

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, AHMEDABAD**

**BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

I.T.A. No.355/Ahd/2018
(Assessment Year : 2014-15)

ACIT.
Cir-2(1)(2),
Ahmedabad-380 014.

Vs. M/s. M&B Engineering Ltd.,
M&B House, 51, Chandrodaya
Society, Opp: Golden Tirangle,
Stadium Road,
Ahmedabad -380 014.

[PAN No. AAACM 7930 Q]

(Appellant)

..

(Respondent)

Appellant by : Shri Lalit P. Jain, Sr. D.R.
Respondent by : Shri Sunil Talati, A.R.

Date of Hearing 06/09/2018
Date of Pronouncement 30/11/2018

ORDER

PER Ms. MADHUMITA ROY - JM:

The instant appeal has been preferred before us by the revenue against the order dated 30.11.2017 passed by the Commissioner of Income Tax(Appeals)-2, Ahmedabad under section 143(3) of the Income Tax Act, 1961 arising out of the order dated 17.10.2016 passed by the Dy. Commissioner of Income Tax, Circle-2(1)(2), Ahmedabad for the Assessment Year 2014-15.

3. In this particular case, the revenue has challenged the deletion of disallowance of commission to foreign agents amounting to Rs.2,93,56,350/- paid by the assessee in the absence of lead evidence to prove the factum of actual rendering of services by such recipients particularly when such disallowance was made u/s 40(a)(ia) of the Act on export commission payments made to the Non-resident Agents. The revenue has also questioned the impugned order which was passed without appreciating the fact that in

terms of the provision of Section 9(1)(vii) of the Act such payments are chargeable to tax and therefore assessee is required to deduct TDS on such remittances.

4. The assessee an Indian Company and engaged in the business of supply and erection of building on part thereof. On perusal of the Profit and Loss account for the year under consideration, it is noticed that the assessee debited an expenditure of Rs.3,16,15,000/- being sales and commission under the head "Other Expenses". The assessee was directed to furnish details along with documentary evidences in respect of such payment of commission expenses upon which relevant documents were furnished by the assessee before the Learned Assessing Officer. It revealed therefrom that the assessee has paid commission amounting to Rs.2,93,56,350/- to non-resident foreign agent without deducting the tax at source. The assessee then was asked to submit the copy of agreement with commission agents, nature of services rendered, basis of commission.

5. In reply thereof the assessee categorically mentioned that the assessee paid commission towards procurement of orders in the earlier years which were wholly and exclusively for the purpose of business and the same was accepted by the department. However, the assessee has not specifically submitted any bill from which it could be ascertained that the assessee has made the commission payments towards that bill. The invoices raised by Stone hill Electromechanical contracting in UAE has also been submitted by the assessee but not the details of the orders thereof. However, the Learned Assessing Officer was not satisfied with the contention made by the assessee and ultimately the commission expenses to foreign agents has been disallowed under section 37(1) of the act. Further that the expenditure claimed under the head commission expenses paid to non residents has been disallowed and added back to the income of the assessee under section 40(a)(i) of the Act for non-reduction of TDS under section 195 of

the Act by the assessee. In appeal the Learned CIT(A) deleted the addition made by the Learned Assessing Officer. Hence the instant appeal filed by the revenue before us.

6. At the time of the hearing of the appeal the Learned Representative of the department relied upon the order passed by the Learned Assessing Officer. On the other hand the Learned counsel for the assessee submitted before us that the agents was non-resident, was acting outside India were providing the services in lieu of commission from abroad. The said agent does not have any permanent establishment in India. In the absence of any activity being carried out in India by a non resident commission agent the commission does not accrue or arise in India and therefore is not taxable in India. The representative of the assessee relied upon the judgment passed by the Coordinate Bench in ITA No. 2503/Ahd/2016 for assessment year 2013-14 which was delivered on the issue identical to the instant case.

7. The assessee further submitted before us that the identical claim of the assessee was accepted and ultimately allowed by the First Appellate Authority for A.Y. 2012-13. The said fact was also brought to the notice of Learned Assessing Officer who however did not consider the same in its proper prospective. The Learned AR prays for rejection of this appeal preferred by the Revenue before us.

8. We have heard the Learned counsel appearing for the parties, we have perused the relevant materials available on record. We find while coming to the conclusion in respect of liability to deduct tax at source by the assessee the Learned Assessing Officer came to a finding that the identity of commission agents has not been proved by the assessee, neither the agreements been submitted by the assessee. It was further observed by the Learned Assessing Officer that it could be ascertained from the agreement since not submitted by the assessee that the assessee made the commission payment to Stone Hill Electromechanical contracting of UAE whereas the assessee has made sales to other

countries like Tanzania and Mozambique. Therefore the assessee failed to specify as to who this commission agents based in UAE made sales to countries like Tanzania and Mozambique. The terms and condition for such payment of commission and the role of commission agent has not been clarified by the assessee as also observed by the Learned Assessing Officer. The assessee has paid commission as high as 20% to the commission agent as contended by the Learned Assessing Officer. The proof of services rendered by the commission agents has not been submitted by the assessee as also one of the findings of the Learned Assessing Officer. In the absence of any proof towards the identity of the commission agents or that the services rendered by the agents the commission expenses to foreign agents has been disallowed under section 37(1) of the Act.

9. Apart from that according to the Learned Assessing Officer since the assessee failed to deduct tax on the commission payment for non-resident foreign agents further show-cause dated 13.10.2016 was issued to him as to why commission on which TDS is not deducted should not be disallowed and added to the income of the assessee. The assessee was further directed to furnish agreement, nature of services provided by the commission agents, details of sale in order to prove genuineness of transaction.

10. In reply to the said show-cause the assessee submitted his written arguments dated 17.10.2016 *inter alia* as follows:

“With regard to asking the complete names, addresses & services rendered of the parties to whom commission on export sales have been paid during the year under consideration to foreign/ overseas commission agents. In this connection, we have already submitted the required details in our earlier submissions in response to details asked vide your notice. Out of total foreign sales commission on exports, of Rs.29356350/-. We have paid an amount Rs.8970500/- to Stone Hill Electromechanical Contracting, an overseas agent having their office situated at Stone Hill Electromechanical Contracting LLC. P.O. Box 96255, Dubai, U.A.E., on export sales and an amount of Rs.20385850/- is paid to Vibgyor International F.Z. LLC, an overseas agent, having their office situated at P.O. Box : 34632, Rak Investment Authority. U.A.E. Statement showing the complete such details of all transactions of export sales and commission part thereon to Stone Hill

Mechanical Contracting and Vibgyor International F.Z. LLC, is enclosed as per Annexure. It is submitted that such commission have been paid by our company to overseas agents against their services rendered towards procurements of orders, follow up for payments from, abroad, co-ordination for execution of supply, etc. i.e. wholly & exclusively for the purpose of business. This type of commission to overseas agents on export sales have been paid in earlier years, a/so and same was accepted in the earlier years scrutiny asst. made u/s. 143(3) upto A. Y. 2011-12. by oil earlier assessing office/s Overseas agent to whom commission is paid is not having any business establishment or set up in India and his income is not at all liable to tax in India, has provisions of Section 195 is not applicable.

From (he details of commission given including the furnishing of the relevant forms required to be submitted at the time of Remittances such as 15CB/CA etc., that the liability towards the TDS on such payments were not arisen because the persons/parties to whom Commission has been paid has tendered the services outside India & also not having any permanent establishment and set up in India. In short, it is submitted that the payments so made by us towards commission to Non-resident does not having/involving income chargeable to tax in India & therefore not attracted at all for deduction of TDS. In furtherance, we have to submit as under:

Section 40(a)(i) states that specified payments to non-residents on which tax is deductible at source shall not be allowed to be deducted in computing the business income, if the tax has not been deducted or paid in accordance with the relevant provisions. In this context, it is importance to note that there must be a clear finding of the AO that payment on which tax is deductible at source has not been deducted.”

However, such explanation given by the assessee was not accepted by the assessing officer in the absence of any contract agreement with the foreign agents and the nature of services rendered on the basis of which the commission has been paid been furnished by the assessee. According to the assessing officer though the agents have rendered services abroad and have solicited orders therefrom the right to receive the commission arises in India with the order executed by the assessee in India and thus according to him the income accrued is sourced in India and the said commission is taxable. Thus the provision of section 195 is squarely applicable to the case of the assessee and the obligation to deduct tax at source under the said provision has been failed to be complied

with by the assessee as held by the Learned Assessing Officer and the expenditure claimed under the head commission expenses paid to non residents has been disallowed and added back to the income of the assessee under section 40(a)(i) of the Act.

11. In appeal, Learned CIT(A) considered the details submissions made by the assessee. The Learned CIT(A) also considered the submissions made by the assessee that no disallowance in this regard was made in the scrutiny assessment completed for A.Y. 2011-12. Further that the plea as the assessee has complied with the provisions of the Income Tax Act, 1961 and the DTAA and accordingly was not under an obligation to make any withholding tax in terms of the beneficial provisions of Section 90(2) of the Act. The First Appellate Authority particularly observed that all the evidences including bank payment details, bank certificate for export realization, company payment advances, form no.15CA, 15CB, credit notes to overseas agent, invoices for export by the company with commission amount were duly furnished for consideration of the issue in justifying the commission of overseas agents by the assessee before the Assessing Officer which was not being controverted. He thus concluded that the commission payment made by the assessee was genuine; the same was paid through banking channels on export orders procured and were made for business purpose in prudent way to increase export and increase customer bills for foreign country. He further observed as follows:

“2.8. With regard to the provisions of section 9(1)(i), it was submitted that the overseas agent was not doing any business in India. It was merely providing export orders to facilitate appellant. Further, the overseas agent did not had any business connection in India, it was further claimed that there is no income deemed to accrue or arise in India in view of the explanations to the provisions of section 9(1)(i) of the I.T. Act as the overseas agent had rendered services outside India and the commission was also paid to them outside India. Hence, there was no obligation to deduct the tax from such commission payments as per the provisions of section 195 of the I.T. Act.

2.9. Thus, it has been submitted that the identity and genuineness of the overseas commission agent is proved with the evidences such as, credit notes to overseas agents, export invoices, shipping bills, bank certificate for export

realization, copy of Form No. 15CA & 6CB and commission payment etc. as discussed above.

2.10. Having considered the facts and submissions, the issues which are to be examined and decided are as under:-

- 1. Whether the commission paid to foreign agents is taxable in India by virtue of the provisions of section 5(2)(b) read with section 9(1)(i) of Income Tax Act.*
- 2. Whether the provisions of section 195(2) were applicable on the appellant and he should have deducted tax and in case of no deduction he should have obtained a no deduction certificate from the AO. And*
- 3. Whether the commission paid was genuine and the services have been rendered.*

2.11. Regarding the first issue it is noted from the evidence, given by the appellant as well as noted by the AO in his order that the services have been tendered by the foreign agents outside India. The sales were booked by them in other countries or for the country for which they have been appointed as commission agents. None of the activities soliciting the client and procuring the orders has taken place in India. The goods were being delivered by the appellant company in the other country. The activities of procuring the payment on behalf of the appellant company were also done abroad. The AO was therefore, incorrect to hold that source of income lies in India as the sales have been made from India the provisions of Income Tax act clearly provide that the tax would be deducted on the income which is taxable in India. The activity of earning the income is not the sale but soliciting the sales by commission agent. Though this activity is linked to the sales of the company but it cannot be said that the income has been derived from sales which has been made from India. The income has been derived from the activity of soliciting the sales on behalf of the appellant company. The agent has carried out all the activity on the foreign soil and none of its activity is in India therefore, it cannot be said that the income has accrued or arisen in India and the source of income was in India. There is no fact brought out by the AO in the order as well as observed by me during the course of appellant proceedings to indicate that the services have been rendered in India.

2.12 The judgment of honorable Supreme Court in the case of CIT vs. Toshoku Limited [125 ITR 525 [SCJ] is impotent on the issue, whereby it has been held that commission earned by the non-resident for acting as the selling agent for the Indian exporter, wherein such non-resident was rendering services from outside

India does not accrue in India. In the present case before me also, the foreign selling commission agent is resident of foreign county, from where the procurement service had been provided for which the commission has been paid, and therefore, THE ISSUE is directly and squarely covered by the Apex Court decision.

2.13. Regarding the observation of the AO that the income is deemed to accrue or arise in India by applying the provisions of section 9(1)(i), it is seen that there is no fact on record to indicate that the agent had any permanent establishment in India. The agent had its office on the foreign soil and nothing on record that it had PE in India, Further the assessing officer has also not pointed out any such office has also not pointed out any such fact in its order which indicate that there was any such office of the overseas agent in India which attract the deeming provisions. Further the observation that the source of income was in India is also not proper as it has clearly been discussed in the preceding paragraphs that none of the services have been rendered in India and source of income cannot be said to be in India as the source of income is the services rendered and not the sales. There is no business connection in India from which the income has been earned, there is no properly through or from which the income has been earned. Therefore, the provisions of section 9(1)(i) also cannot be applied.

*2.14 Reliance is placed on the judgement of honourable Supreme Court in in case of **GE India Technology Centre Private Limited 327 ITR 456** and the judgement of hon'ble ITAT Mumbai in the case of our Ardesi B Cursetjee & Sons Ltd. 115 TTJ 916.*

2.15. Therefore, in view of the preceding discussion the AO was not justified to hold that the commission payable to the overseas agent was deemed to accrue or arise in India and is taxable under the Act in view of the specific provisions of sections 5 (2)(b) read with section 9(1)(i) of Income Tax Act.

2.16. Regarding the issue of obtaining no deduction certificate under section 195 it is seen that for the applicability of the provisions of this section, the sum must be chargeable under the provisions of the income tax Act. Section 195 provides for deduction of tax by the person responsible for paying to a non-resident any interest or any other sum chargeable under the Provisions of the Act. It is clear that the payment was not the interest. It has to be seen whether the payment is covered under the term “any other sum chargeable under the provision of this act”. It has been observed in the proceeding discussion that income was not chargeable to tax as it has not been received in India nor it has accrued or arisen in India directly or indirectly. Therefore, once the income is not taxable there is no liability to deduct tax and therefore, it was not obligatory for the appellant to

deduct tax in view of this, there was no violation of the provisions of section 195 and the appellant was also not required to pay no deduction certificate from the AO.

2.17. The last issue which is to be adjudicated is that whether the commission payments were genuine and the services were rendered. The AO has briefly dealt with the issue in his order. The appellant has placed on record several documents which indicate that the agent have rendered services prior In the actual sales as well as subsequently also. It is further observed that the payment have been made through banking channel and are duly documented. The appellant has made commission payment to agent during the year and it has provided copies of agreements. The appellant has given satisfactory evidences in respect of all commission payment, and therefore, considering the overall facts and circumstances the payment made to the agent is taken as genuine. Accordingly, in my considered opinion the appellant has given SATISFACTORY evidences regarding the services rendered by the agent and the genuineness of payment of commission.

2.18. The AO has also placed reliance on the decision of Hon'ble Authority of Advance Rulings in the case of SKF Boilers and Driers (P.) Ltd. (2012) 18 Taxmann 325 and Rajiv Malhotra (2006) 284 ITR 564 (Delhi). The Judgments are not applicable lo the present facts as there are several other decisions of Hon'ble ITAT, Mumbai in the case of ACIT (International Taxation) Vs. Star Cruise India Travel Services Pvt. Ltd. [14 ITR (T) 282 (Mum)]. CLSA limited Vs. ITO (International Taxation) [56 SOT 254], which hold that such Kind of commission is not taxable in India and accordingly no liability to deduct tax was there. Further the decision of honourable Supreme Court of India in the case of CIT vs. Toshoku Limited 125 ITR 525 Still prevails as on date and is the law of the land as regards applicability of TDS provisions to commission paid to overseas/non-resident agents by Indian Exporters.

2.19 Further, reliance is placed on the following decisions/judgments:

- ACIT Vs. Modern Insulators Ltd. [56 DTR 362 (Jaipur Trib.)]*
- Ishikawajama - Harima Heavy Industries Ltd. Vs. Director of Income Tax [207 CTR 361]*
- Dy. Commissioner of Income Tax Vs. Divi's Laboratories Ltd. [(2011) 60 DTR (Hyd) (Trib) 210]*
- ITO, International Taxation, Chennai Vs. Prasad Production Ltd. [{2010) 125 ITD 263 Chennai) (SB)*
- ACIT, Circle - 16(3)(Hyderabad-Trib) vs. Priyadarshini Spinning Mills (P.) Ltd. (2012) ITA No. 1776 (2011) ACIT (International*

*Taxation) vs. Star Cruise India Travel Services Pvt. Ltd. [14 ITR (T)
282 (Mum.)*

2.20. *In view of the preceding discussions, the submissions of the appellant, including the judgments / decisions of various courts and considering the fact that identical issue has been decided by CIT(A)-2, Ahmedabad in A. Y. 2012-13 and by this office in preceding year i.e. A.Y. 2013-14 in favour of the appellant, it is clear that the appellant was not liable to deduct tax on the commission paid to foreign agent. Therefore, the disallowance of Rs.2,93,56,350/- under section 40(a)(ia) made by the AO is directed to lie **deleted.**”*

12. We find that the same issue was considered by the Co-ordinate Bench in respect of A.Y. 2012-13 in assessee’s own case in revenues appeal which was ultimately decided in favour of the assessee by dismissing the said appeal. In the said appeal following submissions mad as under:

13. We have considered the judgment cited by the Learned counsel appearing for the assessee passed by the Coordinate Bench in ITA No. 2503/Ahd/2016 for assessment year 2013-14 on the identical issue rejecting the appeal preferred by the revenue the relevant portion whereof is as follows:

“10. We have heard the rival contentions of both the parties and perused the material available on record. In the instant case, assessee has made payment to various agents as commission based in foreign countries on account of export made to the parties referred by them. The AO disallowed the same on two grounds, firstly, the identification of the parties, details of payment & services rendered by them were not furnished, secondly no TDS was deducted under section 195 of the Act by the assessee on such payment. The view take by the AO was subsequently reversed by the ld. CIT-A. However the issue before us arises with regard to the non-deduction of TDS by the assessee under section 195 of the Act. In this regard we find important and relevant to reproduce the provision of Section 195 of the Act which reads as under:-

“Other sums.

*⁷¹195. ⁷²[(1) ⁷³Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest ⁷⁴[***] or any other sum chargeable under the provisions of this Act (not being income chargeable under the head “Salaries” ⁷⁵[***]) 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 :”

A plain look at the above statutory provision makes it clear that the assessee is liable to deduct TDS on the payment to Non Residents on any sum chargeable under the provision of this Act. Now, the question arose whether payment made to the foreign agent is chargeable to tax in India. For this purpose, we need to refer the provision of Sec. 5(2) of the Act which reads as under:-

Scope of total income.

⁴⁷5. ⁴⁸(1) Subject to⁴⁹ the provisions of this Act, the total income⁴⁹ of any previous year of a person who is a resident includes all income from whatever source derived which—

XXXXXXXXXXXXXXXXXX

(2) Subject to⁴⁹ the provisions of this Act, the total income⁴⁹ of any previous year of a person who is a non-resident includes all income from whatever source derived which—

- (a) is received⁵⁰ or is deemed to be received⁵⁰ in India in such year by or on behalf of such person ; or*
- (b) accrues⁵⁰ or arises⁵⁰ or is deemed to accrue or arise to him in India during such year.*

It is beyond doubt that the payment for the commission was not received by the foreign agents in India. Therefore, the same cannot be taxed in India as per clause (a) of sub-section (2) of section 5 of the Act. Similarly, we further note that the income was received by the foreign agents on account of services rendered by them in their respective countries. Therefore, we conclude that such income has not accrued or arisen in India and consequential not chargeable to tax in India. Now coming to the fact that whether such commission income by the foreign agents were deemed to accrue or arise in India in terms of provision of Section 9 of the Act, which reads as under:-

“Income deemed to accrue or arise in India.

⁶⁵9. ⁶⁶(1) The following incomes shall be deemed⁶⁷ to accrue or arise in India :—

- ⁶⁸(i) all income accruing or arising, whether directly or indirectly, through or from any business connection⁶⁹ in India, or through or from any property⁶⁹ in India, or through or from any asset or source of income*

in India,⁷⁰[* * *] or through the transfer of a capital asset situate in India.

⁷¹[Explanation 1].—For the purposes of this clause—

(a) in the case of a business of which all the operations⁷² 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 operations⁷² 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 ;

⁷³[* * *]

⁷⁴[(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 ;]

From the above proposition, we find that income shall be deemed to accrue or arise in India if it fulfills any of the conditions :-

- i) Business connection in India; or
- ii) From any property in India; or
- iii) From any asset or source of income in India or
- iv) Transfer of capital asset situated in India

From the above, we note that the case of assessee is not falling in any of the category as discussed above.

Similarly, we also note that it is not the case of Revenue that payment was made by assessee on account of technical services rendered by the foreign agents. Therefore, in our considered view, assessee was not liable to deduct TDS u/s 195 of the Act. In holding so, we find support and guidance from the judgment of Hon'ble Madras High Court in the case of CIT vs. Farida Leather Co. reported in 66 taxman.com 321 (Mad) wherein it was held as under:-

“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.”

We also find support and guidance from the order of ITAT Ahmedabad Bench in the case of DCIT (International Taxation) vs. Welspun Corporation Ltd., reported in 77 taxmann.com 165 (Ahd), wherein it was held as under:-

“33. There are a couple of rulings by the Authority for Advance Ruling, which support taxability of commission paid to non-residents under section 9(1)(i), but, neither these rulings are binding precedents for us nor are we persuaded by the line of reasoning adopted in these rulings. As for the AAR ruling in the case of SKF Boilers & Driers (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.”

Similarly we also find support & guidance from the judgment of Hon'ble Gujarat High Court in the case of PR CIT Vs. MGM Exports in R/Tax Appeal No. 309 of 2018 vide order dated April 11, 2018. The relevant extract of the order is reproduced below :

“7. In the recent order in Tax Appeal No. 290 of 2018, we had dealt with similar situation making following observations:

"It can thus be seen that while confirming the order of CIT [A], the Tribunal relied on judgment of the Supreme Court in the case of G.E India Technology Centre P. Limited vs. Commissioner of Income-Tax & Anr., reported in [2010] 327 ITR 456 (SC) = 2010-TII-07-SC-INTL

In such Judgment, It was held and observed that the most important expression in Section 195[1] of the Act consists of the words, "chargeable under the provisions of the Act". It was observed that, "..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 Act," Counsel for the Revenue, however, drew our attention to the Explanation 2 to sub-section [1] of Section 195 of the Act which was inserted by the Finance Act of 2012 with retrospective effect from 1st April 1962. Such explanation reads as under:-

Explanation 2 - For the removal of doubts, it is hereby clarified that the obligation to comply with subsection (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. is indisputably true that such explanation inserted with retrospective effect provides that obligation to comply with subsection [1] of Section 195 would extend to any person resident or non-resident, whether or not non-resident person has a residence or place of business or business connections in India or any other persons in any manner whatsoever in India. This expression which Is added for removal of doubt is clear from the plain language thereof, may have a bearing while ascertaining whether certain payment made to a non-resident was taxable under the Act or not. However, once the conclusion is arrived that such payment did not entail tax liability of the payee under the Act, as held by the Supreme Court in the case of GE India Technology Centre P. Limited [Supra], sub-section [1] of Section 195 of the Act would not apply. The fundamental principle of deducting tax at source in connection with payment only, where the sum is chargeable to tax under the Act, still continues to hold the field. In the present case, the Revenue has not seven seriously contended that the payment to foreign commission agent was not taxable in India.*

Tax Appeal Is therefore dismissed.”

The principles laid down in the above cited judgments are squarely applicable to the instant facts of the case. Thus, it can be safely concluded that the Commission income in the hands of foreign agent is not chargeable to tax in India in the given facts & circumstances. Once an income is not chargeable to tax in India then the question of deducting TDS under the provision of section 195 of the Act does not arise. Accordingly, we do not find any reason to interfere in the order of ld. CIT-A. Hence the ground of appeal raised by the revenue is hereby dismissed.

14. In that view of the matter, we do not hesitate to conclude that the commission income in the hands of the foreign agents is not chargeable tax in India in the present

facts and circumstances of the case and therefore the assessee is not liable to deduct TDS. The observation made by the Learned CIT(A) does not call for any interference in view of the above conclusion made by us respectfully following the judgments passed by the Co-ordinate Bench as well as judgment passed by the Apex Court we are therefore find no merit in the appeal preferred by the Revenue. Hence, same is dismissed.

15. In the result, the revenue's appeal is thus dismissed.

This Order pronounced in Open Court on

30/11/2018

Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-
(Ms. MADHUMITA ROY)
JUDICIAL MEMBER

Ahmedabad; Dated 30/11/2018

Priti Yadav, Sr.PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad