

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH 'B', CHANDIGARH**

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA Nos. 932, 933, 804 & 1321/Chd/2017

(Assessment Years: 2011-12, 2012-13 & 2013-14)

The DCIT
Circle 4(1)
Chandigarh

Vs.

Winsome Yarns Ltd.
SCO 191-192
Sector 34-A
Chandigarh

PAN: AAACW1911H

(Appellant)

(Respondent)

Assessee by	: Shri. Tej Mohan Singh
Department by	: Shri. D.S. Kalyan
Date of hearing	: 11/04/2018
Date of Pronouncement	: 18/05/2018

ORDER

PER DR. B.R.R. KUMAR, A.M. :

All the above appeals have been filed by the Revenue against the order of the Ld. CIT(A)-2, Gurgaon.

2. The issue raised in all the above appeals are common, therefore all the appeals were heard together and are being disposed of by way of this common order.

3. For the sake of convenience we shall be dealing with the appeal of the assessee in ITA No. 932/Chd/2017. The ground raised by the Revenue reads as under:

i) *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing appeal of the assessee without appreciating the facts of the case.*

ii) *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 2,50,04,141/- made u/s 40(a)(ia) on account of non deduction of taxes at source on payments for commission of sales exports and legal and professional charges despite the fact that the assessee failed to deduct taxes at source u/s 195 of the I.T. Act on the payments made to non-residents without appreciating the fact that the income was accrued in-India and the assessee was under statutory obligation to deduct taxes at source.*

4. Brief facts of the case are that the Assessing Officer has disallowed the amounts under section 40(a)(ia) as no TDS was deducted on the sales commission pertaining to exports paid to the parties operating abroad. The Assessing Officer held that even though the commission agents do not have any PE in India and the services were outside India and since the services were rendered for an Indian Company, TDS needs to be deducted.
5. During the hearing before us, the Ld. AR has argued based on the submissions made before the Ld. CIT(A).
6. The complete details of the arguments and the decision of the Ld. CIT(A) are as under:

The appellant company had made payment to various parties for the above services. The expenses were incurred for services rendered outside India and the payments were made to parties who were outside India. The Learned Assessing Officer ought to have appreciated the legal fact that the provisions of Section 195 of Income Tax Act, 1961 would be applicable in conjunct with Section 9 of the Income Tax Act, 1961 which deals with income deemed to accrue or arise in India. The Learned Assessing Officer ought to have appreciated the fact that the parties to whom payments were made had no Permanent Establishment(P.L) in India. The circular of CBDT. Double Taxation Avoidance Agreement (DTAA) have been brushed aside by the Ld.AO in a casual way with ;i predetermined mind to disallow the expenditure In this regard it is stated as under:

Provisions as per Income Tax Act:-

a. *Section 195 states that a person responsible for making payment to non-corporate nonresident assessee or to a company other than domestic company, of any interest other than interest on securities) or any other sum (not being salary) is required, at the time of payment or at the time of credit to the account of payee, interest payable account, or suspense account, or at the time of payment, whichever is earlier to deduct income tax thereon at the rate prescribed by the relevant Finance Act.*

Section 195 will be applicable subject to section 9(Income deemed to accrue or arise in India) As per Section 9 of The Income Tax Act, certain incomes are deemed to accrue or arise in India even though they actually accrue or arise outside India. This section 9 applies to all assessee's irrespective of their residential status, nationality, domicile and place of business. Out of various categories of income which are deemed to accrue or arise in India. One of which is income from business connection in India.

b. *Business Connection includes profession connection. It includes a person acting on behalf of a non-resident and who performs any one or more of the following; Activity one- he exercise in India an authority to conclude contracts on behalf of the nonresident. (It does not cover the activity of only the purchase of goods or merchandise for the non-resident)*

Activity Two- he has no such authority but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods, or merchandise on behalf of the nonresident

Activity three- He habitually secures order in India (mainly or wholly) for the nonresident or for non -residents under the same management.

c. *As per circular No. 23 of year 1969:*

A foreign agent of India Exporter Operates in his home country and no part of his income arise in India.

His commission is usually remitted directly to him outside India is not received by him in India. Therefore such an agent is not liable for tax on this commission in India. This view was reaffirmed by CBDT vide Circular No. 163 of the 1975.

4. As per Circular No. 786 of the year 2000. The deduction of tax at source under section 195 would arise if the payment of commission to the non-resident agent is chargeable to tax in India. In this regard attention to CBDT Circular No. 23 dated 23-07-1969 is drawn, where the taxability of* Foreign Agent of India Exporters. Was. considered along with certain other specific situations. It had been clarified then that where the non-resident agent operates outside the country. No part of his income arises in India. Further, since the payment is usually remitted directly abroad it cannot be held to have been received by or on behalf of the agent in India. Such payments were therefore held to be not taxable in India. The relevant sections, namely section 5(2) and section 9 of the Income Tax Act. 23 shall prevail. No tax is therefore deductible under section 195 and consequently the expenditure on export commission and other related charges payable to a non-resident for services rendered outside India becomes allowable expenditure ".

Taxability depends on payment Establishment (PE). If any non-resident has no payment Establishment (PE) in India, then any commission attributable will not be taxed in India. If the foreign agent has got a PE in India. Then the commission income that is attributable to it would get taxed in India. Usually the foreign agents operate India and hence do not have PE in India.

However, these circulars (No. 23 dated 23-07-1969 dated 29-05-1975 and No. 786 dated 07-02-2000) has been withdrawn vide Circular No. 7 dated 22-01-2009. But this withdrawal of these circulars does not mean that export commission to overseas agents has become taxable in India. 9extract of book" Direct Taxes Reckoner-Dr. Vinod K. Singhania" is enclosed herewith as Annexure -2)

The case laws relied upon by the assessing officer has no direct bearing to the appellant company. The same are inapplicable to the facts and circumstances of the appellant company. Circular No. 786 dated 07-02-2000 has been withdrawn and the same was clarificatory in nature and did not change the legal position in this contest. No IDS was required to be deducted on commission payment to the agent rendering services outside India as they did not have any permanent establishment or business connection in India. No IDS is required to be deducted as per the provision of section 195 of the Income Tax Act 1961 and DTAA is applicable to all payment covered by section 195

Similar issue came up for consideration of M/s IDS Infortech Ltd. vs. DCIT Circle 4(1), in IT A. No 52/Chd/2016 Assessment Year 2009-10 wherein the Hon'ble IT AT, Chandigarh Bench, Chandigarh held that the services rendered by the non residents are not in the nature in technical services, no income deemed to have accrued of the nonresident entities, there is no liability on the assessee to deduct tax at source on such payment. Therefore, the provisions of section 40 (a) (i) of the Act are not exigible in the present case."

21.11.2016

"In reply to your above referred letter, we hereby submit the following documents/information Point wise as per your requirement:

The List of Parties with complete address along with amount of commission/legal and professional charges paid is enclosed as **Annexure-A**.

Nature of service provided by each party is enclosed as **Annexure-B**.

We would like to submit that after due negotiation we raise sale orders to our customers & in sale order the name of commission agent and percentage of commission payable is provided. The copies of some of the sales orders attached for your perusal.

The commission is calculated on pre agreed percentage of sale value through particular commission agent.

There is proper control over quality of service rendered, as commission is paid/credited to agent only when the amount of sale initiated through him is fully realized. The track record of agent as to promotion of the sales and timely realization of sales made through him plays a pivotal role in his quality of service.

We hope you will find the above in order and suffice to your requirement"

S. No.	Name	Address	Amount
1	AARTI IMPEX	11 , EAGLE PLAINS DRIVE, BRAMPTON ON 1 6R 3M6, CANADA	196641
2	AGENCIA FESMAR SA	P O BOX NO.5.SAN PEDRO SULA, HONDURAS	257145
3	AMJ SINGAPORE	5A CRAIG ROAD, NEAR TANJONG BAGAR MARKET, SINGAPORE	79560
4	AMR FAREK HASSIB DERHALI	56 GOMHORIA STREET DOWN TOWN. CARIO, EGYPT	957285
5	CARMEN TRADE LINKS	30 BALGOBIN AVENUE, QUATRE-BORNES, MAURITIUS	371848
6	EXCEL ENTERPRISE -LDH	LUDHIANA ✓	352370
7	F.A.ZAMAN	NARAYNGANJ, BANGLADESH	1658907
8	GENTRACCO U.A.E (F.Z.E.)	P.O BOX NO 20397.AJMAN, United Arab Emirates	521268
9	GLOBAL APPAREL SOURCING LTD	ROOMS 1316, 18-20 13/F HOLLYWOOD PLAZA, 610, NATHAN ROAD, MONGKOK, KOWLOON, HONGKONG	44648
10	HARI KRISHAN ASWANI	JR AMERICA 496 OFIC 321-322, LA-VICTORIA. USA	2234072
11	INTERFIL SPA	ITALY	3318942
12	JAN TRADE INTERNATIONAL	SUITE # 5B (4TH FL.) H#10, R#03, ALI & NOOR HOUSING, SATMOSJID. MOHAMMADPUR., DHAKA, BANGLADESH	202471
13	JK TRADING CO.	JuGong APT 307-1403, Haan-dong, 650, Gwangmyeong-si, Gyeonggi-do., S KOREA	124971
14	M. BOFARULL	NA	103665
15	MC TEXTILES	85. AVENUE, De' LUMA. 2036 LA, SOUKRA TUNISIA	72322
16	MIGUEL LABAN SARQUIS, REPRESENTACIONES	LUIS THAYER, OJEDA 0115 OF 302, 2341 599, CHILLE,	119171
17	MILLENIUM CORPORATION	430/1 JEJGAON IND. AREA. DHAKA-1208, BANGLADESH	183087
18	MIZANUR RAHMAN	PO BOX 171451, DUBAI, United Arab Emirates	145043
19	MOHAMMAD EHTESHAM	400. WALMER ROAD. SUITE 2004. TORONTO-ON MSP-2X7, CANADA	272917
20	MONTESO ANZA LTD	400. WALMER ROAD. SUITE 2004. TORONTO-ON MSP-2X7, CANADA	2675649
21	NAMSAN TRADING	90-145-LODZ NRUTOWICZA, 121 .POLAND	158323
22	NEW EAST IND.IMP EXP.E REP L	VISCONDE DE ABAETE STR N° 129 1ST FLOOR., CEP: 03012-050 SAO PAULO. BRAZIL	234140
23	NIKOLA TASIC	OBILICEV VENAC 74 B. 11271 SURCIN. SERBIA	148139
24	OVERSEASCO TRADING & AGENCY	477 EL-HORRENGA AVENUE. BULKELEY 2131 I.ALEXANDRIA, EGYPT	219650
25	PACIFIC TEXTILE SOLUTIONS LTD.	NA	363865
26	PERUVIAN CAMELID TRADING EIRL	AV. CAMINOS, DEL INCA 2178. SURCO, LIMA, PERU	291156
27	PGT INTERNATIONAL LTD	18, LORD KITCHENER STREET, PORT LOUIS, MAURITIUS	1421953
28	PRIME VENTURE TEXCHEM LTD	SHATABDI CENTRE, SUITE # 15-A. 292, MOTIJHEEL INNER CIRCULAR ROAD. FAKIRAPOOL, DIIAKA. BANGLADESH	258452

29	PT GLOBAL INDOREKSA ASIA	JLN INDUSTRIAL SELATAN VIII, BLOK EE - 6F.KAWASAN INDUSTRI JABABEKA II, CIKARANG - BEKASI.JAWA BARAT,INDONESIA	242513
30	R R TEXTILES INC	5308,OXFORD DR.CYPRESS CA 90630, USA	613140
31	RENNY INDAH SARI	KELAPA GADINGJAKARTAM,INDONESIA.	3175340
32	S S INTERNATIONAL	3/4-A, PURANA PALTAN. SABIR TOWER (1ST FLOOR), DHAKA. BANGLADESH	89297
33	SHAHID TRADING CO.	RM 2207-08. METRO CENTER II, 21 LAMHING STREET,KOWLOON BAY. KOWLOON.HINGKONG, CHINA	45903
34	SOFEENE ENTERPRISES	Singapore	438459
35	TRADE LINE FAR EAST PTE LTD	Singapore	172539
36	VENZOLASCA LT	MOSSACK & FONSECA & CO ,P O BOX 3136,ROAD TOWN.TORTOLA	241720
37	Y. AZOULAY	64 AVENUE HASSAN SEGHIR.CASSABLANCA.MAROCCO	120935
	Total		22127502

Sr No.	Name	Complete Address	Amount (Rs.)
1	MICCINESI E ASSOCIATI	STUDIO LEGALE E TRIBUTARIO,PIAZZA SANT AMBROGIO,N 8- 20123,MILANO,ITALY	1,622,774
2	MICCINESI E ASSOCIATI	STUDIO LEGALE E TRIBUTARIO,PIAZZA SANT AMBROGIO,N.8- 20123,MILANO,ITAI Y	175,189
3	MICCINESI E ASSOCIATI	STUDIO LEGALE E TRIBUTARIO.PIAZZA SANT AMBROGIO.N 8- 20123,MILANO,ITALY	76,161
4	PRICewaterHOUSECOOPERS LIMITED	JULIA HOUSE,3 THEMISTOELES DERVIS STREET, CY-1086 NICOSIA,PO BOX 21612, CY-1581.NICOSIA,CYPRUS	332,192
5	PRICewaterHOUSECOOPERS LIMITED	JULIA HOUSE,3 THEMISTOELES DERVIS STREET, CY-1086 NICOSIA,PO BOX 21612, CY-1581,NICOSIA,CYPRUS	118,703
6	RICARDO BINI		471,369
7	STABB & ASSOCIATES	ANA ANGHEL LAW OFFICE,STR. DR. HERESCU 15, SECTOR 5, BUCHAREST, ROMANIA	23,409
8	STABB & ASSOCIATES	ANA ANGHEL LAW OFFICE,STR DR HERESCU 15, SECTOR 5, BUCHAREST, ROMANIA	56,842
	Total		2876639

Sr No.	Name	Address	Nature of Service
1	AARTI IMPEX	11 , EAGLE PLAINS DRIVE,BRAMPTOR ON 1 6R 3M6,CANADA	Commission on Sales
2	AGENCIA FESMAR SA	P O BOX NO 5,SAN PEDRO SULA, HONDRUS	Commission on Sales
3	AMJ SINGAPORE	5A CRAIG ROAD.NEAR TANJONG BAGAR MARKET,SINGAPORE	Commission on Sales
4	AMR TAREK HASSIB DERHALI	56 GOMHORIA STREET, DOWN	Commission

		TOWN, CARIO, EGYPT	n on Sales
5	CARMEN TRADE LINKS	30 BALGOBIN AVENUE, QUATRE-BORNES, MAURITIUS	Commission on Sales
6	EXCEL ENTERPRISE -LDH	LUDHIANA	Commission on Sales
7	F A ZAMAN	NARAYNGANJ, BANGLADESH	Commission on Sales
8	GENTRACCO U.A.E.(F.Z.E)	P O BOX NO 20397.AJMAN, United Arab Emirates	Commission on Sales
9	GLOBAL APPAREL SOURCING LTD	ROOMS 1316, 18-20 13/F HOLLYWOOD PLAZA, 610, NATHAN ROAD, MONGKOK, KOWLOON, HONGKONG	Commission on Sales
10	HARI KRISHAN ASWANI	JR AMERICA 496 OFIC 321-322.LA-VICTORIA, USA	Commission on Sales
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14	M BOFARULL	NA	Commission on Sales
15	MC TEXTILES	85, AVENUE, De' LUMA, 2036 LA, SOUKRA, TUNISIA	Commission on Sales
16	MIGUEL LABAN SARQUIS, REPRESENTACIONES	LUIS THAYER OJEDA 0115 OF 302, 2341599, CHILLE.	Commission on Sales
17	MILLENIUM CORPORATION	430/1, TEJGAON IND AREA, DHAKA-1208, BANGLADESH	Commission on Sales
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20	MONTESO ANZA LTD	400, WALMER ROAD, SUITE 2004, TORONTO-ON MSP-2X7, CANADA	Commission on Sales
21	NAMSAN TRADING	90-145-LODZ NRUTOWICZA, 121, POLAND	Commission on Sales
22	NEW EAST IND IMP EXP E REP L	VISCONDE DE ABAETE STR N? 129 1ST FLOOR, CEP: 03012-050 SAO PAULO, BRAZIL	Commission on Sales
23	NIKOLA TASIC	OBILICEV VENAC 74 B, 11271 SURCIN, SERBIA	Commission on Sales
24	OVERSEASCO TRADING & AGENCY	477 EL-HORRENGA AVENUE, BULKELEY 21311, ALEXANDRIA, EGYPT	Commission on Sales
25	PACIFIC TEXTILE SOLUTIONS LTD	NA	Commission on Sales
26	PERUVIAN CAMELID TRADING EIRL	AV CAMINOS, DEL INCA 2178, SURCO, LIMA, PERU	Commission on Sales
27	PGT INTERNATIONAL LTD	18, LORD KITCHENER STREET, PORT LOUIS, MAURITIUS	Commission on Sales
28	PRIME VENTURE TEXCHEM LTD	SHATABDI CENTRE, SUITE # 15-A, 292, MOTIJHEEL INNER CIRCULAR ROAD, FAKIRAPOOL, DHAKA, BANGLADESH	Commission on Sales
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34	SOFEENE ENTERPRISES	Singapore	Commission on Sales
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36	VENZOLASCA LT	MOSSACK & FONSECA & CO., P.O. BOX 3136, ROAD TOWN, TORTOLA	Commission on Sales
37	Y AZOULAY	64 AVENUE HASSAN SEGHIR, CASSABLANCA, MAROCCO	Commission on Sales

Sr No.	Name	Complete Address	Nature of Service
1	MICCINESI E ASSOCIATI	STUDIO LEGALE E TRIBUTARIO, PIAZZA SANT AMBROGIO, N.8- 20123, MILANO, ITALY	ADVISOR SERVICES CHGES FOR THE FILING OF THE APPEAL
2	MICCINESI E ASSOCIATI	STUDIO LEGALE E TRIBUTARIO, PIAZZA SANT AMBROGIO, N.8- 20123, MILANO, ITALY	ADVISOR SERVICES CHGES FOR THE FILING OF THE APPEAL
3	MICCINESI E ASSOCIATI	STUDIO LEGALE E TRIBUTARIO, PIAZZA SANT AMBROGIO, N.8- 20123, MILANO, ITALY	ADVISOR SERVICES CHGES FOR THE FILING OF THE APPEAL
4	PRICewaterhouseCOOPERS LIMITED	JULIA HOUSE, 3 THEMISTOELES DERVIS STREET, CY-1086 NICOSIA, PO BOX 21612, CY-1581, NICOSIA, CYPRUS	COMPLIANCE SERVICES RENDERED
5	PRICewaterhouseCOOPERS LIMITED	JULIA HOUSE, 3 THEMISTOELES DERVIS STREET, CY-1086 NICOSIA, PO BOX 21612, CY-1581, NICOSIA, CYPRUS	ADVISORY SERVICES RENDERED
6	RICARDO BINI		CONSULTANCY CHARGES
7	STABB & ASSOCIATES	ANA ANGHEL LAW OFFICE, STR. DR. HERESCU 15, SECTOR 5, BUCHAREST, ROMANIA	LEGAL SERVICES
8	STABB & ASSOCIATES	ANA ANGHEL LAW OFFICE, STR. DR. HERESCU 15, SECTOR 5, BUCHAREST, ROMANIA	LEGAL SERVICES

3.2. I have given careful consideration to the issue in hand. The dynamics of taxation of the remittance made to non-resident by an entity in India has been analyzed by Hon'ble jurisdictional ITAT in the case of **IDS Infotech Ltd. v. Deputy Commissioner of Income-tax, Circle 4(1), Chandigarh [2016] 69 taxmann.com 393 (Chandigarh -Trib.)** and the following has been held:

25. The basic issue is whether the tax is to be deducted while making these impugned payments. The Assessing Officer has invoked the provisions of section 40(a)(i) of the Act in this regard. The provisions of section 40(a) (i) of the Act to the extent relevant in the present case reads as under:

40(a)(i) 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

(A) 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 [during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200]:

[Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, 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;

26. The most important terms in the provisions of this section are 'on which tax is deductible at source' under Chapter-XVII, meaning thereby that only those payments made to non-residents on which tax is required to be deducted as provided under the relevant Chapter, the provisions of this section can be invoked. Chapter-XVII deals with collection and recovery of taxes while part-B of this Chapter deals with tax deduction at source, the provisions relating to tax to be deducted out of payment made to a nonresident are provided in section 195 of the Act, which read as under :

"195(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest on securities) 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: "

27. The most important terms in this section are "chargeable under the provisions of this Act". From this, it is very clear that only if an amount is chargeable under the Income Tax Act, the liability to deduct tax on the payment of such amount arises. Charge of income tax is provided under section 4 of the Act, while scope of total income is provided in section 5 of the Act. The provisions of section 5 of the Act relating to scope of total income in respect of a non-resident are provided in sub-section (2) of said section, which read as under:

"5(2) Subject to the provisions of this Act, 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. Explanation 1-Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2 - For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India. "

28. From the bare perusal of the provisions of the above section, it is quite clear that a non-resident is chargeable to tax if it receives or deemed to receive any amount in India. The provisions emerging from the analysis are very clear that, when income accrues, arises or received in India, the same is taxable. Income which is deemed to accrue or arise in India is taxable in India, even if the same is not actually accrues, arises or receives in India.

A careful perusal of the above shows that any such remittance made to any non resident would be subjected to TDS only if it includes "sum chargeable to tax" under Income Tax Act in India. In case such element is missing then no tax is to be deducted. Further, combined reading of section 4, Section 5 and section 9 would suggest that

payments made to rfon resident as business commission can only be considered from the view point of section 9 to find that whether it has any element of income deem to have accrue or arise in India.

3.2.1. **'Concept of deemed to accrue or arise in India':** The dispute may be only with regard to the impugned amount being income 'deemed to accrue or arise in India'. Various instances of income considered to be deemed to accrue or arise in India to a nonresident are provided in section 9 of the Income Tax Act. For the purpose of adjudicating the issues arising in the present appeal, the relevant provisions are that of section 9(1)(i) of the Act, which read as under :

"9 (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; [Explanation 1]: For the purposes of this clause—

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

(b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export;

** ** *

[(c) in the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India;]

[(d) in the case of a non-resident, being—

(1) an individual who is not a citizen of India; or

(2) a firm which does not have any partner who is a citizen of India or who is resident in India; or

(3) a company which does not have any shareholder who is a citizen of

India or who is resident in India, no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations which are confined to the shooting of any cinematograph film in India;]

no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations which are confined to the shooting of any cinematograph film in India;]

[Explanation 2: For the removal of doubts, it is hereby declared that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident,

(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident unless his activities are limited to the purchase of goods or merchandise for the non-resident; or

(b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or

(c) habitually secures orders in India, mainly or wholly for the nonresident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident:

Provided that such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business : Provided further that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident (hereinafter in this proviso referred to as the principal non-resident) or on behalf of such nonresident and other non-residents which are controlled by the principal non-resident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status.]"

3.2.2 It is to be judged from the facts and circumstances of the present case, whether the impugned payments are deemed to accrue or arise in India to the respective recipients, as we have already mentioned that only those payments which are of the nature of sum chargeable under the provisions of the Act are exigible for provision of tax deduction at source. Here we are inclined to refer to the judgment of the 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, whereby it has been held that section 195(1) of the Act uses the expression 'sum' chargeable under the provision of the Act and weightage is needed to be given to these words. Further, section 195 uses the word 'payer' and not the word 'assessee'. The payer is not assessee. The payer becomes an assessee in default only when he fails to fulfil statutory obligation under section 195(1) of the Act. If the payment does not have the element of the income, the payer cannot be made liable. The Hon'ble Supreme Court thus rejected the contention of the Department by holding that if the sum paid is not chargeable to tax, then no tax is required to be deducted.

3.2.3. As explained, in **CIT v. R.D. Aggarwal & Co. [1965] 56 ITR 20 (SC)**, which stands referred to in **CIT v. Toshoku Ltd. [1980] 125 ITR 525 (SC)**, and continues to govern the field, business connection involves the relationship between the business carried on by a non-resident (outside taxable territories), which yields profits or gains, and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits and gains. It predicates an element of continuity, and postulates a real and intimate relation between the trading activity carried on outside the taxable territories and the trading activity within the territories, the relation between the two contributing to the earning of income by the non-resident in his trading activity - the Agents in the present case. The matter is, thus, principally and primarily factual.

3.2.4 In the facts of the case, the commission is for soliciting sale orders. No part of the **said activity is stated as** carried out in India, where there is admittedly no permanent establishment (PE) of the non-resident agents. The income is by way of commission per se, so that no part of it can be said to be taxable in India, as clarified by the Apex Court in Toshoku Ltd. (supra). In the facts of that case, the commission was in respect of participation in a show in India, which was facilitated by the agent by booking orders by non-resident Exhibitors. The sales in the instant case, on the supply of goods in pursuance to the purchase order booked by the agents, and for which therefore commission is allowed to them, takes place outside India.

3.2.5 The decision in the case of **GE India Technology Centre (P.) Ltd. v. CIT [2010] 327 ITR 456/193 Taxman 234/7 taxmann.com 18 (SC)** would, accordingly, clearly apply in the facts of the case, so that the provisions of section 195 of the Act and, consequently, of section 40(a)(i), are inapplicable. The Hon'ble court has scanned the entire law on this aspect as under:

"7. Under section 195(1), the tax has to be deducted at source from interest (other than interest on securities) or any other sum (not being salaries) chargeable under the Income-tax Act in the case of non-residents only and not in the case of residents. Failure to deduct the tax under this section may disentitle the payer to any allowance apart from prosecution under section 276B. Thus, section 195 imposes a statutory obligation on any person responsible for paying to a non-resident, any interest (not being interest on securities) or any other sum (not being dividend) chargeable under the provisions of the Income-tax Act, to deduct income-tax at the rates in force unless he is liable to pay income-tax thereon as an agent. Payment to non-residents by way of royalty and payment for technical services rendered in India are common examples of sums chargeable under the provisions of the Income-tax Act to which the afore-stated requirement of tax deduction at source applies. The tax so collected and deducted is required to be paid to the credit of the Central Government in terms of section 200 of the Income-tax Act read with rule 30 of the Income-tax Rules, 1962. Failure to deduct tax or failure to pay tax would also render a person liable to penalty under section 201 read with section 221 of the Income-tax Act. In addition, he would also be liable under section 201(1A) to pay simple interest at 12 per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid. The most important expression in section 195(1) consists of the words "chargeable under the provisions of the Act". A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the Income-tax Act. For instance, where there is no obligation on the part of the payer and no right to receive the sum by the recipient and the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the Income-tax Act. It may be noted that section 195 contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which have an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct TAS in respect of such composite payments. The obligation to deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. This obligation being limited to the appropriate proportion of income flows from the words used in section 195(1), namely, "chargeable under the provisions of the Act". It is for this reason that vide Circular No. 728 dated October 30, 1995 the Central Board of Direct Taxes has clarified that the tax deductor can take into consideration the effect of the DTAA in

respect of payment of royalties and technical fees while deducting TAS. It may also be noted that section 195(1) is in identical terms with section 18(3B) of the 1922 Act. In *CIT v. Cooper Engineering Ltd.* [1968] 68 ITR 457 it was pointed out that if the payment made by the resident to the non-resident was an amount which was not chargeable to tax in India, then no tax is deductible at source even though the assessee had not made an application under section 18(3B) (now section 195(2) of the Income-tax Act). The application of section 195(2) presupposes that the person responsible for making the payment to the non-resident is in no doubt that tax is payable in respect of some part of the amount to be remitted to a non-resident but is not sure as to what should be the portion so taxable or is not sure as to the amount of tax to be deducted. In such a situation, he is required to make an application to the Income-tax Officer (TDS) for determining the amount. It is only when these conditions are satisfied and an application is made to the Income-tax Officer (TDS) that the question of making an order under section 195(2) will arise. In fact, at one point of time, there was a provision in the Income-tax Act to obtain a NOC from the Department that no tax was due. That certificate was required to be given to the RBI for making remittance. It was held in the case of *Czechoslovak Ocean Shipping International Joint Stock Company v. ITO* [1971] 81 ITR 162 (Cal.) that an application for NOC cannot be said to be an application under section 195(2) of the Act. While deciding the scope of section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of section 195. Hence, apart from section 9(1), sections 4, 5, 9, 90, 91 as well as the provisions of the DTAA are also relevant, while applying tax deduction at source provisions. Reference to the Income-tax Officer (TDS) under section 195(2) or 195(3) either by the non-resident or by the resident payer is to avoid any future hassles for both resident as well as non-resident. In our view, section 195(2) and 195(3) are safeguards. The said provisions are of practical importance. This reasoning of ours is based on the decision of this court in *Transmission Corporation* in which this court has observed that the provision of section 195(2) is a safeguard. From this it follows that where a person responsible for deduction is fairly certain then he can make his own determination as to whether the tax was deductible at source and, if so, what should be the amount thereof. Submissions and findings thereon

8. If the contention of the Department that the moment there is remittance the obligation to deduct TAS arises is to be accepted then we are obliterating the words "chargeable under the provisions of the Act" in section 195(1). The said expression in section 195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. The payer is bound to deduct TAS only if the tax is assessable in India. If tax is not so assessable, there is no question of TAS being deducted. (See : *Vijay Ship Breaking Corporation v. CIT* [2009] 314 ITR 309).

9. One more aspect needs to be highlighted. Section 195 falls in Chapter XVII which deals with collection and recovery. Chapter XVII-B deals with deduction at source by the payer. On analysis of various provisions of Chapter XVII one finds use of different expressions, however, the expression "sum chargeable under the provisions of the Act" is used only in section 195. For example, section 194C casts an obligation to deduct TAS in respect of "any sum paid to any resident". Similarly, sections 194EE and 194F, inter alia, provide for deduction of tax in respect of "any amount" referred to in the specified provisions. In none of the provisions we find the expression "sum chargeable under the provisions of the Act", which as stated above, is an expression used only in section 195(1). Therefore, this court is required to give meaning and effect to the said expression. It follows, therefore, that the obligation to deduct TAS arises only when there is a sum chargeable under the Act. Section 195(2) is not merely a provision to provide information to the Income-tax Officer (TDS). It is a provision requiring tax to be deducted at source to be paid to the Revenue by the payer who makes payment to a non-resident. Therefore, section 195 has to be read in conformity with the charging provisions, i.e., sections 4, 5 and 9. This reasoning flows from the words "sum chargeable under the provisions of the Act" in section 195(1). The fact that the Revenue has not obtained any information per se cannot be a ground to construe section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression "sum chargeable under the provisions of the Act" from section 195(1). While interpreting a section one has to give weightage to every word used in that section. While interpreting the provisions of the Income-tax Act one cannot read the charging sections of that Act de hors the machinery sections. The Act is to be read as an integrated code. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in the case of *CIT v. Eli Lilly and Co. (India) (P.) Ltd.* [2009] 312 ITR 225 the provisions for deduction of TAS which are in Chapter XVII dealing with collection of taxes and the charging provisions of the Income-tax Act form one single integral, inseparable code and, therefore, the

provisions relating to TDS apply only to those sums which are "chargeable to tax" under the Income-tax Act. It is true that the judgment in *Eli Lilly* [2009] 312 ITR 225 was confined to section 192 of the Income-tax Act. However, there is some similarity between the two. If one looks at section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head salaries". Similarly, section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum "chargeable under the provisions of the Act", which expression, as stated above, do not find place in other sections of Chapter XVII. It is in this sense that we hold that the Income-tax Act constitutes one single integral inseparable code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the Income-tax Act. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the moneys deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the Income-tax Act by which a payer can obtain refund. Section 237 read with section 199 implies that only the recipient of the sum, i.e., the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all payments, the payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum chargeable under the Act. The interpretation of the Department, therefore, not only requires the words "chargeable under the provisions of the Act" to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax. In our view, section 195(2) provides a remedy by which a person may seek a determination of the "appropriate proportion of such sum so chargeable " where a proportion of the sum so chargeable is liable to tax. The entire basis of the Department's contention is based on administrative convenience in support of its interpretation. According to the Department, huge seepage of revenue can take place if persons making payments to non-residents are free to deduct TAS or not to deduct TAS. It is the case of the Department that section 195(2), as interpreted by the High Court, would plug the loophole as the said interpretation requires the payer to make a declaration before the Income-tax Officer (TDS) of payments made to non-residents. In other words, according to the Department, section 195(2) is a provision by which the payer is required to inform the Department of the remittances he makes to non-residents by which the Department is able to keep track of the remittances being made to non-residents outside India. We find no merit in these contentions. As stated hereinabove, section 195(1) uses the expression "sum chargeable under the provisions of the Act." We need to give weightage to those words. Further, section 195 uses the word "payer" and not the word "assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfil the statutory obligation under section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default. The abovementioned contention of the Department is based on an apprehension which is ill-founded. The payer is also aft assessee under the ordinary provisions of the Income-tax Act. When the payer remits an amount to a non-resident out of India he claims deduction or allowances under the Income-tax Act for the said sum as an "expenditure". Under section 40(a) (i), inserted, vide Finance Act, 1988, with effect from April 1, 1989, payment in respect of royalty, fees for technical services or other sums chargeable under the Income-tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in respect of payments outside India which are chargeable under the Income-tax Act. This provision ensures effective compliance with section 195 of the Income-tax Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the Income-tax Act. In a given case where the payer is an assessee he will definitely claim deduction under the Income-tax Act for such remittance and on inquiry if the Assessing Officer finds that the sums remitted outside India come within the definition of royalty or fees for technical service or other sums chargeable under the Income-tax Act then it would be open to the Assessing Officer to disallow such claim for deduction. Similarly, vide the Finance Act, 2008, with effect from April 1, 2008, sub-section (6) has been inserted in section 195 which requires the payer to furnish information relating to payment of any sum in such form and manner as may be prescribed by the Board. This provision is brought into force only from April 1, 2008. It will not apply for the period with which we are concerned in these cases before us. Therefore, in our view, there are adequate safeguards in the Act which would prevent revenue leakage.

Applicability of the judgment in the case of Transmission Corporation (supra)

10. In *Transmission Corporation's* case [1999] 239 ITR 587 (SC) a non-resident had entered into a composite contract with the resident party making the payments. The said composite contract not only comprised supply of plant, machinery and equipment in India, but also comprised the installation and commissioning of the same in India. It was admitted that the erection and commissioning of plant and machinery in India gave rise

to Income-taxable in India. It was, therefore, clear even to the payer that payments required to be made by him to the non-resident included an element of income which was exigible to tax in India. The only issue raised in that case was whether TDS was applicable only to pure income payments and not to composite payments which had an element of income embedded or incorporated in them. The controversy before us in this batch of cases is, therefore, quite different. In *Transmission Corporation case* [1999] 239 ITR 587 (SC) it was held that TAS was liable to be deducted by the payer on the gross amount if such payment included in it an amount which was exigible to tax in India. It was held that if the payer wanted to deduct TAS not on the gross amount but on the lesser amount, on the footing that only a portion of the payment made represented "income chargeable to tax in India", then it was necessary for him to make an application under section 195(2) of the Act to the Income-tax Officer (TDS) and obtain his permission for deducting TAS at lesser amount. Thus, it was held by this court that if the payer had a doubt as to the amount to be deducted as TAS he could approach the Income-tax Officer (TDS) to compute the amount which was liable to be deducted at source. In our view, section 195(2) is based on the "principle of proportionality". The said subsection gets attracted only in cases where the payment made is a composite payment in which a certain proportion of payment has an element of "income" chargeable to tax in India. It is in this context that the Supreme Court stated, "If no such application is filed, income-tax on such sum is to be deducted and it is the statutory obligation of the person responsible for paying such 'sum' to deduct tax thereon before making payment. He has to discharge the obligation to TDS". If one reads the observation of the Supreme Court, "the words 'such sum' clearly indicate that the observation refers to a case of composite payment where the payer has a doubt regarding the inclusion of an amount in such payment which is exigible to tax in India. In our view, the above observations of this court in *Transmission Corporation case* [1999] 239 ITR 587 (SC) which are put in italics have been completely, with respect, misunderstood by the Karnataka High Court to mean that it is not open for the payer to contend that if the amount paid by him to the nonresident is not at all "chargeable to tax in India", then no TAS is required to be deducted from such payment. This interpretation of the High Court completely loses sight of the plain words of section 195(1) which in clear terms lay down that tax at source is deductible only from "sums chargeable" under the provisions of the Income-tax Act, i.e., chargeable under sections 4, 5 and 9 of the Income-tax Act." (underline provided & portion highlighted by us)

3.2.6. The aforesaid decision of Hon'ble Supreme Court has discussed the case law of *Transmission Corporation* which has been distinguished on the facts that in that case there was a composite contract having bearings in India. In the present case, the entire activity of sales done by the respective commission agents is outside the territories of India. The argument of the Assessing Officer that the sales pertain to Indian entity does not hold good ground because by that analogy each and every sale would become taxable in India. In consideration of the decided cases as above and the facts of the present case, it can be concluded that since there exists no income chargeable to tax having accrued or arisen to the foreign commission agents in India, therefore provisions of tax withholding are not applicable. Under such circumstances, there was no default as contemplated under section 40 (a) (ia) of Income Tax Act.

7. Ld. DR relied on the order of the Assessing Officer.

8. We have gone through the facts of the case and find that (a) the agents abroad were non-residents operating outside India; (b) the commission paid relates to services provided outside India; (c) the agents did not have any permanent establishment in India; and (d) the amounts were remitted directly outside India. Reliance is also placed on the judgment of Hon'ble Madras High Court in case of *Farida Leather Company* in appeal no. 484 of 2015 dt. 02/01/2016 wherein it was held that Merely because a person has not deducted tax at source or a remittance abroad, it cannot be inferred that the person making the remittance, 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. The tax withholding liability of the

payer is inherently a vicarious liability on behalf of the recipient and therefore, when the recipient / foreign agent do 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.

9. 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 were 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 consists in the development and transfer of a technical plan or design. The parties merely source the prospective buyers for effecting sales by the assessee.

10. When the transaction does not attract the provisions of Section 9 of the Act, the Revenue has no case and the appeal is liable to be dismissed.

11. In the result, all the appeals of the Revenue are dismissed.

12. However before parting we find that commission on sales has been paid to one M/s Excel Enterprises, Ludhiana at S.No. 6 of the table (A.Y. 2011-12), Shroff Textile Export at S.No. 40, Taj Club Marketing Pvt. Ltd. at S.No. 45, Vijay Kumar Kapoor at S.No. 49 and Vinod Kumar Kirori at S.No. 50 (A.Y. 2012-13) are operating from India. Hence, the addition made by the Assessing Officer under section 40(a)(ia) to that extent stands confirmed.

Order pronounced in the open Court.

Sd/-
(SANJAY GARG)
JUDICIAL MEMBER
 Dated : 18/05/2018
 AG

Sd/-
(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER

Copy to: 1.The Appellant, 2. The Respondent, 3. The CIT(A), 4. The CIT, 5. The DR