

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH, AHMEDABAD**

[Coram: Pramod Kumar AM and S S Godara JM]

ITA No. 1391/Ahd/2015
Assessment year: 2010-11

M/s. Inox India Ltd.Appellant
*9th Floor, KP Platina,
Race Course, Baroda-390007
[PAN: AAACI 4416 P]*

Vs.

The Principal Commissioner of Income-tax-1Respondent
Vadodara

Appearances by:

Shradha Khemka *for the appellant*

VK Singh *for the respondent*

Date of concluding the hearing : 25.09.2017

Date of pronouncing the order : 25.09.2017

O R D E R

Per Pramod Kumar, AM:

1. This appeal of assessee for Assessment Year 2010-11 is directed against the order of the Principal Commissioner of Income-tax, Vadodara-1, Vadodara dated 12.03.2014, arising out of order under Section 263 of the Income-tax Act, 1961.

2. The grievances raised by the assessee, are as follows:-

"1. The learned Principal Commissioner of the Income Tax-1, Baroda ("the CIT") erred in fact and in law in revising the assessment by invoking powers u/s. 263 of the Income Tax Act, 1961 ("the Act") which was completed by way of assessment made u/s 143(3) of the Act despite the fact that the conditions stipulated for invoking such extra-ordinary jurisdiction were not satisfied.

2. The learned CIT erred in fact and in law in setting aside the assessment u/s. 143(3) and directing the AO to frame fresh assessment.

3. The learned CIT erred in fact and in law in observing that the assessment u/s. 143(3) was framed without proper enquiry and verification despite the fact that the AO had examined the issue at length and had called for various details during the course of assessment.

4. The learned CIT erred in fact and in law in rejecting the contention of the Appellant that the commission of Rs. 98,27,174/- paid to Non Residents for

rendering services outside India was not chargeable to tax in India and therefore there was no liability to withhold the tax u/s. 195 of the Act.

5. The learned CIT erred in fact and in law in holding that payment of Rs. 98,27,174/- made by the Appellant are subject to withholding tax u/s. 195 of the Act despite the fact that no tax is required to be withheld.

6. The learned CIT erred in fact and in law in observing that the commission of Rs.98,27,174/- should be disallowed u/s 40(a)(i) on the ground of non deduction of TDS u/s 195.”

3. Briefly stated, the relevant material facts are like this. The assessee before us is a manufacturer of specialized anti corrosive tanks. The return of income for the year under consideration was filed on 30.09.2010 declaring total income at Rs. 40,98,72,941/-. Subsequently, an order u/s 143(3) dated 20.11.2012 was passed after disallowing certain expenditure amounting to Rs.3,08,990/-. The assessed income, as per assessment order dated 20.11.2012, was Rs.41,01,81,930/-. Subsequently, on perusal of P&L account & Form 3CD, Pri. CIT noticed that assessee has paid commission of Rs.98,27,174/- to 11 non-residents without deducting the tax at source. Therefore, as per Pri. CIT, it was required in view of the provisions of Section 195(1) of the Act, which was applicable even during the currency of Circular No.7 dated 22.10.2009. According to him, the TDS was required to be made on commission payments to non-residents for rendering sale service out of India. Since the assessee has not deducted TDS on such payments, Pri. CIT was of the opinion that the expenditure of Rs.99,20,174/- was required to be disallowed. Accordingly, he passed an order under Section 263 of the Act, thereby set aside the order framed by the by the Assessing Officer u/s 143 (3) of the Act and directed him to examine the claim as per the provisions of the Act and make the disallowance as per the provisions of the law.

4. The assessee is aggrieved by the order so framed by the Pri. CIT and is in appeal before us.

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

6. We find that, as learned representatives fairly agree, the issue in question is covered, in favour of the assessee, by the decision of the co-ordinate bench in the case of DCIT vs. Welspun Corp Ltd [(2017) 55 ITR (Trib) 405 (Ahd)] wherein the Tribunal has observed as follows:-

“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

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 (P.) Ltd. In re [2012] 343 ITR 385/206 Taxman 19/18 taxmann.com 325 (AAR - New Delhi), we find that this decision merely follows the earlier ruling in the case of Rajiv Malhotra, In re [2006] 284 ITR 564/155 Taxman 101 (AAR - New Delhi) 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 is 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 section 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. These findings are reproduced by us earlier in this order. While, for the sake of brevity, we need to repeat each of these reasons analysed by the learned CIT(A), suffice to say that we approve his well-reasoned findings and line of reasoning, and we will also briefly touch upon this aspect of the matter. Before we do so, we may take note of some of the clauses in a typical commission agreement entered into by the assessee with its commission agents. The key provisions in this agreement, a copy of which is placed before us at pages 103 to 109 of the paper-book, are as follows:

Article 5 - AGENT'S OBLIGATION

The AGENT shall carry out all the duties normally rendered by an AGENT including but not limited to the following:

5.1 To act exclusively on behalf of the PRINCIPAL and not source, procure or market products of similar type manufactured by competitive companies without prior written consent of the PRINCIPAL.

5.2 To use its best endeavors and facilities to develop, expand and promote diligently, the sale and the market for the Products. The agent will be responsible of making the necessary market plans and establish the marketing network of representatives to help promote Welspun products .

5.3 To provide the PRINCIPAL with information such as market developments, activities of competitors, intentions and plans of clients to the maximum of his knowledge.

5.4 Endeavor to provide the PRINCIPAL prompt advance information regarding tenders. To forward to the PRINCIPAL tender documents, inquiries etc, with full technical specifications well ahead - as much as he can - of tender closing.

5.5 The AGENT on behalf of the PRINCIPAL, will purchase tender documents and forward the same to the PRINCIPAL well ahead - as much as he can - of tender closing. The cost of purchase of such tender documents shall be reimbursed by the PRINCIPAL to the AGENT.

5.6 To assist for claims and complaints (if say) that may arise from third parties and help to reach appropriate settlement in close co-ordination with the PRINCIPAL.

5.7 The AGENT will not enter into Agreements or Contractual Obligations & create any financial liabilities on behalf of the PRINCIPAL, without the PRINCIPAL'S prior written consent.

5.8 The AGENT hereby nominates Mr. Hossam Kawash as their contact point who will be totally responsible for the PRINCIPAL'S business for clarity of communication & expeditious action.

5.9 To assist the PRINCIPAL in all possible way, as and when requested by the PRINCIPAL for the fulfillment of its obligations, in case of a contract within the TERRITORY. It includes assisting the PRINCIPAL in identifying subcontractors like logistics, shippers, cargo handling agencies for smooth execution of such contracts.

5.9a To send the PRINCIPAL periodic reports on business activity.

5.9b To keep the PRINCIPAL continuously apprises of all relevant Political/Economic changes which would affect tie business,

5.9c To undertake not to divulge sales documents, catalogues, prices etc. to competitors and their agents and associates.

Article 7 – PRINCIPAL'S OBLIGATIONS

During the continuance of this Agreement the PRINCIPAL agrees :

7.1 To give the AGENT full support for promoting and creating market for the products of the PRINCIPAL in the TERRITORY.

7.2 To inform the AGENT on receipt of an inquiry from the TERRITORY requiring direct supply .

7.3 The AGENT shall be entitled to commission as agreed upon in the contract.

7.4 To take into consideration the recommendations made by the AGENT while making the offer.

7.5 To provide all informative data, catalogues and technical material (all in the English Language) regarding the PRINCIPAL'S products and activities and keep the AGENT informed about all relevant charges.

7.6 To offer competitive prices as far as possible to enable the sale of the products as the agent is only entitled for commissions and not fixed salary on his work.

7.7 The PRINCIPAL nominates Mr. Ranjit Lala as the contact person with the AGENT for all correspondences and communications.

Article 9 - TERMINATION.

9.1 This Agreement shall remain valid for a period of One year from the date of signing. The said Agreement can also be terminated by either party anytime giving notice to the other party of at least 90 days in advance by fax and followed by registered letter stating reasons for the termination. The agreement can be reinstated for a further period of two years based on mutual agreement and then after its termination another period of five years.

9.2 In the event of the termination, the AGENT will furnish all the relevant information to the PRINCIPAL and will be responsible for realization of payments outstanding till date within the TERRITORY. Also the AGENT shall return all the customers records and other data relating to the Company's business or Services which may be in his possession.

9.3 In the event of termination, if any contract is concluded after the termination date, but the exercise has commenced prior to the termination date, the agent is entitled for the applicable commissions.

SALES COMMISSION FOR THE SONATRACH GK3 PROJECT

WELSPUN will pay GLOBAL SYNERGY INTERNATIONAL LTD. in its capacity as agent for WELSPUN a sales commission, based on the FOB mill sales price for the GK 3 project equal to:

(i) 2% of the FOB Mill value in U.S. Dollars for the ordered quantity.

All sales commissions shall be paid in U.S. Dollars to the bank account to be advised by GLOBAL SYNERGY, details of which will be provided by the agent. The sales commission shall be payable by WELSPUN to GLOBAL SYNERGY INTERNATIONAL LTD. as interim payments on prorata basis after realization of the payments received by the PRINCIPAL within a reasonable time but not exceeding 30 days from receipt of payment by the PRINCIPAL.

SALES COMMISSION FOR THE SONATRACH GK3 PROJECT

By the virtue of this addendum, WELSPUN agree to pay GLOBAL SYNERGY INTERNATIONAL LTD., in its capacity as agent for WELSPUN, a sales commission, based on the FOB mill sales price for the GK 3 project equal to:

- (i) 4.10% of the FOB Mill value in U.S. Dollar for the quantity shipped is last (18") Shipment.
- (a) GLOBAL SYNERGY INTERNATIONAL LTD agrees to unconditionally to fulfill the scope set therein by the virtue of this addendum.
- (b) This commission is over the above the commission payable by Welspun to Global Synergy as specified in Annexure-1 of Agency agreement dated 29th day of June, 2008.

All sales commission shall be paid in U.S. Dollars to the bank account to be advised by GLOBAL SYNERGY, details of which are available with WELSPUN. Unless otherwise agreed, the sales commission shall be payable by WELSPUN to GLOBAL SYNERGY INTERNATIONAL LTD., as interim payments on prorata basis after realization of the payments received by the PRINCIPAL within a reasonable time but not exceeding 30 days from receipt of payment by WELSPUN.

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 donot 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. This issue is also covered, in favour of the assessee, by a coordinate bench decision in the case of Dy. CIT v. Troikaa Pharmaceuticals Ltd. [IT Appeal No. 2028/Ahd/13 and CO No 13/Ahd/14] and vice versa, wherein it has been, inter alia, observed as follows:

'5. As regards the references to Section 9(1)(vii), as made by the Assessing Officer and the learned Departmental Representative, we find that aspect of the matter is also covered, in favour of the assessee, by a large number of judicial precedents- including Hon'ble Madras High Court's judgment in the

case of CIT v. Farida Leather Co. [(2016) 66 taxmann.com 321 (Madras)], wherein Their Lordships have, inter alia, observed as follows:

5. The main contention of the learned counsel for the assessee/respondent is that the agency commission/sales commission paid by the assessee to non-resident agents, for the services rendered by them, outside India, in procuring export orders for the assessee, would not attract or partake the character of "fees for technical services" as explained in the context of 9(1)(vii) of the Act and therefore, there is no scope for the application of the provisions of Section 195 of the Act (Tax Deducted at Source). It is also contended that as the non-resident agents have neither business connection in India nor they have permanent establishment in India, they are liable to be taxed in India.

5.1 Yet another contention of the learned counsel for the assessee is that: (a) the assessee paid the amount by way of commission to foreign agents for the services rendered outside India; (b) the Tax Deduction at Source (TDS) is required to be made on all payments to non-residents, only if such payments are liable to be taxed in India. (c) following the decision of this Court, CIT v. Faizan Shoes (P.) Ltd. [2014] 367 ITR 155/226 Taxman 115/48 taxmann.com 48 (Mad.), the assessee is not liable to deduct tax at source, when the non-resident agent provides services outside India on payment of commission.

5.2 The contention of the Revenue is that such services are attracted by Explanation (2) to Section 9 (1) (vii) of the Act and therefore TDS certificate is essential.

6. Whether this contention is correct, is the issue to be decided.

7. In order to appreciate this contention, it is necessary to consider the relevant provisions of the Act:—

(i) Section 40(a)(i) of the Act :—

"Section 40 - Amounts not deductible:

Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession", —

(a) in the case of any assessee

—

- (i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,—
- (A) outside India; or
- (B) in India to a non-resident, not being a company or to a foreign company, on which tax is deductible at source under Chapter XVII B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139:

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but

paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

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

(A) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9:

(B) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9:

(ia) thirty per cent of any sum payable to a resident, on which tax is deductible at source under Chapter XVIIIB and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139.

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139 thirty per cent of, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.'

(ii) *Explanation 2 to Section 195(1) of the Act :—*

'Section 195 - Other sums: (1) Any person responsible for paying to a non-resident not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :

Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-O.

[Explanation 1] :.....

[Explanation 2.- For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall

be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

- (i) a residence or place of business or business connection in India; or
- (ii) any other presence in any manner whatsoever in India."

Explanation 4 to Section 9 (1) (i) of the Act:—

"Section 9 - Income deemed to accrue or arise in India —

(1) The following incomes shall 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, or through the transfer of a capital asset situate in India.

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Explanation 4.- For the removal of doubts, it is hereby clarified that the expression "through" shall mean and include and shall be deemed to have always meant and included "by means of", "in consequence of" or "by reason of".'

7.1 Section 40 of the Act spells out what amounts are not deductible from the income charged to tax under the profits and gains of business or profession.

7.2 Section 40(a)(i) of the Act deals with interest and other sums payable outside India. The provisions of this sub-clause made applicable to interest have been extended to payment of royalty, technical fees and any other sum chargeable under this Act. The section provides that the sums covered by the sub-clause, which are chargeable under the Act and are payable outside India, shall not be allowed as an expenditure to the assessee, unless tax is paid thereon or is deducted therefrom under Chapter XVII-B of the Act.

7.3 Section 195(1) of the Act deals with deduction of tax from payment to non-residents and foreign companies. Section 195(1) of the Act comes into play at a stage where the payer, who is enjoined to deduct the tax, either credit such income to the account of the payee or make payment thereof, whether in cash / cheque / draft or any other mode. The taxability of such amount in the hands of the payee or occasioning of the taxable event is alien for the purpose of Section 195(1) of the Act.

7.4 Section 195(2) is an enabling provision, enabling an assessee to file an application before the Assessing Officer to determine the appropriate proportion of the sum chargeable and upon such determination, the tax has to be deducted under Section 195(1) of the Act. The payment is made credited to the account of the payee.

8. The question now is, whether the assessee ought to have deducted tax at source as contemplated under Section 195 of the Act, when the assessee paid commission to foreign agent.

9. This question has been answered by the Hon 'ble Supreme Court, in the case of G.E.India Technology Centre (P.) Ltd. (supra), in which, it is very categorically held that the tax deducted at source obligations under Section 195(1) of the Act arises, only if the payment is chargeable to tax in the hands of the non-resident recipient.

9.1 Therefore, merely because a person has not deducted tax at source or a remittance abroad, it cannot be inferred that the person making the remittance, namely, the assessee, in the instant case, has committed a default in discharging his tax withholding obligations because such obligations come into existence only when the recipient has a tax liability in India.

9.2 The underlying principle is that, the tax withholding liability of the payer is inherently a vicarious liability on behalf of the recipient and therefore, when the recipient / foreign agent does not have the primary liability to be taxed in respect of income embedded in the receipt, the vicarious liability of the payer to deduct tax does not arise. This vicarious tax withholding liability cannot be invoked, unless primary tax liability of the recipient / foreign agent is established. In this case, the primary tax liability of the foreign agent is not established. Therefore, the vicarious liability on the part of the assessee to deduct the tax at source does not exist.

10. Further, just because, the payer / assessee has not obtained a specified declaration from the Revenue Authorities to the effect that the recipient is not liable to be taxed in India, in respect of the income embedded in the particular payment, the Assessing Officer cannot proceed on the basis that the payer has an obligation to deduct tax at source. He still has to demonstrate and establish that the payee has a tax liability in respect of the income embedded in the impugned payment.

11. In the instant case, it is seen, admittedly that the nonresident agents were only procuring orders abroad and following up payments with buyers. No other services are rendered other than the above. Sourcing orders abroad, for which payments have been made directly to the non-residents abroad, does not involve any technical knowledge or assistance in technical operations or other support in respect of any other technical matters. It also does not require any contribution of technical knowledge, experience, expertise, skill or technical know-how of the processes involved or consist in the development and transfer of a technical plan or design. The parties merely source the prospective buyers for effecting sales by the assessee, and is analogous to a land or a house / real estate agent / broker, who will be involved in merely identifying the right property for the prospective buyer / seller and once he completes the deal, he gets the commission. Thus, by no stretch of imagination, it cannot be said that the transaction partakes the character of "fees for technical services" as explained in the context of Section 9(1)(vii) of the Act.

12. As the non-residents were not providing any technical services to the assessee, as held above and as held by the Commissioner of Income Tax (Appeals), the commission payment made to them does not fall into the category of "fees of technical services" and therefore, explanation (2) to

Section 9(1)(vii) of the Act, as invoked by the Assessing Officer, has no application to the facts of the assessee's case.

13. In this case, the commission payments to the non-resident agents are not taxable in India, as the agents are remaining outside, services are rendered abroad and payments are also made abroad.

14. The contention of the learned counsel for the Revenue is that the Tribunal ought not to have relied upon the decision G.E.India Technology's case, cited supra, in view of insertion of Explanation 4 to Section 9(1)(i) of the Act with corresponding introduction of Explanation 2 to Section 195(1) of the Act, both by the Finance Act, 2012, with retrospective effect from 01.04.1962.

15. The issue raised in this case has been the subject matter of the decision, in the recent case, CIT v. Kikani Exports (P.) Ltd. [2014] 369 ITR 96/[2015] 232 Taxman 255/49 taxmann.com 601 (Mad.) wherein the contention of the Revenue has been rejected and assessee has been upheld and the relevant observation reads as under:—

'... the services rendered by the non-resident agent could at best be called as a service for completion of the export commitment and would not fall within the definition of "fees for technical services" and, therefore, section 9 was not applicable and, consequently, section 195 did not come into play. Therefore, the disallowance made by the Assessing Officer towards export commission paid by the assessee to the non-resident was rightly deleted.'

16. When the transaction does not attract the provisions of Section 9 of the Act, then there is no question of applying Explanation 4 to Section 9 of the Act. Therefore, the Revenue has no case and the Tax Case Appeal is liable to be dismissed.

6. Clearly, therefore, the payment of commission in the hands of the non-resident agent, as long as such an agent carries out its activities outside India, does not result in taxability in the hands of the agent in India.'

39. As we deal with this aspect of the matter, we may also take note of the following analysis, in the case of UPS SCS Asia Ltd. v. Asstt. DIT, (International Taxation) [2012] 50 SOT 268/18 taxmann.com 302 (Mum.), about the scope of managerial, consultancy and technical services which the services rendered must fulfil so as to lead to taxability as fees for technical services:

'5. A bare perusal of the above quoted provision indicates that the "fees for technical services" means any consideration for rendering of any "managerial, technical or consultancy services" but does not include the consideration for any construction, assembly etc. The learned CIT(A) has held the services rendered by the assessee as fees for technical services' coming within the sweep of "managerial, technical or consultancy services". On the contrary, the contention of the assessee has remained before the authorities below as well as us that the such services do not fall within the ambit of any of the categories taken note of by the authorities below. We will examine as to whether the services so provided by the assessee fall within

the scope of 'managerial, technical or consultancy services' as per Explanation 2 to section 9(1)(vii).

6. In order to appreciate the nature of services more elaborately, it is relevant to consider the terms of the Agreement entered into between the assessee and Menlo India executed on November 7, 2006 with effect from 1st June, 2005, a copy of which is available on page 1 onwards of the paper book. The scope of services has been given in clause 1.1. In the recital clause it has been provided that the assessee— company may require Menlo India to perform logistics services such as transport, procurement, custom clearance, sorting, delivery, warehousing and picking up services (Local services) within India (Local operating area). It has further been provided that Menlo India may also seek similar services from the assessee— company such as transport, procurement, customs clearance, sorting, delivery, warehousing and pick up services (International services) outside India. In the present appeal we are concerned with the "International services" provided by the assessee to Menlo outside India. These services comprise of transport, procurement, customs clearance, sorting, warehousing and pick up services on the cargo exported by Menlo on behalf of its customers. Having noted the nature of services provided by the assessee outside India, for which Menlo India made the payment, let us consider if these can be described as managerial or technical or consultancy services.

7. First we will consider the ambit of 'managerial services' to test whether the instant services can qualify to be so called. Ordinarily the managerial services mean managing the affairs by laying down certain policies, standards and procedures and then evaluating the actual performance in the light of the procedures so laid down. The managerial services contemplate not only execution but also the planning part of the activity to be done. If the overall planning aspect is missing and one has to follow a direction from the other for executing particular job in a particular manner, it cannot be said that the former is managing that affair. It would mean that the directions of the latter are executed simplicity without there being any planning part involved in the execution and also the evaluation of the performance. In the absence of any specific definition of the phrase "managerial services" as used in section 9(1)(vii) defining the "fees for technical services", it needs to be considered in a commercial sense. It cannot be interpreted in a narrow sense to mean simply executing the directions of the other for doing a specific task. For instance, if goods are to be loaded and some worker is instructed to place the goods on a carrier in a particular manner, the act of the worker in placing the goods in the prescribed manner, cannot be described as managing the goods. It is a simple direction given to the worker who has to execute it in the way prescribed. It is quite natural that some sort of application of mind is required in each and every aspect of the work done. As in the above example when the worker will lift the goods, he is expected to be vigilant in picking up the goods moving towards the carrier and then placing them. This act of the worker cannot be described as managing the goods because he simply followed the direction given to him. On the other hand, 'managing'

encompasses not only the simple execution of a work, but also certain other aspects, such as planning for the way in which the execution is to be done coupled with the overall responsibility in a larger sense. Thus it is manifest that the word 'managing' is wider in scope than the word 'executing'. Rather the later is embedded in the former and not vice versa.

8. Adverting to the facts of the instant case it is observed that the assessee performed freight and logistics services outside India in respect of consignments originating from India undertaken to be delivered by Menlo India. The role of the assessee in the entire transaction was to perform only the destination services outside India by unloading and loading of consignment, custom clearance and transportation to the ultimate customer. In our considered opinion, it is too much to categorize such restricted services as managerial services. We, therefore, jettison this contention raised on behalf of the Revenue.

9. Now we take up the next component of the definition of "fees for technical services", being 'consultancy services', which has been pressed into service by the learned CIT(A) to fortify his view that the amount received by the assessee is covered within section 9(1)(vii). The word "consultancy" means giving some sort of consultation de hors the performance or the execution of any work. It is only when some consideration is given for rendering some advice or opinion etc., that the same falls within the scope of "consultancy services". The word 'consultancy' excludes actual 'execution'. The nature of services, being freight and logistics services provided by the assessee to Menlo India has not been disputed by the authorities below. There is nothing like giving any consultation worth the name. Rather such payment is wholly and exclusively for the execution in the shape of transport, procurement, customs clearance, delivery, warehousing and picking up services. That being the position, we opine that the payment in lieu of freight and logistics services cannot be ranked as consultancy services.

10. The only left over component of the definition of "fees for technical services" taken note of by the Id. CIT(A) is "technical services". He observed that the assessee's business structure is time bound service coupled with continuous real time transmission of information by using and also making available its technology in the form of sophisticated equipments and software etc. The learned CIT(A) has held that : "in order to ensure efficient and timely delivery and to provide continuous real time information, the Appellant is required to use sophisticated technology for which the Indian entity is also equally involved and to whom the appellant is committed to providing the requisite software and equipment". The learned CIT(A) has also accentuated on the clause 2 of the Agreement which reads as under:—

"2. Contractor shall separately execute a Technology and Software license agreement for the provision of computer equipment and software supplied by SCS. Contractor shall separately execute a Trademark license agreement for the use of any marks or brands owned by United Parcel Service of America, Inc. The fee payable by Contractor under paragraph 3.1 will not include any royalty amount relating to the use of intangible property or information."

11. On going through clause 2 of the Agreement, it is obvious that Menlo India shall 'separately execute a technology and software license agreement' for the provision of computer equipment and software supplied by the assessee. It is nobody's case that the consideration in question relates to the supply of any computer equipment and software by the assessee to Menlo India. We fail to appreciate as to how this clause 2 makes the services provided by the assessee as "technical". Rather clause 2 mandates to execute a separate Technology and Software license agreement for the provision of computer equipment and software. How is it that the consideration for the services can be attributed to a proposed agreement, which has yet to see the light of the day.

12. The learned CIT(A) has also harped on "transportation of time sensitive packages" with a view to bring the services provided by the assessee within the fold of "technical services". In reaching this conclusion the learned CIT(A) also relied on the order passed by the Mumbai bench of the Tribunal in *Blue Dart Express Limited v. JCIT*. Let us examine the facts of that case. The assessee there claimed deduction u/s 80-O in respect of its foreign exchange earnings for rendering technical / professional services to a US Multi International company. During the course of assessment proceedings, the A.O. required the assessee to furnish the nature of services rendered and also the calculation of deduction. The assessee did it. On being satisfied the A.O. granted deduction u/s 80-O. By exercising the power u/s 263, the learned CIT held the assessment order to be erroneous and prejudicial to the interest of the Revenue to the extent of granting deduction u/s 80-O. When the matter came up before the Tribunal, it was observed that the issue is debatable and hence outside the ambit of section 263. Apart from that, it was also observed that the assessee was engaged in integrated air and ground transportation of time sensitive packages to various destinations rendering commercial services. It was in this context that the assessee was held to be eligible for deduction u/s 80-O. At this juncture it will be useful to note that at the material time section 80-O provided for deduction on any 'income by way of royalty, commission, fees or any similar payment received by the assessee from the Government of a foreign State or a foreign enterprise in consideration for the use outside India of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee, or in consideration of technical or professional services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee'. From the above quoted part of sec. 80-O, it can be seen that the deduction at that time was available not only in respect of income as a consideration for the use of 'technical or professional services' but also any 'commercial....knowledge experience or skill'. These two sources are distinct from each other as can be seen from the employment of word 'or' between them. In order to qualify for deduction under this section, the income could have resulted from the rendering of 'technical or professional services' or commercial knowledge, experience or skill etc. When the tribunal in *Blue Dart Express Limited (supra)* held the

assessee to be entitled to deduction, it was considering all the species of the services set out in section 80-O and not only 'technical or professional services'. It was in the light of such language of the provision that the Tribunal held the assessee to be eligible for relief u/s 80-O. We are currently dealing with section 9(1)(vii), being the 'fees for technical services' and the definition of such expression is restricted only to 'managerial, technical or consultancy services' and does not have any such elements as are there in section 80-O. The decision in the case of Blue Dart Express Limited (supra) came up for consideration before the Mumbai bench of the tribunal in Dampskibsselskabet AF 1912 v. Addl. DIT (International Taxation) [(2011) 51 DTR 148] (to which one of us, namely, the Id. JM is party) in which it has been held that the ratio laid down in that case cannot be universally applied. Due to material difference in the language of sections 9(1)(vii) and 80-O as discussed above, we hold that the decision in Blue Dart Express Limited (supra), can not be held to be supporting the case of the Revenue.

13. The Id. CIT(A) in reaching the conclusion that the assessee rendered 'technical services' also observed that its 'business structure is time bound service coupled with continuous real time transmission of information by using and also making available advanced technology in the form of sophisticated equipment and software.' He was swayed by the contention of the assessee that the Manlo India or the ultimate customer could track the movement of cargo with the help of computers. We have noted supra that the consideration received by the assessee did not include any consideration for the supply of any equipment to Manlo India. Now we will examine as to whether the use of computer in any manner for knowing the location of the cargo at a particular time, can be held as technical service.

14. Explanation to section 9(1)(vii) defines the expression "fees for technical services" as consideration for rendering 'managerial, technical or consultancy services'. It is seen that there is no definition of the term "technical services" in the Act.

15. The principle of *noscitur a sociis* mandates that the meaning of a word is to be judged by the company of other words which it keeps. This rule is wider in scope than the rule of *eiusdem generis*. In order to discover the meaning of a word which has not been defined in the Act, the Hon'ble Supreme Court has applied the principle of *noscitur a sociis* in several cases including *AravindaParamila Works v. CIT* [(1999) 237 ITR 284 (SC)]. As noted above the word 'technical' has been sandwiched between the words 'managerial' and 'consultancy' in Explanation 2 to sec. 9(1)(vii) and no definition has been assigned to the 'technical' services in the relevant provision, we need to ascertain the meaning of the 'technical services' from the overall meaning of the words 'managerial' and 'consultancy' services by applying the principle of *noscitur a sociis*. It has been held above that the 'managerial services' and 'consultancy services' pre-suppose some sort of direct human involvement. These services cannot be conceived without the direct involvement of man. These services can be rendered with or without any equipment, but the human involvement is inevitable. Moving in the light of this rule, there remains no doubt whatsoever that the technical services

cannot be contemplated without the direct involvement of human endeavor. Where simply an equipment or a standard facility albeit developed or manufactured with the use of technology is used, such a user cannot be characterized as using 'technical services'.

16. Coming back to the facts of the present case, even if we accept the learned first appellate authority's point of view that the computer could be used in tracing the movement of the goods, such use of computer, though indirect, remote and not necessary, can not bring the payment for freight and logistics services within the purview of "technical services". The essence of the consideration for the payment is rendering of services and not the use of computer. If incidentally computer is used at any stage, which is otherwise not necessary for rendering such services, the payment for freight and logistics will not partake of the character of fees of 'technical services'. We, therefore, repel this contention raised on behalf of the Revenue.

17. Thus it can be noticed that the payment made to the assessee in question is not a consideration for managerial or technical or consultancy services. That being the position, it cannot fall within the ambit of section 9(1)(vii).'

40. We may also take note of another decision of a coordinate bench dealing with materially similar question dealing with taxability of income in the hands of non-resident commission agents, representing Indian principal, in which similar activities were said to have been performed. In the case of Armyesh Global v. Asstt. CIT [2012] 51 SOT 564/21 taxmann.com 130 (Mum.), the coordinate bench has, inter alia, observed as follows:

'16. We have considered the issue and examined the facts on record. The learned Assessing Officer tried to invoke the definitions of technical services on the commission paid to the foreign company. The reason being that commission payment to non-resident is not covered by the provisions of section 40(a)(ia), as it has only applicable to any interest royalty, fees for technical services or other sum chargeable under this act which payable outside India on which tax is deductible at source but has not been deducted. The Assessing Officer made out a case that the commission paid is Fees for technical services' without specifying what are the technical/Managerial services rendered by the said company to the assessee. Assessee indeed entered into an agreement for propagation of its handicraft products with the non-resident company. The copies of the agreement have been placed before the authorities. The agreement clearly shows that the non-resident company was to get commission for promoting the products of the assessee company and rendering incidental services on sales such as recovery etc. for doing export sales. It is also responsibility of the non-resident company to disseminate the information and inquire about various importers in various countries so that assessee exports can be increased. The agreement clearly shows that non-resident company was to get the commission for promoting the product of assessee company after sales proceeds are received. The detailed terms of the agreement are as under:

"Agency Agreement

In this Agreement between M/s Armyesh Global, Kamanwala Chambers, 2nd Floor, Sir P.M. Road, Fort, Mumbai 400 001, India hereinafter referred to as "Principal" and Indijack Limited, 99 Breck Nock Road, London N19 5 AB, U.K. — hereinafter referred to as "Agent"— the following is agreed upon: -

Article 1- Object of Agreement

1.1. The principal entrusts the Agent with the non exclusive agency for the following contractual territory (area): Worldwide

1.2. The principal also has the right to operate actively' in he aforementioned territory (area).

1.3. The agency covers the following products:

Hand embroidered products of any and all kinds.

1.4. The Agent covenants and agrees to represent the principal on a commission basis.

Article 2— Duties of the Agent

2.1 It shall be the Agent's duty to negotiate contracts with the overseas party. Furthermore, the Agent shall act on the principal's behalf in conformity with provisions hereinafter enumerated. The Agent shall not be authorized to enter into a contract or otherwise to bind the principal. The principal shall be free to conclude, or to refuse the conclusion of a contract negotiated by the Agent.

2.2 While negotiating contracts of sale the Agent shall act in conformity with all the conditions and particularly of delivery and payment as fixed by the principal.

2.3 The Agent shall be responsible for negotiating with all parties in their territory (area). The Agent shall travel in their territory (area) regularly to visit customers, and is bound to keep concluded contracts secret. The Agent shall always keep the principal informed about their activities and shall supply the principal, at least once every quarter, with reports on economic developments and market conditions in the territory (area) and at the same time, convey to the principal, the Agent's observations with respect to activities of competitors. The Agent shall report immediately on particular profitable business possibilities and extraordinary events.

2.4. The Agent shall abstain from any competition whatsoever against the principal and shall not promote competition by third persons. In particular, the Agent shall not act for competitive firms as a commercial Agent, Commission Merchant or Distributor, nor shall the Agent associate directly or indirectly with competitive firms. The Agent shall not, for all time exploit or disclose to other persons any business and production secrets of the principal that have been communicated to them or which they have otherwise come to know, irrespective of whether or not the contract is still in force.

2.5 The Agent shall observe the rules of fair competition and be responsible for any violation of the same.

2.6 The Agent is not authorized to accept payments directly in their own name but shall assist the principal in collecting outstanding payments. The Agent is also authorized to accept notification of defects by a customer, as well as the statement of a customer that he will the goods at the disposable of the principal or any similar statement by which the customer exercises his rights resulting from defective delivery. The Agent shall immediately ii principal and shall see to it that the necessary evidence in favour of the principal is obtained.

2.7 The Agent shall establish business relations only with such customers whose solvency is satisfactory to the best of the knowledge and belief of the Agent.

17. Thus as can be seen from the above, all the terms do indicate that the said company was only acting as an Agent on commission basis and has not been providing any Managerial/Technical services. Further there is no evidence on record that they are providing any technical/managerial services. The said company was responsible for arranging timely payment from the customers and commission was paid only after the sales amount was received. Since the services were rendered outside India, the provisions of section 5 cannot be applied to the commission paid so as to make it taxable in India.

18. This aspect can also be examined in another way as already given a finding by the Bench earlier and which is also not in dispute, that the foreign company does not have any PE in India. Therefore, the commission paid to the foreign company which has to be considered as business income and cannot be taxed in India as per the DTAA between India and UK. The definition of 'fee for technical services' between UK and India does not include managerial services. However, neither the Assessing Officer nor the CIT (A) considered the issue of DTAA, even though assessee mentioned the same in its submissions before the authorities. The definition of technical services as per the Income Tax Act is as under:

"9.(1) The following incomes shall be deemed to accrue or arise in India:

(i) & (vi)**

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(vii) Income by way of fees for technical services payable by—

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

[Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.]

[Explanation 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.]

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".

19. As can be seen from the above section 9(1)(vii)(b), fee payable for the purposes of making or earning income from any source outside India is not included in the definition. The amount has to be considered as business income. Since the services are rendered outside India, that amount is not taxable as it does not accrue or arise in India. The same view was considered by the Hon'ble Bombay High Court in the case of CEAT International S.A. v. CIT 237 ITR 859, where certain export commission was paid to a Non-Resident Company and it was held that the assessee did not impart any information concerning technical, industrial, commercial or scientific knowledge exports or skill, nor rendered any managerial technical or consultancy services. The commission attributable to the services rendered cannot be regarded as royalty or fees for technical services and it was held that the same was not taxable under section 9(1)(vii). Similar issue was also considered by the Hon'ble Delhi High Court in the case of Director of Income Tax v. Sheraton International Inc. 313 ITR 267 where certain payments for advertising, publicity and sales promotion services were considered and held that those payments cannot be considered as either royalty or for technical services. Since the Non-Resident does not have any PE in India, such income which is to be considered as business income was not taxable in India.'

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 (P.) Ltd. v. CIT [2010] 327 ITR 456/193 Taxman 234/7 taxmann.com 18, 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 granted by the CIT(A) and decline to interfere in the matter."

7. We see no reason to take any other view of the matter than the view so taken by the co-ordinate bench. Respectfully following the decision of Co-ordinate Bench in the case of Welspun Corp Ltd (supra), we quash the impugned order as the issue on which the order of the Assessing Officer sought to be revised is now covered against the revenue.

8. In the result, the appeal is allowed. Pronounced in the open court today on the 25th day of September, 2017.

Sd/-

S S Godara
(Judicial Member)

Ahmedabad, the 25th day of September, 2017

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Copies to: (1) The appellant
(2) The respondent
(3) Commissioner
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

Sd/-

Pramod Kumar
(Accountant Member)

By order

TRUE COPY

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad