

**IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI  
BEFORE SHRI G.S.PANNU, AM AND SHRI RAVISH SOOD, JM**

ITA Nos. 1036 & 1037/Mum/2016  
(निर्धारण वर्ष / Assessment Years: 2011-12 & 2012-13)

M/s Chemical Process Piping Pvt. Ltd. CPE Plots, BSD Marg, Govandi East, Mumbai-400 088	<b>बनाम/ Vs.</b>	Shri R. M. Madhavi, Erstwhile Additional CIT- 10(2), Now, Addl CIT 14(2), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN No. AACCC6212D		
<b>(अपीलार्थी / Appellant)</b>	:	<b>(प्रत्यर्थी / Respondent)</b>

अपीलार्थी की ओर से / <b>Appellant by</b>	:	Shri V. Chandrashekhar & Shri Ashok Suthor, A.Rs
प्रत्यर्थी की ओर से / <b>Respondent by</b>	:	Shri M.V. Rajuru, D.R

सुनवाई की तारीख / <b>Date of Hearing</b>	:	06.02.2018
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	02.05.2018

**आदेश / ORDER**

**PER RAVISH SOOD, JUDICIAL MEMBER:**

The present set of appeals have been filed by the assessee against the respective orders passed by the CIT(A)-56, Mumbai for A.Y(s) 2011-12 and 2012-13, each dated 31.12.2015, which in itself arises from the respective orders passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961 (for short 'Act') dated 20.03.2014 and 20.03.2015, respectively. As certain common issues are involved in the aforementioned appeals, therefore, the

same are being taken up and disposed off by way of a consolidate order. We shall first take up the appeal of the assessee for A.Y 2011-12. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:-

- “1.0. *The Hon. Commissioner of Income Tax (Appeals) [Hon CIT(A)] erred in partly upholding the Learned Assessing Officer's order by disallowing only 12.50% of Purchases from certain parties, considering it as income element in it.*
- 1.1. *On the facts and circumstances of the case and in law, the Hon. CIT(A) erred in making disallowance of Rs. 3,49,072/- (being 12.5% of purchase of Rs. 27,92,573/-) treating them as not a genuine purchase without considering the fact that all the purchases were supported with invoices, delivery proof, payments by banking channel and materials were used with entire quantity records, wherein no defect was found.*
- 1.2. *On the facts and circumstances of the case and in law, the Hon. CIT(A) erred in making disallowance of Rs.3,49,072/- (being 12.5% of purchase of Rs.27,92,573/-) treating them as not a genuine purchase, which is mere suspicion & surmise, as its based on 3rd party information, which is indirect and no adverse statement nor information against the Appellant was recorded or produced.*
- 2.0. *The Hon. Commissioner of Income Tax (Appeals) [Hon CIT(A)] erred in upholding the Learned Assessing Officer's disallowance u/s. 40(a)(i) of Income tax Act for non- deduction of tax on payment to Foreign Parties of Slovenia.*
- 2.1. *On the facts and circumstances of the case and in law, the Hon. CIT(A) considering the same as Fees for Technical Services in respect of payment made to M/s. Thermo and Plast of Slovenia.*
- 2.2. *On the facts and circumstances of the case and in law, the Hon. CIT(A) erred in incorrectly understanding and interpreting the amendment in explanation to section 9(1)(vii) to state that it covers all the payments to Non-Residents.*
- 2.3. *Without prejudice to the above, the Hon. CIT(A) erred in not considering that the provision of section 40(a)(i) is applicable only in case of amount payable at the end of year and not in case of amount already paid during the year.*
- 2.4. *Without prejudice to the above, the Hon. CIT(A) erred in not considering the CBDT Circular No. 3/2015 dated 12.02.2015, which is clarification and hence applicable retrospectively, wherein it was directed that for the purpose of making disallowance of 'other sum chargeable' under section 40(a)(i) of the Act, the 'appropriate portion of the sum which is chargeable to tax' under the Act shall form the basis of such disallowance.*
3. *The Hon'ble Commissioner Of Income-Tax (Appeals) [Hon CIT(A)] erred in partly upholding the Learned Assessing Officer's disallowance u/s 40A(2) of the Income tax Act for failing to justify the reasonableness for making payments to related parties.*
- 3.1. *On the facts and circumstances of the case and in law, the Hon. CIT(A) erred in not allowing the entire amount paid to related party even after accepting the applicability of CBDT*

*Circular No.6-P dated 06/07/1968, as there was no transfer of profit to evade tax.*

3.2. *Without prejudice to above the Hon. CIT(A) erred in not allowing the entire amount paid to related party on the basis, even after the Appellant justified with reasons for making such payments to related parties.*

4.0. *The Appellant craves leave, to add, amend, alter, modify and /or withdraw any of the above grounds of appeal as the situation may warrant, on or before the date of hearing of appeal.*

2. Briefly stated, the facts of the case are that the assessee company had filed its return of income for A.Y. 2011-12 on 23.09.2011, declaring total income of Rs.8,50,15,810/-. The assessment in the case of the assessee was completed by the A.O under Sec. 143(3) on 20.03.2014 at an income of Rs.10,15,59,800/- *interalia* making the following additions/ disallowances:

Sr. No.	Particulars	Amount
1.	Disallowance of bogus purchase	Rs.27,92,573/-
2.	Disallowance u/s 40(a)(i) of technical/consulting charges paid to foreign parties:- (i) EFE Engineering Pte. Ltd, Singapore (ii) Thermo & Plast, Slovenia.	Rs.45,36,488/- Rs.19,41,279/-
3.	Disallowance under Sec. 40A(2)(b) of payments made to related parties.	Rs.40,41,737/-

3. Aggrieved, the assessee assailed the order passed by the A.O in appeal before the CIT(A). The CIT(A) after deliberating on the contentions raised by the assessee before him in context of the aforesaid additions/disallowance made by the A.O, dealt with the same as under:-

- (i) The disallowance of bogus purchase made by the A.O at Rs.27,92,573/- was restricted by the CIT(A) to an amount of Rs.3,49,072/- (being 12.5% of purchases of Rs.27,92,573/-).
- (ii) The disallowance made by the A.O under Sec. 40A(2)(b) of the payments by the assessee to its related parties was scaled down by the CIT(A) to Rs.62,742/-.
- (iii) The disallowance made by the A.O under Sec.40(a)(i) for non deduction of tax of payments made to foreign parties was modified by the CIT(A) as under:

Name of the foreign party	Nature of services	Amount (Rs.)	CIT(A)
EFE Engineering Pte. Ltd., Singapore	Technical report and analysis	4,536,488/-	Deleted
Thermo & Plast, Slovenia	Supervision Charges	1,397,364/-	Upheld
Thermo & Plast, Slovenia	Reimbursement of Expenses	5,43,915/-	Deleted
	Total	6,477,767/-	

4. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee at the very outset submitted that the CIT(A) by wrongly characterising the purchase transactions of Rs. 27,92,573/- as bogus, had erred in sustaining the disallowance of Rs.3,49,072/- (being 12.5% of purchases of Rs.27,92,573/-). The Id. A.R submitted that the CIT(A) had absolutely lost sight of the fact that the authenticity of the purchase transactions under consideration were duly supported by the invoices, delivery proof and the fact that the payments to the supplier parties were made by banking channels. The Id. A.R in order to impress upon us that there was no reason for the lower authorities to stamp the purchase transactions as bogus and its book results were well in order, submitted that the assessee company which was mainly engaged in the business of export of special pipes had during the year under consideration declared a gross profit rate of 40%. It was thus the contention of the Id. A.R that no part of the purchase transactions under consideration was liable to be disallowed. The Id. A.R further adverted to the sustaining of the disallowance made by the A.O under Sec. 40(a)(i) in respect of the supervision charges of Rs.13,97,363/- paid by the assessee to Thermo & Plast of Slovenia. The Id. A.R submitted that the lower authorities had wrongly characterised the said payments as "fees for technical services" (for short 'FTS') made to the aforesaid party. It was submitted by the Id. A.R that the lower authorities had misconstrued the scope and gamut of the amendment to the *Explanation* of Sec. 9(2) and had wrongly observed that the same covered all the payments which were made to the non-residents. Alternatively, it was submitted by the Id. A.R that even otherwise the CIT(A) had erred in not considering the CBDT Circular No. 3/2015, dated

12.02.2015, as per which the disallowance of “other sum chargeable” under Sec. 40(a)(i) of the Act was to be restricted only to the extent of the appropriate portion of the sum which was chargeable to tax under the Act. It was submitted by the Id. A.R that the aforesaid circular which being clarificatory in nature was to be given a retrospective application, thus covered the case of the assessee for the year under consideration, viz. A.Y. 2011-12. The Id. A.R took us through the last page of the ‘Paper book’ of the assessee (for short ‘APB’), which was a letter dated 31.01.2011 addressed by the assessee to M/s Thermo & Plast, Slovenia. The Id. A.R in order to drive home his contention that the payments which were made to the aforementioned foreign party were in respect of charges for supervision of installation of GRP pipes at its Koniambo Nickel Project, New Caledonia, took us through the contents of the aforesaid letter. It was the contention of the Id. A.R that keeping in view the nature of work to be carried out by the aforesaid party, viz. M/s Thermo & Plast, Slovenia, it could safely be gathered that the same would fall within the sweep of exceptions carved out in *Explanation 2* of Sec. 9(1)(vii) and thus would not fall within the sweep of FTS. The Id. A.R further assailed the disallowance of Rs. 62,742/- under Sec. 40A(2)(b) which was sustained by the CIT(A) (out of total disallowance of Rs.40,41,737/- made by the A.O). The Id. A.R took us through the relevant observations of the CIT(A) in context of the issue under consideration. It was averred by the Id. A.R that as the CIT(A) in the backdrop of the CBDT Circular No. 6-P, dated 06.07.1968 and the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Indo Saudi Services (Travel) Pvt. Ltd. (2009) 310 ITR 306 (Bom), had correctly appreciated that a perusal of the profitability of both the assessee and the related parties proved that the assessee was in no way benefitted, therefore, on the said count alone the disallowance sustained by the CIT(A) was liable to be vacated. It was submitted by the Id. A.R that despite concluding as hereinabove, the CIT(A) had wrongly sustained the addition to the extent of Rs.62,742/-. The Id. A.R in the backdrop of his aforesaid contentions submitted that the disallowance under Sec. 40A(2)(b) of Rs.62,742/- sustained by the CIT(A) may be deleted.

Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities.

5. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We shall first advert to the disallowance of Rs.3,49,672/- (being 12.5% of purchases of Rs.27,92,573/-) which had been upheld by the CIT(A) in context of the purchase transactions characterised as bogus transactions by the lower authorities. We have perused the orders of the lower authorities and find that the A.O was in receipt of information from the Sales tax department, Maharashtra, that bogus purchases of Rs.27,92,573/- were made by the assessee during the year under consideration, as under:-

Sr. No.	Party Name	F.Y	Amount
1.	Alpesh Trading Company	2010-11	6,82,584
2.	Cprihans Trade Centre	2010-11	6,88,026
3.	Growell Enterprises	2010-11	7,10,273
4.	Shreeji Sales	2010-11	7,11,690
		Total	27,92,573

We find that from a perusal of the orders of the lower authorities, it can safely be gathered that the assessee could not substantiate the genuineness and veracity of the purchase transactions which were claimed to have been made from the aforementioned parties. The A.O observing that the assessee had failed to prove the authenticity of the purchase transactions, added the entire amount of purchases of Rs.27,92,573/- to the income of the assessee. The CIT(A) observing that as the assessee had neither produced the aforesaid parties for examination nor placed on record the confirmations from the said parties, therefore, was persuaded to be in agreement with the A.O that the assessee had not made any genuine purchases from the aforementioned parties. However, the fact that in a subsequent assessment order passed for A.Y 2010 -11 the A.O had restricted the addition only to the extent of Rs.12.5% of the purchases made by the assessee from the aforementioned parties weighed in the mind of the CIT(A), who thus on a similar footing restricted the disallowance of purchases during the year

under consideration at Rs.3,49,072/- (12.5% of the purchases of Rs.27,92,573/-).

6. We have given a thoughtful consideration to the aforesaid issue and are unable to persuade ourselves to be in agreement with the claim of Id. A.R that no part of the purchases made by the assessee from the aforementioned parties was liable to be disallowed. We find that as observed by us hereinabove, the assessee had not only failed to produce the aforementioned parties to prove to the hilt the genuineness of the purchase transactions under consideration, but rather, could not even place on record the confirmations from them. We are of the considered view that as the sales of the assessee had not been dislodged or disturbed by the lower authorities, therefore, it could safely be concluded that the assessee had made the purchases of the goods under consideration, though not from the aforementioned parties, but from the open/grey market. We are of a strong conviction that as the assessee would have been benefitted monetarily by making the purchases of the goods from the open/grey market, therefore, the profit element involved in making of such purchases could safely be taken @ 12.5% of the aggregate value of the purchases. We find that our aforesaid view is fortified by the judgment of the Hon'ble High Court of Gujarat in the case of CIT Vs. Simit P. Sheth (2013) 356 ITR 451 (Guj). We thus finding no infirmity in the sustaining of addition in respect of the purchase transactions to the extent of 12.5% by the CIT(A), therefore, uphold the order of the CIT(A) in context of the aforesaid issue under consideration. The **Ground of appeal No. 1** raised by the assessee is dismissed.

7. We shall now advert to the challenge thrown by the assessee to the sustaining of the disallowance of Rs. 13,97,363/- under Sec. 40(a)(i) by the CIT(A) as regards the payment made by the assessee to M/s Thermo & Plast, Slovenia towards supervision charges. We find that the lower authorities had observed that the payment to the aforementioned foreign party was made by the assessee towards consultancy charges, viz. Excel Programme

for calculation of the pipe thickness in base of TUV report, excel programme for underground pipe verification according to the relevant AWWA standard, and fabrication trading for steel moulds for construction of the bell and for coupling. The lower authorities characterising the services rendered by the said party as technical consultancy charges/testing charges, had observed that as the assessee had failed to deduct tax at source from the above payments as per the provisions of Sec. 195 of the Act, therefore, the said amount was liable to be disallowed under Sec. 40(a)(i) of the Act. The assessee tried to impress upon the lower authorities that no obligation was cast upon it to deduct tax at source in respect of the aforesaid payment of Rs.13,97,363/- made to the aforementioned foreign party. It was submitted by the assessee that as M/s Thermo & Plast which was a non-resident concern had no permanent establishment in India and the services were rendered by the aforementioned party outside India and also the end manufacturing and exports of the assessee were in a location outside India, therefore, the consultancy charges were not subject to tax in India. The assessee taking support of the aforesaid contentions claimed that no obligation was cast upon it to deduct tax at source while making the payment of Rs.13,97,363/- to the aforesaid non-resident party. We find that the CIT(A) was not persuaded to subscribe to the aforesaid claim of the assessee. The CIT(A) was of the view that pursuant to the retrospective amendment to *Explanation 2* of Sec. 9(2) by the Finance Act, 2010, all the payments made to a non-resident outside India shall be taxable in India, regardless of the fact whether the services have been rendered in India or not. The CIT(A) held a conviction that it was the situs of the payer and situs of utilization of service, which pursuant to the amendment was relevant and not the situs of rendering the services. It was observed by the CIT(A) that as the payments made by the assessee to the non-resident company were squarely covered by the *Explanation 2* of Clause (vii) of sub-section (1) of Sec. 9 of the Act, therefore, it was clearly a payment made for technical services rendered by the non-resident party. The explanation of the assessee that as the services rendered by the non-resident service provider (recipient

of income) were utilized by the assessee who was a resident payer for the purpose of earning income from carrying out exports, therefore, fees so paid to the non-resident service provider for earning of export income which was sourced outside India, as per Sec. 9(1)(vii)(b) would not be deemed to accrue or arise in India did not find favour with the CIT(A), who declined to accept the same. We find that the CIT(A) by taking support of the judgment of the High Court of Delhi in the case of CIT Vs. Havells India Ltd. (I.T.A. Nos. 55 & 57/2012) concluded that the export activity having taken place or having been fulfilled in India, the source of income has to be taken as located in India and not outside India. The CIT(A) further observed that Article 12 of the India-Slovenia tax treaty covered supervision charges under FTS. The CIT(A) on the basis of his aforesaid observations concluded that the payment of Rs.13,97,363/- made by the assessee to M/s Thermo & Plast, Slovenia was liable for deduction of tax at source under Sec.195 of the Act. On the basis of the aforesaid deliberations the lower authorities being of the view that the assessee had failed to comply with the statutory obligation of having deducted tax at source under Sec. 195 of the Act, therefore, concluded that the said amount was liable to be disallowed under Sec. 40(a)(i) of the Act.

8. The ld. A.R during the course of hearing of the appeal took us through a letter dated 31.01.2011 addressed by the assessee to M/s Thermo & Plast, Slovenia (last page of the 'APB'). The contents of the letter revealed that the payments were made by the assessee to M/s Thermo & Plast, Slovenia towards assembling charges in respect of the nickel project of the assessee at Koniambo, New Caledonia. The ld. A.R by taking support of his aforesaid contention had tried to persuade us to return a finding that as the payment to the aforementioned non-resident company was made in respect of assembling charges, therefore, the same as per the exclusions carved out in *Explanation 2* of Sec. 9(1)(vii) of the Act, fell beyond the sweep of FTS.

9. We have perused the contents of the aforesaid letter dated 31.01.2011 addressed by the assessee to M/s Thermo & Plast, Slovenia and the copies

of the invoices raised by the said foreign party on the assessee. We find that the aforesaid respective documents reveals that the payment of Rs. 13,97,363/- was made by the assessee to the said foreign party towards supervision charges for installation of GRP pipes manufactured by the assessee at its Nickel project at Koniambo, New Caledonia. We are of the considered view that such consideration paid by the assessee to M/s Thermo & Plast, Slovenia towards supervision of the installation of the GRP pipes & fittings at the Koniambo Nickel Project, New Caledonia, can safely be characterised as having been made in context of assembly project undertaken by the latter. We thus are of the view that as the payment of Rs. 13,97,363/- made by the assessee to M/s Thermo & Plast was in respect of an assembly project, therefore, the same would squarely fall within the sweep of the exceptions carved out in *Explanation 2* of Sec. 9(1)(vii) of the Act, and thus could not be held as FTS. Thus, the assessee being under no obligation of deducting tax at source under Sec. 195 on the aforesaid payment of Rs. 13,97,363/- made to M/s Thermo & Plast, Slovenia, therefore, the same could not have been disallowed under Sec. 40(a)(i) of the Act in the hands of the assessee. We thus in terms of our observations set aside the order of the CIT(A) in context of the aforesaid issue under consideration and delete the disallowance under Sec. 40(a)(i) of Rs. 13,97,363/- sustained by him. The **Ground of appeal No. 2** raised by the assessee is allowed.

10. We further find that the assessee had assailed before us the part disallowance of Rs.62,742/- which was sustained by the CIT(A) out of the total disallowance of Rs.40,41,737/- made by the A.O under Sec. 40A(2)(b) of the Act. We find that the CIT(A) being of the view that as the finding of the A.O that the assessee had diverted its profit to the sister concern was not backed by any evidence, therefore, the same was not tenable. Rather, the CIT(A) taken cognizance of the CBDT Circular No. 6-P, dated 06/07/1968 and the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Indo Saudi Services (Travel) Pvt. Ltd. (2009) 310 ITR 306 (Bom) observed that where it emerges that there was no attempt on the part of the assessee

to evade tax, no disallowance was liable to be made in respect of payments made to relatives or sister concerns of the assessee. However, we find that the CIT(A) going by the factual position placed on record by the assessee that given the average rates charged by the related parties and by the other third parties, the higher rates were charged only as regards the payments made to carpenters. The CIT(A) observed that the assessee had fairly conceded that the payments made to the related parties in context of carpenter services were higher by an amount of Rs. 20/- per pay, as in comparison to the payments made to third parties. The CIT(A) in the backdrop of the aforesaid facts concluded that now when the assessee itself had accepted of having made an excess payment to the related parties for carpenter services, therefore, such excess payments aggregating to Rs. 62,742/- was liable to be disallowed under Sec. 40A(2)(b) of the Act. We have deliberated on the aforesaid issue and are persuaded to be in agreement with the view taken by the CIT(A). We are of the considered view that now when the assessee had itself worked out the excessive payment of Rs. 62,742/- made in respect of the carpenter services to the related parties, therefore, the CIT(A) was justified in sustaining the disallowance under Sec. 40A(2)(b) to the said extent. We thus finding no infirmity in the order of the CIT(A) as regards the the issue under consideration, thus uphold his order to the said extent. The **Ground of appeal No. 3** raised by the assessee is dismissed in terms of our aforesaid observations.

11. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

**ITA No 1037/Mum/2016**  
**A.Y.2012-13**

12. We shall now take up the appeal of the assessee for A.Y 2012-13. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:-

*“1.0. The Hon. Commissioner of Income Tax (Appeals) [Hon CIT(A)] erred in upholding the Learned Assessing Officers disallowance*

*u/s-40(a)(i) of Income tax Act for non-deduction of tax on payment to Foreign Parties of Slovenia and Germany.*

- 1.1. *On the facts and circumstances of the case and in law. the Hon. CIT(A) erred in upholding disallowance made for Supervision Charges of Rs. 29,67,963/- considering the same as Fees for Technical Services in respect of payment made to M/s. Thermo and Plast of Slovenia.*
- 1.2. *On the facts and circumstances of the case and in law, the Hon. CIT(A) erred in upholding disallowance made for Testing Charges of Rs. 4,67,244/- considering the same as Fees for Technical Services in respect of payment made to M/s. TUV SUD Industries Services GMBH of Germany.*
- 1.3. *On the facts and circumstances of the case and in law, the Hon. CIT(A) erred in incorrectly understanding and interpreting the amendment in explanation to section 9(1)(vii) to state that it covers all the payments to Non-Residents.*
- 1.4. *Without prejudice to the above, the Hon. CIT(A) erred in not considering that the provision of section 40(a)(i) is applicable only in case of amount payable at the end of year and not in case of amount already paid during the year.*
- 1.5. *Without prejudice to the above, the Hon. CIT(A) erred in not considering the CBDT Circular No. 3/2015 dated 12.02.2015, which is clarification and hence applicable retrospectively, wherein it was directed that for the purpose of making disallowance of "other sum chargeable" under section 40(a)(i) of the Act, the "appropriate portion of the sum which is chargeable to tax" under the Act shall form the basis of such disallowance.*
- 2.0. *The Hon. Commissioner of Income Tax (Appeals) [Hon CIT(A)] erred in partly upholding the Learned Assessing Officers disallowance u/s-40A(2) of the Income tax Act for failing to justify the reasonableness for making payments to related parties.*
  - 2.1. *On the facts and circumstances of the case and in law. the Hon. CIT(A) erred in not allowing the entire amount paid to related party even after accepting the applicability of CBDT Circular No.6-F dated 06/07/1968, as there was no transfer of profit to evade tax.*
  - 2.2. *Without prejudice to above the Hon. CIT(A) erred in not allowing the entire amount paid to related party on the basis, even after the Appellant justified with reasons for making such payments to related parties.*
- 3.0. *The Appellant craves leave, to add, amend, alter, modify and / or withdraw any of the above grounds of appeal as the situation may warrant, on or before the date of hearing of appeal.*

13. Briefly stated, the assessee had filed its return of income for A.Y 2012-13 on 20.09.2012, declaring total income of Rs.6,05,86,626/-. Assessment was completed by the A.O on 20.03.2015 and the income of the assessee was assessed under Sec. 143(3) at Rs.6,73,87,350/-.

14. The A.O while framing the assessment made certain disallowances/additions, which on appeal were sustained by the CIT(A), as under:-

Sr. No.	Particulars	Amount
1	(i) Disallowance under Sec. 40(a)(i) for non deduction of tax on payments made to the following foreign parties:-  (a) Disallowance of payment made for supervision charges, M/s Thermo & Plast of Slovenia.  (b) Disallowance of payment made for testing the charges to M/s TUV SUD Industries Services BMBH of Germany.	Rs. 29,67,963/-  Rs. 4,67,244/-
2.	The A.O while framing assessment made a disallowance under Sec. 40A(2)(b) of Rs.13,66,982/- which was scaled down by the CIT(A).	Rs. 1,90,623/-

The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. We shall first advert to the disallowance of Rs.29,67,963/- sustained by the CIT(A) in respect of payments made by the assessee to M/s Thermo & Plast, Slovenia. We find that as a similar issue had been adjudicated upon by us while disposing off the Ground of appeal No. 2 in the assessee's own case for A.Y 2011-12 in ITA No. 1036/Mum/2016, therefore, said order in context of the issue under consideration shall *mutatis mutandis* apply in respect of the ground of appeal No. 1 raised by the assessee before us in the present appeal.

15. We shall now advert to the disallowance under Sec. 40(a)(i) of Rs.4,67,244/- paid by the assessee towards testing charges to M/s TUV SUD Industries Services GMBH of Germany. We find that the contention of the assessee that as per the provision of Sec. 9 of the Act, any payment made for rendering services outside India for earning income outside India is not taxable in India, did not find favour with the lower authorities. Rather, it was observed by the A.O that as per the retrospective amendment in *Explanation* of Sec. 9(2) of the Act by the Finance Act, 2010, payment made to a non-resident outside India shall be taxable in India, regardless of the fact that whether the services have been rendered in India or not. The A.O on the basis of his aforesaid observations concluded that as the payment made by the assessee to the aforesaid foreign party, viz. TUV SUD Industries

Services BMBH, Germany was clearly as per Sec. 9(1)(vii) and Article 12 of India-Germany tax treaty towards “fees for technical services”, therefore, on the failure on the part of the assessee to deduct tax at source under Sec. 195 on the payment made to the foreign party, the same was liable to be disallowed under Sec.40(a)(i) of the Act. We have deliberated on the facts pertaining to the issue under consideration and the orders of the lower authorities. The ld. A.R submitted before us that the payment made by the assessee to the aforesaid foreign party, viz. TUV SUD Industries Services GMBH, Germany, as per *Explanation 2* of Sec. 9(1)(vii) was not in the nature of “fees for technical services”. The ld. A.R further averred that as per CBDT circular No. 3/2015, dated 12.02.2015, the Board referring to its earlier Instruction No. 02/2014, dated 26.02.2014 had clarified that in cases where tax is not deducted at source under Sec.195 of the Act, the A.O shall determine the appropriate portion of the sum chargeable to tax, as mentioned in Subsection (1) of Sec.195, in order to ascertain the tax liability on which the deductor shall be deemed to be an assessee in default under Sec. 201 of the Act. The ld. A.R taking support of his aforesaid contention submitted that in the aforesaid circular it has been clarified that for the purpose of disallowance under Sec. 40(a)(i) which is interlinked with the sum chargeable under the Act as mentioned in Sec. 195, only appropriate portion of such sum which is chargeable to tax under the Act shall be disallowed under the aforesaid statutory provision. It was thus the contention of the ld. A.R that the lower authorities had erred in making/sustaining the disallowance under Sec.40(a)(i) of the entire amount of payment under consideration. We have deliberated on the aforesaid contentions of the ld. A.R and are unable to persuade ourselves to subscribe to the same. We find that the aforesaid Circular No. 3/2015, dated 12.02.2015 was issued by the CBDT in order to dispel doubts as regards the scope of disallowance contemplated under Sec. 40(a)(i) of the Act in context of “other sum” chargeable under the Act, which are payable outside India or in India to a non-resident, not being a company, or to foreign company. We are of the considered view that as disallowance under Sec. 40(a)(i) in the

case of the present assessee is in context of the amounts paid by it towards 'fees for technical services' to the aforesaid party, and not towards 'other sum' chargeable under the Act, therefore, the aforesaid CBDT circular would not be of any assistance for its case. The contention of the assessee thus fails in terms of our aforesaid observations. We thus being of the considered view that as there is no reason for us to dislodge the well reasoned order of the CIT(A) in context of the issue under consideration, therefore, uphold the disallowance made under Sec. 40(a)(i) of Rs. 4,67,244/- as had been sustained by him. The **Ground of appeal No. 1** is partly allowed in terms of our aforesaid observations.

16. We shall now take up the disallowance of Rs. 1,90,623/- made by the A.O under Sec. 40A(2)(b) and confirmed by the CIT(A). We find that as an identical issue had been adjudicated upon by us while disposing off the ground of appeal No. 3 raised by the assessee in its own case for A.Y 2011-12 in ITA No. 1036/Mum/2016, therefore, our order in respect of the said issue shall apply *mutatis mutandis* for disposing off the present ground of appeal no. 2 raised by the assessee before us. The **Ground of appeal No.2** is dismissed in terms of our aforesaid observations.

17. The appeal of the assessee is partly allowed.

18. The appeal of the assessee for A.Y 2011-12 and A.Y 2012-13 in ITA No. 1036/Mum/2016 and ITA No. 1037/Mum/2016, respectively, are partly allowed in terms of our aforesaid observations.

Order pronounced in the open court on 02.05.2018

Sd/-  
(G.S.PANNU)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 02.05.2018

Ps. Rohit

Sd/-  
(RAVISH SOOD)  
JUDICIAL MEMBER

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**

**आयकर अपीलीय अधिकरण, मुंबई / ITAT,  
Mumbai**