IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, HON'BLE ACCOUNTANT MEMBER

ITA NO.6071/MUM/2016 (A.Y: 2012-13)

M/s. Accutest Research Laboratories (India) Pvt. Ltd., Plot No. A-31, MIDC, TTC Industrial Area, Koparkhairne, Navi Mumbai – 400 709 **PAN: AADCA 0798 B**	*v.*	A.C.I.T – 15(1)(1) Room No. 470, 4th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020
(Appellant)		**(Respondent)**

ITA NO.6196/MUM/2016 (A.Y: 2012-13)

A.C.I.T – 15(1)(1) Room No. 470, 4th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020	*v.*	M/s. Accutest Research Laboratories (India) Pvt. Ltd., Plot No. A-31, MIDC, TTC Industrial Area, Koparkhairne, Navi Mumbai – 400 709 **PAN: AADCA 0798 B**
(Appellant)		**(Respondent)**

Assessee by : **Shri Jitendra Jain &**
Shri Ravikant S. Pathak

Department by : **Shri Satishchandra Rajore**

Date of Hearing : **01.11.2018**

Date of Pronouncement : **30.01.2019**

O R D E R

PER C.N. PRASAD (JM)

1. These two appeals are filed by the assessee and Revenue against the order of the Ld. Commissioner of Income–tax (Appeals)-24, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 29.07.2016 for the Assessment year 2012-13.

2. Revenue in its appeal raised the following grounds: -

> *1. "On the facts and in the circumstances of the case and in Law, the Ld.CIT(A), Mumbai erred in deleting the disallowance made under section 40(a)(i) of the I.T. Act in respect to commission paid to foreign agents without appreciating the fact that the income has accrued directly or indirectly in India and is taxable u/s 40(a)(i) of the Act."*
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> *2. "On the facts and in the circumstances of the case and in Law, the Ld.CIT(A), Mumbai erred in deleting the disallowance made under section 40(a)(i) of the I.T. Act in respect to professional fees without appreciating the fact that the income has accrued directly or indirectly in India and is taxable u/s 40(a)(i) of the Act."*

3. At the outset, Ld. Counsel for the assessee submitted that identical issue has been decided in favour of the assessee by the Coordinate Bench of this Tribunal in ITA.No. 2724/MUM/2015 dated 28.02.2017 for the Assessment year 2011-12 wherein the Revenue appeal has been dismissed. Parties being identical, it is submitted that the same may be followed.

4. Ld. DR vehemently supported the orders of the Assessing Officer.

5. We have heard the rival submissions, perused the orders of the Authorities below and the Coordinate Bench decision for the Assessment

year 2011-12. On a reading of the decision of this bench, we find that identical issue came up before the Tribunal for the A.Y. 2011-12 wherein the Tribunal adjudicated as to whether the commission payments made to M/s. Moksh Amin Inc & M/s. Paulo Muradian is liable for TDS u/s. 195 of the Act and consequently whether it is liable for disallowance u/s. 40(a)(i) of the Act. We observe that the Tribunal deleted the disallowance made u/s. 40(a)(i) observing as under: -

> *"7. The learned Commissioner (Appeals) has deleted all disallowances made by the Assessing Officer under section 40(a)(i) except, the payment of ₹.89,140 to Mr. Jorgir Alberto Fedrico of Mexico. However, in the only effective ground raised, the Revenue has restricted its challenge to the decision of the learned Commissioner (Appeals) in allowing assessee's claim in respect of commission payment as mentioned in item no.(a) and (b) herein above. Since the Revenue has not challenged the relief granted by the learned Commissioner (Appeals) in respect of the other payments, we propose to deal with the issue relating to allowability of commission paid to non–resident agents. As could be seen, the Assessing Officer, though, has agreed that agents have rendered services in the form of soliciting orders in respective countries where they are located and the commission was remitted abroad, however, he has held that the assessee was liable to deduct tax at source under section 195(1), since according to him the commission paid to non–residents is to be treated as income deemed to accrue or arising at their hands in India as per sections 5 and 9(1) of the Act by virtue of a business connection in India. Thus, from the aforesaid finding of the Assessing Officer, it is very much clear that the commission paid to non–resident agents were for services rendered by them in their country of residence for soliciting orders on behalf of the assessee. It is also not disputed by the Assessing Officer that the commission payments were remitted abroad. Therefore, keeping in view the aforesaid facts, it has to be seen whether it can be said that the commission income was earned by the non–resident agents through any business connection in India.*
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> *8. Section 9(1)(i) postulates that all income accruing or arising, whether directly or indirectly through or from any business connection in India or through or from any property in India or through or from any asset or source of income in India shall be deemed to accrue or arise in India. Explanation–2 to section 9(1)(i) defines business connection. On a careful reading of Explanation–2, it is to be noted that the activities carried on by the non–resident agents in the present case do not fit into any of the categories as mentioned in clause (a), (b) and (c) of Explanation–2. Explanation–1(a) to section 9(1)(i) provides that in case of a business of which all the operations are not carried out in India, the income which can be reasonably attributable to the operations carried out in India shall be deemed to accrue or arise in India.*
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> *9. Keeping in view the aforesaid statutory provisions if we examine the facts of the present case, it becomes clear that the entire service rendered by the non–resident commission agents in procuring orders for the assessee were not only rendered outside India in their respective countries but the payments were also directly remitted to them abroad. No part of the services rendered by the non–*

resident agents was in India. Moreover, there is nothing on record to demonstrate that non–resident agents have any business connection in India as provided under Explanation–2 to section 9(1). On the contrary, the learned Commissioner (Appeals) after perusing the business development agreement entered into by the assessee with the non–resident agents have factually found that the entire service by the non–resident commission agent were rendered outside India. That being the case, no part of the income arising out of commission payment is attributable to any operation carried out in India. Therefore, in terms of section 9(1)(i), Explanation–1(a) income cannot be deemed to accrue or arise in India. Further, the Assessing Officer has not brought any material on record to establish the fact that the non–resident agents to whom the assessee paid commission either have any P.E. or business connection in India. That being the case, as per the relevant DTAA between the assessee and the respective countries where the non–resident commission agents are located the income cannot be taxable in India. Moreover, when the Assessing Officer himself admits that commission was paid to non–resident agents for procuring orders for the assessee in other countries and commission was remitted abroad, keeping in view the decisions relied upon by the learned Authorised Representative, the commission paid to non–resident agents is not taxable in India. Therefore, as a natural corollary, there is no liability on the assessee to deduct tax under section 195(1) of the Act, since, as per the language used in section 195(1), any payment which is chargeable under the provisions of the Act is subject to deduction of tax at source under section 195. In the aforesaid view of the matter, in our considered opinion, the learned Commissioner (Appeals) was justified in deleting the disallowance made under section 40(a)(i) of the Act. The ground raised by the Revenue is dismissed.

6. Facts being same and identical, respectfully following the same, we hold that the Ld. CIT(A) was justified in deleting the disallowance u/s.40(a)(i) of the Act. Grounds raised by the Revenue are rejected.

7. Coming to the appeal of the assessee, assessee challenged the order of the Ld.CIT(A) in sustaining the disallowance made u/s. 40(a)(i) in respect of the payments made to CPC Lucia, Mexico and Merill Corporation Ltd., USA.

8. At the outset, Ld. Counsel for the assessee submitted that in so far as the payments made to Merill Corporation Ltd., is concerned, this issue was never decided in the A.Y. 2011-12, therefore, the same may be restored to the file of the Ld. CIT(A). In so far as the payments made to

CPC Lucia, Mexico is concerned, the Ld. Counsel for the assessee submitted that the services rendered by this party during this Assessment year is different, the said party has rendered only accounting services this year and there are no technical services rendered to the assessee.

9. Considering the submissions made by the Ld. Counsel for the assessee, we are of the view that this issue in assessee's appeal has to be re-examined by the Ld.CIT(A) with reference to the submissions and facts brought by the Assessing Officer on record. Thus, we restore the issue of disallowance u/s. 40(a)(i) in respect of these two parties to the file of the Ld. CIT(A) for fresh adjudication after providing adequate opportunity of being heard to the assessee.

10. In the result, appeal of the Revenue is dismissed and the appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on the 30th January, 2019

Sd/-	Sd/-
(N.K. PRADHAN)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai / Dated 30/01/2019
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum