recipient non-residents is carried out in India, no income accrues to these non-residents in India. The case of the revenue hinges on income which is "deemed to accrue or arise in India". Coming to the deeming provisions, which are set out in Section 9, we find that the following statutory provisions are relevant in this context:

Section 9- Incomes deemed to accrue or arise in India (1) The following incomes will be deemed to accrue or arise in India:

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India,

Explanation: For the purpose of this clause [i.e. 9(1)(1)],

(a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;

(b) (c) (d).....

(vii) income by way of fees for technical services payable by-

(a).....

(b) a person who is a resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c).....

Explanation 1-...

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

**Not relevant for our purposes*

32. So far as deeming fiction under section 9(1)(i) is concerned, it cannot be invoked in the present case since no part of the operations of the recipient's business, as commission agent, was carried out in India. Even though deeming fiction under section 9(1)(i) is triggered on the facts of this case, on account of commission agent's business connection in India, it has no impact on taxability in the hands of commission agent because admittedly no business operations were carried out in India, and, therefore Explanation 1 to Section 9(1)(i) comes into play.



33. There are a couple of rulings by the Authority for Advance Ruling, which support taxability of commission paid to non-residents under section 9(1)(i), but, neither these rulings are binding precedents for us nor are we persuaded by the line of reasoning adopted in these rulings. As for the AAR ruling in the case of SKF Boilers & Driers Pvt. Ltd [(2012) 343 ITR 385 (AAR)], we find that this decision merely follows the earlier ruling in the case of Rajiv Malhotra ((2006) 284 ITR 564] which, in our considered view, does not take into account the impact of Explanation 1 to Section 9(1)(i) properly. That was a case in which the non-resident commission agent worked for procuring participation by other non-resident entities in a food and wine show in India, and the claim of the assessee was that since the agent has not carried out any business operations in India, the commission agent was not chargeable to tax in India, and, accordingly, the assessee had no obligation to deduct tax at source from such commission payments to the non-resident agent. On these facts, the Authority for Advance Ruling, inter alia, opined that "no doubt the agent renders services abroad and pursues and solicits exhibitors there in the territory allotted to him, but the right to receive the commission arises in India only when exhibitor participates in the India International Food & Wine Show (to be held in India), and makes full and final payment to the applicant in India" and that "the commission income would, therefore, be taxable under section 5(2)(b) read with section 9(1)(i) of the Act". The Authority for Advance Ruling also held that "the fact that the agent renders services abroad in the form of pursuing and soliciting participants and that the commission is remitted to him abroad are wholly irrelevant for the purpose of determining situs of his income". We do not consider this approach to be correct. When no operations of the business of commission agent is carried on in India, the Explanation 1 to Section 9(1)(i) takes the entire commission income from outside the ambit of deeming fiction under section 9(1)(i) and, in effect, outside the ambit of income 'deemed to accrue or arise in India' for the purpose of Section 5(2)(b). The point of time when commission agent's right to receive the commission fructifies is irrelevant to decide the scope of Explanation 1 to Section 9(1)(i) which is what is material in the context of the situation that we are in seisin of. The revenue's case before us hinges on the applicability of Section 9(1)(i) and, it is, therefore, important to ascertain as to what extent would the rigour of Section 9(1)(i) be relaxed by Explanation 1 to Section 9(1)(i). When we examine things from this perspective, the inevitable conclusion is that since no part of the operations of the business of the commission agent is carried out in India, no part of the income of the commission agent can be brought to tax in India. In this view of the matter, views expressed by the Hon'ble AAR, which do not fetter our independent opinion anyway in view of its limited binding force under s. 245S of the Act, do not impress us, and we decline to be guided by the same. The stand of the revenue, however, is that these rulings, being from such a high quasi-judicial forum, even if not binding, cannot simply be brushed aside either, and that these rulings at least have persuasive value. We have no quarrel with this proposition. We have, with utmost care and deepest respect, perused the above rulings rendered by the Hon'ble Authority for Advance Ruling. With greatest respect, but without slightest hesitation, we humbly come to the conclusion that we are not persuaded by these rulings.

34. Coming to Section 9(1)(vii)(b) this deeming fiction- which is foundational basis for the action of the Assessing Officer, inter alia, provides that the income by way of technical services payable by a person resident in India, except in certain situations- which are not attracted in the present case anyway, are deemed to be income accruing or arising in India. Explanation 2 to Section 9(1)(vii) defines 'fees for technical services'



as 'any consideration (including any lumpsum consideration) for the rendering of any managerial, technical or consultancy services (including the provisions of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'Salaries' (Relevant portion highlighted by underlining)]".

35. In the light of the above legal position, what we need to decide at the outset is whether the amounts paid by the assessee to the non-resident agents could be termed as "consideration for the rendering of any managerial, technical and consultancy services". As we do so, it is useful to bear in mind the fact that even going by the stand of the Assessing Officer, at best services rendered by the non-resident to the agent included technical services but it is for this reason that the amounts paid to these agents, on account of commission on exports, should be treated as fees for technical services. Even proceeding on the assumption that these non-resident agents did render the technical services, which, as we will see a little later, an incorrect assumption anyway, what is important to appreciate is that the amounts paid by the assessee to these agents constituted consideration for the orders secured by the agents and not the services alleged rendered by the agents. The event triggering crystallization of liability of the assessee, under the commission agency agreement, is the event of securing orders and not the rendition of alleged technical services. In a situation in which the agent does not render any of the services but secures the business anyway, the agent is entitled to his commission which is computed in terms of a percentage of the value of the order. In a reverse situation, in which an agent renders all the alleged technical services but does not secure any order for the principal i.e. the assessee, the agent is not entitled to any commission. Clearly, therefore, the event triggering the earnings by the agent is securing the business and not rendition of any services. In this view of the matter, in our considered view, the amounts paid by the assessee to its non-resident agents, even in the event of holding that the agents did indeed render technical services, cannot be said to be "consideration for rendering of any managerial, technical or consultancy services (Emphasis by underlining supplied by us)". The services rendered by the agents, even if these services are held to be in the nature of technical services, may be technical services, but the amounts paid by the assessee are not for the rendition of these technical services nor the quantification of these amounts have any relation with the quantum of these technical services. The key to taxability of an amount under section 9(1)(vii) is that it should constitute "consideration" for rendition of technical services. The case of the revenue fails on this short test, as in the present case the amounts paid by the assessee are "consideration" for orders secured by the assessee irrespective of how and whether or not the agents have performed the so called technical services.

36. Let us sum up our discussions on this part of the scheme of Section 9, so far as tax implications on commission agency business carried out by non-residents for Indian principals are concerned. It does not need much of a cerebral exercise to find out whether the income from the business carried on by a non-resident assessee, as a commission agent and to the extent it can be said to directly or indirectly accruing through or from any business connection in India, is required to be taxed under section 9(1)(i) or under section 9(1) (vii) of the Income Tax Act, 1961. The answer is obvious. Deeming fiction under 9(1)(i) read with proviso thereto, as we have seen in the earlier discussions, holds the key, and lays down that only to the extent that which the



operations of such a business is carried out in India, the income from such a business is taxable in India. When no operations of the business are carried on India, there is no taxability of the profits of such a business in India either. The question then arises whether in a situation in which, in the course of carrying on such business, the assessee has to necessarily render certain services, which are of such a nature as covered by Explanation 2 to Section 9(1)(vii) and even though the assessee is not paid any fees for such services per se, any part of the business profits of the assessee can be treated as 'fees for technical services' and taxed as such under section 9(1)(vii). This question does not pose much difficulty either. In the light of the discussions in the foregoing paragraph, unless there is a specific and identifiable consideration for the rendition of technical services, taxability under section 9(1)(vii) does not get triggered. Therefore, irrespective of whether any technical services are rendered during the course of carrying on such agency commission business on behalf of Indian principal, the consideration for securing business cannot be taxed under section 9(1)(vii) at all. This profits of such a business can have taxability in India only to the extent such profits relate to the business operations in India, but then, as are the admitted facts of this case, no part of operations of business were carried out in India. The commission agents employed by the assessee, therefore, did not have any tax liability in India in respect of the commission agency business so carried out.

37. On a more fundamental note, however, it is also a settled legal position by now that the services of the nature rendered by these commission agents cannot anyway be treated as fees for technical services anyway. Viewed thus, even the discussion on whether the amounts in question could be treated as 'consideration' for technical services, may be rendered academic in effect. Learned CIT(A) has very well summarized the judicial precedents in support of this line of reasoning, and, in an erudite and extended discussion, dealt with each limb of the definition of technical services.

38. As is clear from the above provisions of the agreement, the work that the agent has to done under this agreement, as is stated unambiguously in the agreement itself, is to "carry out all the duties normally rendered by an agent" including but not limited to the activities specified therein. The consideration for which the payment made to the commission agent is obtaining of the orders and not any services per se. The consideration is computed on the basis of business procured. Obviously, if there are no business generated for the principal, the agent gets nothing. Quite clearly, what is done by the agent is not a rendition of service but pure entrepreneurial activity. The work actually undertaken by the agent is the work of acting as agent and so procuring business for the assessee but as the contemporary business models require the work of agent cannot simply and only be to obtain the orders for the product, as this obtaining of orders is invariably preceded by and followed by several preparatory and follow up activities. The description of agent's obligation sets out such common ancillary activities as well but that does not override, or relegate, the core agency work. The consideration paid to the agent is also based on the business procured and the agency agreements do not provide for any independent, standalone or specific consideration for these services. The services rendered under the agreement cannot, therefore, be considered to be technical services in nature or character. The services rendered in the course of rendering agency services are essentially business services and to obtain the business. We have also noted that, so far as rendition of technical services is concerned, one of the main points in the case of the revenue, as evident from a plain reading of the



impugned order under section 201, is that "manufacturing of specialized pipe was a highly technical activity involving very complex technical exercise of technology and skilled labour and finest grade of raw material" and that "obviously, to procure the orders, the assessee company will need specialist agents who can understand the nitty gritty of the assessee's business and can demonstrate the assessee's business profile and quality of products of the assessee to the potential clients to convince them to enter into a contract with the assessee company". Just because a product is highly technical does not change the character of activity of the sale agent. Whether a salesman sells a handcrafted souvenir or a top of the line laptop, he is selling nevertheless. It will be absurd to suggest that in the former case, he is selling and the latter, he will be rendering technical services. The object of the salesman is to sell and familiarity with the technical details, whatever be the worth of those technical details, is only towards the end of selling. In a technology driven world that we live in, even simplest of day to day gadgets that we use are fairly technical and complex. Undoubtedly, when a technical product is being sold, the person selling the product should be familiar with technical specifications of the product but then this aspect of the matter does not anyway change the economic activity. Nothing, therefore, turns on the details of the products being technical. It was also noted that by the Assessing Officer that "it is a very technical exercise to obtain the contracts since it involves complex process requiring elaborate discussion, technical expertise and present of complex technical presentation, on behalf of the assessee, which can only be done by a specialist in this field so as to convince the clients about Welspun's suitability to the contract". This at best signifies complexity in the businesses and the need of technical inputs in the process of businesses, particularly when the products being dealt with are technical products, but then merely because technical inputs are needed in carrying out business activity, it does not become a technical service rather than a business activity. At the cost of repetition, we must emphasize the important distinction between a business activity, requiring understanding of related technology, and rendition of technical services simpliciter. In any case, what has been described as a technical service is the service being rendered to the buyer but the payment received by the commission agents is not for this service per se but for generating business orders for the assessee. Generating business or securing orders is an entrepreneurial activity and cannot, by any stretch of logic, be treated as a technical service per se. The same is the position with regard to assistance with respect of logistics, such as shipping and handling services, with respect to sale forecasting, with respect to gathering information on markets, business environment and on specific buyers and with respect to development of sales network. All these services are essentially integral part of, and are thus aimed at, developing business for the assessee and securing orders for the assessee from the right persons. Neither these services can be viewed on a standalone basis divorced from the economic activity of securing orders, nor any payment can be said to be for rendition of these services inasmuch as it is not the rendition of these services but securing business of the assessee which triggers the income accruing to the non-resident agents of the assessee and it is securing of business for the assessee which is the proximate cause of the income accruing to the assessee.-----

41. We are in considered agreement with the views so expressed by the coordinate bench. In view of these discussions, as also bearing in mind entirety of the case, we uphold well reasoning findings of the learned CIT(A) that the commission payments made to the non- resident agents did not have any taxability in India, even under the provisions of the domestic law i.e. Section 9. Once we come to the conclusion that the



income embedded in these payments did not have any tax implications in India, no fault can be found in not deducting tax at source from these payments or, for that purpose, even not approaching the Assessing Officer for order under section 195. In our considered view, the assessee, for the detailed reasons set out above, did not have tax withholding liability from these payments. As held by Hon'ble Supreme Court in the case of GE India Technology Centre Pvt Ltd Vs CIT [(2010) 327 ITR 456 (SC)], payer is bound to withhold tax from the foreign remittance only if the sum paid is assessable to tax in India. The assessee cannot, therefore, be faulted for not approaching the Assessing Officer under section 195 either. As regards the withdrawal of the CBDT circular holding that the commission payments to non resident agents are not taxable in India, nothing really turns on the circular, as dehors the aforesaid circular, we have adjudicated upon the taxability of the commission agent's income in India in terms of the provisions of the Income Tax Act as also the relevant tax treaty provisions.

42. In view of these discussions, we uphold the relief granted by the CIT(A) and decline to interfere in the matter."

22. Therefore, learned CIT(A) noticed that assessee's case is covered by the above detailed decision which provides full and complete guidance in the present case. It is evident in the present case that assessee has made payments to agents located in foreign country and the agents had rendered services outside India. The agents are engaged in the services executed outside India and cannot be considered to carry on any business operation in India and therefore provisions of section 9 (1) (i) of the Act, will not be applicable. It is also evident that the payments made to foreign agent is sales commission and cannot be deemed as fee for technical services and thus provisions of section 9 (1) (vii) of the Act, will also be not applicable. Now, if the payments to the foreign agent are not a receipt (in agent's hand) which is liable to tax in India, then there is no question of deduction of tax at source. Therefore the provision of section 195 of the Act will not be applicable and therefore the disallowance made by assessing officer u/s 40(A) (ia) of the Act, is bad in law, and hence cannot be upheld. The Assessing officer has also raised another issues that assessee can make payment to non-resident u/s 195 of the Act, without deduction of tax, only if it had obtained an order u/s 195(2) of the Act, from the assessing officer. The assessing officer had opined that no such approval from assessing officer was obtained in present case and therefore the amount payable was not eligible as an allowable deduction. The



assessing officer had relied upon the decision of Poompohar Shipping Corpn. Ltd. Vs. ITO (Int. Tax)-II, Chennai [2007] 109 ITD 226 & Cheminor Drugs Ltd. vs. ITO [2001] 76 ITD 37(Hyd.). In this regard, the ld. CIT(A) held that conclusion drawn by assessing officer is totally wrong; as in the cited judgments the amount payable to the non-resident was eligible to tax and no TDS was deducted whereas in the assessee's case, it is apparent that the amount payable was not liable to tax and therefore no TDS was deductible. In assessee's own case in earlier year in respect of same foreign agent, M/s Jaya Inc, no TDS was ruled to be necessary. Moreover, in assessee's case, the matter to be decided is whether TDS was required to be deducted and then to decide whether Section 40 (a)(ia) applicable. This issue is also settled by Hon'ble ITAT Bench Ahmedabad in the case of Deputy Commissioner of Income Tax. (International Taxation), Ahmedabad Vs Welspun Corporation Limited TA No. 249/Ahd/15 and 48/Rjt/15 Assessment year: 2010-11, (noted supra). We have gone through the above detailed findings of the Ld. CIT(A) and noted that there is no any infirmity in the conclusion reached by the learned CIT(A). On a careful reading of the Ld. CIT(A)'s order and the findings thereon, we do not find any valid reason to interfere with the decision and findings of the Ld. CIT(A) in holding that the assessee is not liable to deduct TDS under section 195 of the Act or under section 40(a) (ia) of the Act. Hence, we sustain the order of the Ld. CIT(A) and reject the grounds raised by the Revenue.

23. In the result, appeal filed by the revenue is dismissed.

Order pronounced in the open court on 21/08/2025.

Sd/-
(DINESH MOHAN SINHA)
JUDICIAL MEMBER

Rajkot

दिनांक/ Date: 21/08/2025

Copy of the Order forwarded to

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER



1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr. CIT
5. DR/AR, ITAT, Rajkot
6. Guard File

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Rajkot