आयकर अपील य अ धकरण, अहमदाबाद यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL,
'' D '' BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
SHRI Ms. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./**ITA No. 539/AHD/2018**
नधारण वष/Asstt. Year: 2008-2009
And
आयकर अपील सं./**ITA No. 1246/AHD/2016**
नधारण वष/Asstt. Year: 2010-2011

The D.C.I.T, Circle-1(1)(1), Ahmedabad	Vs.	Amol Dicalite Ltd. 301, Akshay, 53, Shirmali Society Navrangpura, Ahmedabad PAN : AABCA2807K

(Applicant)		**(Respondent)**

Revenue by	:	Ms. Sonia Kumar, Sr. DR
Assessee by	:	Shri S.N. Soparkar, A.R.

सुनवाई क तारख/**Date of Hearing : 29/01/2019**
घोषणा क तारख **/Date of Pronouncement: 27/03/2019**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeals have been filed at the instance of the Revenue against the two separate order of the Commissioner of Income Tax (Appeals) dated 12/02/2016 & 22/12/2017 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to

as "the Act") dt.15/03/2013 & 28/03/2016 relevant to Assessment Years 2008-2009 & 2010-11 respectively.

2 First, we take ITA bearing No. 539/Ahd/2018 for A.Y. 2008-09. Revenue has raised following ground of appeal:

> ñ*1.That the Ld.CIT(A) has erred in law and on facts in deleting the disallowance of Rs.1,22,19,321/- made under section 40(a)(i) of the Act on account of payment to non-residents without deduction of tax at source.''*

2.1 The issue in the appeal relates to non-deduction of tax at source on the payment to non-residents amounting to Rs. 1,26,63,364/- which was disallowed u/s 40(a)(i) of the Act.

3. It is the second round of appeal. ITAT in the first round of appeal in ITA No. 3103/AHD/2011 remitted the issue to the file of AO to decide afresh vide order dated 17/10/2014 as assessee filed additional evidence in the form of a note on duties of consultant and plant superintendent, a copy of consultancy agreement, etc. which were not placed before the lower authorities.

4. Subsequently, the AO issued the notice and accordingly the assessee in response to the notice of AO files the party wise breakup of expenses as detailed under:

A	*Fees for Technical Services to Anderson Kill & Click Paid of*	*Rs.1,78,922*
B	*Consulting charges paid to Mr.W.H. Waugh (USA)*	*Rs.51,24,214*
	Consulting charges paid to Mr.Luis Spelzinl	*Rs.3,73,060*
	Re-imbursement exps. Paid to Mr. Luis Spelzini	*Rs.70,983*
	Total	***Rs.55,68,257***
C	*Foreign Technician Supervision charges paid to Mr. Kenneth Harmston (UK)*	*Rs.31,58,605*

	Foreign Technician Supervision charges paid to Mr. Hunt Waugh Jr. (USA) Rs.	*Rs.37,33,847*
	Re-imbursement exps. Paid to Mr. Kenneth Harmston (UK) Rs.	*Rs.14,739*
	Re-imbursement exps. Paid to Mr. Hunt Waugh Jr. (USA)	*Rs.8,994*
	Total	***Rs.69,16,185/-***

5. In addition to the above assessee also submitted the following shreds of evidence.

''In support of the said payment made to above referred foreign technician/consultant, we furnish the details/information as asked by you in your notice under para-4 as under:

1. *Copy of set of Additional Evidences along-with Application filed to Hon. ITAT Bench-C on 22-07-13.*

2. *Copies of Retainership Agreement executed with Mr.Kenneth Harmston (UK) on 01/04/07 and with Mr.W.Hant Waught Jr.(USA) executed on 01-04-07 have already been filed to AO in the course of original assessment proceedings. Hence, not being filed herewith.*

3. *An Excel Sheet containing the name and addresses of the persons received consultancy/ retainership fees as per agreement with amount of fees and reimbursement of expenses.*

Over and above, we furnish herewith the following:

1. *Copy of Ledger account of Anderson kill & Olick, consulting charges, reimbursement expenses to consultant, foreign technician charges and reimbursement expenses to foreign technician from our books of accounts.*

2. *Copy of all invoices issued by above referred parties for consultancy and retainership fees and reimbursement of expenses.''*

6. In respect of payment of consultancy charges and reimbursement expenses of Rs. 3,73,060/- and Rs. 70,983/- respectively to Mr. Luis Spelzinl, the assessee contended with supporting evidence that TDS was deducted as per the provision of law. Therefore, no addition on account of non-deduction

of TDS is sustainable. Accordingly, the AO after verification accepted the contention of the assessee.

7. In respect of other reimbursement expenses for Rupees, 14,739.00 and 8,994.00 to Mr. Kenneth Harmston (UK) and Mr. Hund Waugh Jr. (USA), the assessee contends that TDS provisions do not apply on the reimbursement of the expenses. The assessee in support of his contention relied on the order of ITAT Delhi in case of ITO Vs. Dr. Willmar Schwabe India (P.) Ltd.(3 SOT 71) & ITAT Mumbai in case of Mahindra & Mahindra Ltd.(134 ITD 312).

8. In respect of balance payment made towards consultancy & retainership fees paid, the assessee contended that these were paid outside India to Nonresidents for the services rendered outside India. Therefore, the same is not chargeable to tax in India under section 4, 5 and 9 of the Act. Accordingly, there is no question of deducting the tax at source u/s 195 of the Act. The assessee in support of its contention relied on Apex court in case of GE India technology Cen. P. Ltd. Vs. CIT (193 Taxmann 234).

9 Without prejudice, the assessee also contended that the fees for technical services in India are taxable in India only when these services are utilized in India and also rendered in India as held by the Hon'ble Apex Court in the case of Ishikawajma Harima heavy industries Ltd (288 ITR 408). The assessee also contended that the same decision was followed by the Bombay high court in case of Clifford Chance (318 ITR 237).

9.1 The assessee also relied on the decision of ITAT Agra in case of Virola international (147 ITD 419) wherein it was held that the position for the fees of technical services cannot be taxed in India unless it is rendered in India,

has been changed by Finance Act 2010 w.e.f. 08.05.2010 with retrospective effect.

9.2 It was held in this case (*supra*) that although this amendment was retrospective, however, an amendment in law cannot change the tax withholding liability with retrospective effect.

9.3 Considering the principle held in the above order of ITAT assessee contended that such amendment has no value in the present case as all the foreign remittances were made before 08.05.2010.

9.4 Assessee alternatively also submitted that impugned payment do not qualify for as the ñfees for technical servicesò as per the definition of DTAA as detailed under:

> *''C. In the alternative it is further submitted that the careful reading of both Articles under DTAA with U.K. and USA refers as under:*
>
> *4. For the purpose of paragraph 2 of this Article, and subject to paragraph 5, of this Article, the term" fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provision of services of technical or other personnel) which:*
>
> ***(a)*** *are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this Article is received; or*
>
> ***(b)*** *are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this article is received; or*
>
> ***(c) make available*** *technical knowledge, experience, skill, know-how or processes, or consist of the development and transfer of a technical plan or technical design.*

Careful reading of the above reproduced Article-13.4 (a) and (b) shows that it applies to the payment described in paragraph 3 (a) and likewise paragraph 3(b) of this Article which refers the term of ***"Royalties"*** *and does not refer to the payments made for fees for technical services or fees paid for included services. Since, our case is for fees for technical services or fees paid for included services and not for payment made for Royalties and hence, it has no application to the facts of our case.*

The facts of our case are squarely covered within Article-13.4 (c) of DTAA with UK and Article 12.4 (b) of DTAA with USA for which the submission is made hereunder:

In our instant case, fees for technical services was paid to Anderson Kill & Click for imparting his technical knowledge and skill at our project site carried out at abroad and likewise, consultation charges were paid to W.H.Waugh and supervision charges were paid to Kenneth Harmston and Hunt Waugh Jr. for imparting their services and knowledge at our project site carried out at abroad and these facts have not been disputed by the then AO. Thus, such technical services rendered by these persons are similar like services rendered by persons who were paid fees in regard to issuance of GDR in cases of ***1] Raymond Ltd. and 2] Mahindra and Mahindra Ltd. [Supra]*** *and such services were performed at the abroad project site by Payees and nothing was* ***made available*** *by way of such service related technology being transferred in India to our company. Such fact can be verified from the duties of Consultants and Plant Superintendent submitted hereinabove under para -1 being the requirement met with para-4 of your present notice.''*

9.5 The assessee also relied on several case laws and contended that these services could be held taxable only when services fall under the category of ñmake available, and the recipient was enabled to apply the technology,ò but in the present case, nothing was made available to it.

10. After considering the submission of the assessee, the AO after due verification accepted the contention of the assessee in respect of Mr. Luis Spelzini that payment made of Rs. 3,73,060/- for Consultancy fees and Rs. 70,983/- for reimbursement of expenses due TDS was deducted and deposited by the assessee.

10.1 In respect of all the other payment, AO observed in his order that assessee is taking the approbating and reprobating approach as the agreement between Mr. Luis Spelzini(TDS deducted) and Mr. W.H. Waugh (TDS not deducted) are identical, prepared on the stamp of Rs. 100/- each and subject to Ahmedabad Court jurisdiction. Therefore, in the similar facts and circumstances, in case of one party assessee is deducting TDS but in the case of other parties failed to deduct the TDS. Thus the assessee used the approbating and reprobating approach which is not permissible under the provision of law. Accordingly, AO held that the assessee ought to have applied the same standards and criteria in dealing with all the persons concerned. Thus the AO disregarded the contention of the assessee and disallowed the expenses claimed by the assessee for Rs. 1,22,19,321/- (69,16,185 +51,24,214+1,78,922) due to non-deduction of TDS u/s 40(a)(i) of the Act.

10.2 The AO in support of his contention also observed in his order that in respect of both the consultant, i.e. Mr. W.H. Waugh and Mr. Luis Spelzini assessee charged service tax on Reverse Charge Mechanism (for short RCM) basis which means assessee himself has accepted and admitted that both the persons have rendered their services in India. Therefore, this can be again categorized as the approbating and reprobating approach of the assessee.

10.3 Further, AO observed that as per invoice issued by the Mr. Kenneth Harmston for the period of 01/04/2007 to 30/06/2007 it could be pointed out that he was on the plant or in India for assesseeôs job for 21 days in April, 23 days May, 24 days in June. Similarly, in the case of Mr. H.W. (Jr.) for the

same period, he was in India. Accordingly, the AO was of the view that the bills were raised by the parties to the assessee when they were in India.

10.4 AO also on perusal of the retainer ship agreements dated 01/04/2007 and 01/04/2008 with Mr. Kenneth Harmston of UK and with Mr. W. Hunt Waugh Jr. dated 01/04/2007 observed that it is mentioned in the agreements that in case of the retainership in India the rate will be GBP 14.19 per hour. Further, in these agreements, the provisions of reimbursement are also mentioned. Therefore, the services have been rendered in India and the amount has been shown in the accounts.

10.5 The AO also countered the case laws relied upon by the assessee and differentiated them with the present facts of the case as detailed under:

1. In the case of G. E. India technology (*supra*) issue related to taxability was Royalty whereas in instant case it is related to ñfees for technical services.ò

2. In the case of Ishikawajma Harima Heavy Industries Ltd (*supra*) assessee has relied only on the catch note without going into the details of judgment. In this case, the Hon'ble Apex court held that section 9(1)(vii) read with the memo, cannot be given a wide meaning to held that amendment was only to include the income of nonresident taxpayers received by them outside India for services rendered outside India. In the instant case, the services of consultants were utilized in India, and the ñlive- linkò was established which is very much evident from the copy of agreements.

3. Reliance placed by the assessee on ITAT Agra in case of Virola International (*supra*) is not correct as the assessee has entered into two agreement for consultancy services with Mr. Luis Spelzini and Mr. W. Hunt Waugh on 01/03/2007 and 01/04/2007 respectively for a period of 12 months. Now in case of one party assessee has deducted TDS it means assessee was fully conscious towards its responsibilities and liabilities of tax withholding for fees of technical services.

10.6 AO also disagreed with the contention of the assessee by observing that services are like ófees for included servicesô as per Article 12 of the Indo-USA DTAA since payee did not stay in India beyond the specified period, the same is not taxable in India in terms of Article 12. In holding so, AO observed that Para 2 of Article 12 itself covers the ófees for technical servicesô, which assessee himself admitted the nature of services, as defined in Explanation 2 to section 9(1)(vii) of the Act.

10.7 Further, AO also held that as per Para 7(a) of Article 12 of the DTAA ófees for included servicesô are deemed to accrue in that contracting state when the payer is the resident of that contracting state. As in the present case also all these conditions are present and intellectual property rights also transferred to the assessee as per the agreement, therefore, as per DTAA and domestic laws ófees for technical servicesô paid to nonresident arise in India.

10.8 The AO was also of the view that all the intellectual property rights created by the consultant under this agreement shall belong to the assessee. Therefore, it is not correct to hold that nothing was made available to the

assessee. Thus the contention of the assessee that nothing was made available to the assessee by the parties and services are rendered outside India as held in the case of Raymond Ltd (86 ITD 791), and Mahindra & Mahindra Ltd (30 SOT 374) is factually incorrect.

10.9 In Mahindra & Mahindra Ltd (*supra*) the facts of the case were related to the managing and selling FCCB on behalf of the client and the services were not provided to Mahindra & Mahindra though it was for the benefit of it and accordingly tribunal, in that case, concluded that services were not made available to the appellant. Hence the same was not taxable in India. AO concluded that in the present case consultants were working on the plants to be installed at the clientôs job work sites, and they were working on behalf of the assessee on the plants of the appellants. Therefore, the facts of the case are totally different from the case of Mahindra & Mahindra Ltd (*supra*).

In the view of above, AO finally held that appellant is clearly covered in sub-clause (c) of clause 4 of article 13 of UK DTAA and article 2 of USA DTAA. Accordingly, the AO disallowed the expenses as discussed above due to non-deduction of TDS under section 40(a)(i) of the Act and added to the total income of the assessee.

11. Aggrieved assessee preferred an appeal to ld. CIT-A wherein it submitted as under:

1. There are two types of agreement, i.e., retainer ship agreement & consultancy agreement. The retainer ship agreement was entered with Mr. Kenneth Harmstone (UK) and Mr. W. hunt Waugh Jr. (USA) both on 01.04.2007. The consultancy agreement was entered with Mr.

Whitney Waugh (USA) and with Mr. Luis Spelzini (Argentina) on 01.04.2007.

2. Even if agreement is almost the same but in the case of Mr. Luis Spelzini (Argentina) services were provided in India as evident from invoices issued by him and in case of Mr. Whitney Waugh (USA) services were provided at the plant site of the client which is outside India as evident from the copy of invoices submitted.

3. Charging service tax cannot establish that the services were taxable in India, it was charged only from a safety point of view as it was claimed as Input Tax Credit.

4. AO without any findings made only a general statement that two plant supervisors were deputed at the plant site of the client situated at abroad as decided by the assessee. Whereas all the documents were submitted which clearly state that they were deputed on abroad plant sites. Further, AO did not confront them via e-mail whereas complete addresses with phone numbers were provided to AO.

5. AO completely erred in holding that on the basis of invoices consultant was on the plant of India for the period 01.04.2007 to 30.06.2007. Similarly, considering the duty sheet AO also erred in holding that they were present in India for the next three quarters in the year 07-08. In this regard, it is to submit that invoices issued by both the consultants were in pursuance of retainer ship agreements which are based on a fixed rate to be paid every month irrespective of place of duty. Similarly, there is a clause 3(a)(iv) in the agreement which states that payment would be at stipulated fixed rate when services are rendered in

India. Only such clauses were there, but no actual services were provided from India. Therefore, the observation and conclusion of AO were based upon assumption, surmises and conjectures without establishing the case. The assessee to clarify this submitted the details of contents in invoices by way of the summary chart.

6. AO erred in holding that in the case of GE (Supra) the issue was only in respect of royalty and not applicable in case of the assessee. The correct fact is that the same was delivered on Section 195 wherein it was held that section 195 has to be read in conformity with section 4, 5 and 9 and obligation to deduct TDS arises when there is a sum chargeable to tax under the Act.

7. Similarly, in case of other case law relied upon by the assessee, AO did not give any cogent reason demonstrating that those cases were not applicable.

12. The ld. CIT(A) after considering the submission of the assessee deleted the addition made by the AO after having a reliance on the order of his predecessor pertaining to the AY 2012-13 as detailed under:

Mr. W.H. Waugh (USA) Rs. 51,24,214/-

No evidence placed on record by AO that Mr. W.H. Waugh has ever visited India to render services. It is also not the case that Mr. W.H. Waugh had a fixed base which was made available by the **appellant. A**ccordingly, no question of attributing the income to the fixed base arise. Further, stay of Mr. W.H. Waugh does not exceed 90 days in India, therefore, as per Article 15 of DTAA income for rendering professional services would be taxable in the country in which the person is resident. CIT-A also relied on the judgment of GE India (193 taxman 234)

Mr. Hunt Waugh Jr.(USA) Rs. 37,33,847/-

As per the note, Mr. Hunt Waugh Jr. was present in India for 63 days. However, the stay of Mr. Hunt does not exceed 90 days. There was also no factual finding regarding fixed base of Mr. Hunt in India of the AO.

Mr. Kenneth Harmston (UK) Rs. 31,58,605/-

Similarly, Mr. Kenneth Harmston was in India for 73 days which is less than 90 days. There was also no factual finding regarding fixed base of Mr. Hunt in India of the AO.

12.1 Similarly the ld. CIT-A also deleted the addition for the reimbursement of the expenses to Mr. Hunt Waugh Jr. (USA) Rs. 8,994/- and Mr. Kenneth Harmston (UK) Rs. 14739.00.

13. Being aggrieved by the order of ld. CIT-A, the Revenue is in appeal before us. The learned DR before us vehemently supported the order of the AO. On the other hand the learned AR drew our attention on the order passed by the tribunal in the own case of the assessee in ITA number 2745/Ahd/2014 and CO. 326/Ahd/2014 on the provisions of section 201(1)/ 201(1A) of the Act pertaining to the assessment year 2008-09 vide order dated 22-6-2017 and demonstrated that the assessee is not liable for the deduction of TDS under section 195 of the Act. The learned AR before us vehemently supported the order of the learned CIT-A.

14. We have heard the rival contentions and perused the materials available on record. The issue in the instant case relates to the fact whether the assessee was liable for the deduction of TDS on the payment made to the foreign

parties under section 195 of the Act. In this regard, we note that the ITAT in the own case of the assessee *(supra)* has held that the impugned payment is not subject to the provisions of section 195 of the Act. Thus the addition made by the AO under section 201(1) & 201(1A) of the Act was directed to be deleted. The relevant extract of the order is reproduced as under:

> *''12. For the similar lapse of non-deduction of withholding tax under s.195 as alleged by the Revenue, apart from the contention towards expiry of reasonable time limit in the similar lines for earlier years, the Ld.Senior Counsel for the assessee also adverted our attention to Explanation appended to section 9 (2) of the Act. With reference thereto, the Ld.Senior Counsel for the assessee submitted that the aforesaid Explanation seeks to expand the scope of chargeability under S.9 of the Act with retrospective effect. The ld.Senior Counsel submitted that the aforesaid Explanation has been inserted by Finance Act, 2010 with retrospective effect from 01/06/1976. The Ld.Senior Counsel pointed out that having regard to the retrospective amendment, while the aforesaid remittance might fall within the ambit of clauses(v), (vi) & (viii) of section 9(1) with retrospective effect as per Finance Act, 2010, the assessee could not be expected to envisage such retrospective amendment at the time of making payment or credit towards remittances. It is thus the contention on behalf of the assessee that retrospective amendment in law may possibly change the course of tax liability in respect of any income with retrospective effect but, nonetheless, it cannot fasten withholding tax liability with retrospective effect after the expiry of event. The Ld.Senior Counsel relied upon the decision of the Coordinate Bench in DCIT vs. Virola International (2014) 42 taxmann.com 286 (Agra-Trib.) and Ashok Piramal Management Corporation Ltd. vs. ACIT (2016) 74 taxmann.com 111 (Mumbai-Trib.) to buttress this aforesaid proposition. The Ld.Senior Counsel contended that the assessee cannot be expected to implement a retrospective amendment carried out at a later point of time after the event of payment/credit in favour of the non-resident. The Ld.Senior Counsel also contended on merits with reference to various clauses of DTAA to demonstrate that the payee non-residents are not chargeable to tax in India under the provisions of DTAA and therefore obligation to deduct TDS under s.195 of the Act does not arise.*
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> *13. The Ld.DR relied upon the order of the AO to fasten the obligation under s.195 of the Act on the assessee and extensively relied upon the agreement executed by the assessee with the non-residents for availing their services qua the provisions of DTAA. The Ld.DR submitted that the aforesaid services availed from the non-residents cannot be covered as independent personal services but are in the nature*

of fee for technical services/royalty payment in view of various clauses of consultancy agreement.

14. As the legal issue seeking to oust the applicability of s.9(1)(v), (vi) & (vii) at the relevant time of making payment has been raised on behalf of the assessee with reference to Explanation to section 9(2) of the Act as noted above, we consider it expedient to address the legal contention so raised first.

14.1. We find that the identical issue towards non-applicability of section 9(1) of the Act for the purposes of obligation cast under s.195 of the Act prior to substitution of the Explanation by Finance Act, 2010 albeit with retrospective effect from 01/06/1976 has been duly examined by the Coordinate Bench in the case of Agra Bench and Mumbai Bench and is thus no longer res integra.

14.2. The Coordinate Bench of the Tribunal in Virola International (supra) after examining the issue observed that a retrospective amendment in law does change tax liability in respect of an income with retrospective effect but, however, it cannot change tax withholding liability with retrospective effect. Accordingly, it was concluded in favour of assessee therein to hold that unless technical services were rendered in India, fees for such services could not be brought to tax under section 9(1)(vii) prior to 08/05/2010 in so far as provisions of section 195 is concerned. The relevant portion of the aforesaid decision is reproduced hereunder for ready reference:-

> ***"5.** We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.*
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> ***6.** Hon'ble Supreme Court, in the case of Ishikawajma Harima Heavy Industries Ltd. v. DIT [2007] 288 ITR 408/158 Taxman 259, had held that in order to bring a fees for technical services to taxability in India, not only that such services should be utilized in India but these services should also be rendered in India. Analyzing this legal position, Hon'ble Bombay High Court has, in the case of Clifford Chance v. Dy. CIT [2009] 318 ITR 237/176 Taxman 458, observed as follows:*
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> > *"The apex Court had occasion to consider the above question in the case of Ishikawajma-Harima Heavy Industries Ltd. v. Director of IT [2007] 288 ITR 408 (SC), wherein, while interpreting the provisions of s. 9(1)(vii)(c) of the Act, the Supreme Court held as under (p. 444):*
> >
> > *'Sec. 9(1)(vii)(c) of the Act states that 'a person who is a non-resident, where the fees are payable in respect of services utilized in a business or profession carried on by such person in India, or for the purposes of making or earning any income from any source of India'.'*

Reading the provision in its plain sense, as per the apex Court it requires two conditions to be met-the services which are the source of the income that is sought to be taxed, has to be rendered in India, as well as utilized in India, to be taxable in India. Both the above conditions have to be satisfied simultaneously. Thus for a non-resident to be taxed on income for services, such a service needs to be rendered within India, and has to be part of a business or profession carried on by such person in India.

In the above judgment, the apex Court observed that (p. 444) :

'Sec. 9(1)(vii) of the Act must be read with s. 5 thereof, which takes within its purview the territorial nexus on the basis whereof tax is required to be levied, namely, (a) resident; and (b) receipt of accrual of income'. According to the apex Court, the global income of a resident although is subjected to tax, the global income of a non-resident may not be. The answer to the question would depend upon the nature of the contract and the provisions of the DTAA. What is relevant is receipt or accrual of income, as would be evident from a plain reading of s. 5(2) of the Act subject to the compliance with 90 days rule.'

As per the above judgment of the apex Court, the interpretation with reference to the nexus to tax territories also assumes significance. Territorial nexus for the purpose of determining the tax liability is an internationally accepted principle. An endeavour should, thus, be made to construe the taxability of a non-resident in respect of income derived by it. Having regard to the internationally accepted principle and the DTAA, no extended meaning can be given to the words 'income deemed to accrue or arise in India' as expressed in s. 9 of the Act. Sec. 9 incorporates various heads of income on which tax is sought to be levied by the Republic of India. Whatever is payable by a resident to a non-resident by way of fees for services, thus, would not always come within the purview of s. 9(1)(vii) of the Act. It must have sufficient territorial nexus with India so as to furnish a basis for imposition of tax. Whereas a resident would come within the purview of s. 9(1)(vii) of the Act, a non-resident would not, as services of a non-resident to a resident utilized in India may not have much relevance in determining whether the income of the non-resident accrues or arises in India. It must have a direct link between the services rendered in India. When such a link is established, the same may again be subjected to any relief under the DTAA. A distinction may also be made between rendition of services and utilization thereof.

With the above understanding of law laid down by the apex Court, if one turns to the facts of the case in hand and examines them on the touchstone, s. 9(1)(vii)(c) which clearly states 'where the fees are

payable in respect of services utilized in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India'. It is thus, evident that s. 9(1)(vii)(c), read in its plain, envisages the fulfilment of two conditions : services, which are source of income sought to be taxed in India must be (i) utilized in India, and (ii) rendered in India. In the present case, both these conditions have not been satisfied simultaneously."

7. *The law laid down by Hon'ble Supreme Court, in the case of Ishikawajma-Harima Heavy Industries Ltd. (supra) , binds everyone under Article 141 of the Constitution of India. The legal position thus was that unless the services are rendered in India, the same cannot be brought to tax as 'fees for technical services' under Section 9. However, this legal position did undergo a change when Finance Act 2010 received assent of the President of India on 8th May 2010. Explaining the scope of this amendment, a coordinate bench of this Tribunal, in the case of Ashapura Minichem Ltd. v. Asstt. DIT [2010] 40 SOT 220 (Mum.), has explained thus:*

"……(this legal position)does no longer hold good in view of retrospective amendment w.e.f. 1st June, 1976 in s. 9 brought out by the Finance Act, 2010. Under the amended Explanation to s. 9(1), as it exists on the statute now, it is specifically stated that the income of the non-resident shall be deemed to accrue or arise in India under cl. (v) or cl. (vi) or cl. (vii) of s. 9(1), and shall be included in his total income, whether or not (a) the non-resident has a residence or place of business or business connection in India; or (b) the non-resident has rendered services in India. It is thus no longer necessary that, in order to attract taxability in India, the services must also be rendered in India. As the law stands now, utilization of these services in India is enough to attract its taxability in India. To that effect, recent amendment in the statute has virtually negated the judicial precedents supporting the proposition that rendition of services in India is a sine qua non for its taxability in India."

8. *It is thus clear that till 8th May 2010, the prevailing legal position was that unless the technical services were rendered in India, the fees for such services could not be brought to tax under Section 9(1)(vii). The law amended was undoubtedly retrospective in nature but so far as tax withholding liability is concerned, it depends on the law as it existed at the point of time when payments, from which taxes ought to have been withheld, were made. The tax-deductor cannot be expected to have clairvoyance of knowing how the law will change in future. A retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability, with retrospective effect. The tax withholding obligations from payments to non-residents, as set out in Section 195, require that the person making the payment "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". When these obligations are to be discharged at the point of time when payment is made or credited, whichever is earlier, such obligations can only be discharged in the light of the law as it stands that point of time. Section 40(a)(i) provides that, inter alia, notwithstanding anything to the contrary in sections 30 to 38, any amount payable outside India, or payable in India to a non-resident, shall not be deducted in computing the income chargeable under the head 'profits and gains of business or profession' "on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted". The disallowance under section 40(a)(i) is not for the payments made to non-residents, which are taxable in India, but for the payments on which tax was deductible at source but tax has not been deducted, and such deductibility of tax at source, as we have discussed above, has to be in the light of the legal position as it stood at the point of time when payment was made or credited- whichever is earlier. Clearly, therefore, the disallowance under section 40(a)(i) can come into play only when the assessee had an obligation to deduct tax at source from payments to non-residents, and the assessee fails to comply with such an obligation. In view of these discussions, so far as payments made before 8th May 2010 are concerned, the assessee did not have any tax withholding liabilities from foreign remittances for fees for technical services unless such services were rendered in India, and a fortiori no disallowance can be made under section 40(a)(i) for assessee's failure to deduct tax at source from such payments.

9. *In the case before us, there is no material whatsoever to demonstrate and establish that the design and development services, for which impugned payments were made, were rendered in India. Therefore, the assessee did not have any liability under section 195 r.w.s. 9(1)(vii) to deduct tax at source from these payments. Once we come to the conclusion that the assessee did not have any obligation to deduct tax at source from these payments, in the light of the above discussions and as corollary thereto, no disallowance can be made in respect of these payments. As we have come to these conclusions in the light of the provisions of the domestic law, i.e. Income Tax Act, itself, there is no need to deal with the taxability of incomes embedded in these payments under the provisions of the applicable tax treaties. That would be relevant with respect to taxability of these payments in the hands of the recipients, but, for the reasons set out above and in the light of the legal position discussed above, will be academic in the present context. As regards learned Departmental Representative vehement reliance on a decision of Chennai A bench of this Tribunal in the case of Asstt. CIT v. Evolv Clothing Co. (P.) Ltd. [2013] 33 taxmann.com 309/142 ITD 618 wherein on the basis of taxability of income alone, the coordinate bench has confirmed the*

disallowance under section 40(a)(i), we can only say that a decision cannot be an authority for a legal question which has not been dealt with in that decision, or not having been raised in that case.

10. In view of these discussions, as also bearing in mind entirety of the case, we uphold the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter. As we have decided this appeal on this short legal point regarding scope of section 40(a)(i) r.w.s section 195, we see no need to deal with other erudite contentions of the parties as also findings of the learned CIT(A), which, given our adjudication on this legal issue, are now rendered academic in the present context."

14.3. On facts, we find no material whatsoever to demonstrate and establish that the services were rendered in India in lieu of the payment under consideration. The Non-resident payees were not alleged to have a redence or place of business or business connection in India either. On the contrary, we find that two of the three consultants; namely, Mr.Kenneth Harmston and Mr.W.H.Waugh did not visit India at all during the financial year 2007-08 relevant to AY 2008-09. Another consultant Mr.W.Hunt Waugh Jr. visited India for barely nine days during the relevant financial year. On these facts, it is clearly a case where such services stands excluded from the purview of preamended S.9(1)(vi)/(viii) of the Act. Prior to the amendment, it was well settled that services provided offshore or outside India could not be taxed in India. The amendment to Explanation-9(2) brought in by Finance Act, 2010 has sought to amend this position whereby only requirement for taxing such income shall be the utilization of services in India and not place of rendering services. Thus, at the time of occurance of event of obligation to apply providing S.195, the preamended provisions towards chargeability of income was in place, where income from services outside India were outside tax net.

14.4. Hence, for the parity of reasons noted in the aforesaid decisions, we find merit in the legal contention raised on behalf of the assessee.

14.5. In view thereof, we are not inclined to deal with the merits of chargeability of tax on payments made to the non-residents or otherwise as contemplated in terms of various Articles of the DTAA with respective countries.

On perusal of the above order, there remains no ambiguity that the assessee was not liable to deduct the TDS under section 195 of the Act on the payment as discussed above. Accordingly we hold that the impugned

expenses/payments cannot be disallowed due to non-deduction of TDS. Thus we do not find any reason to disturb the finding of the learned CIT-A. Accordingly we direct the AO to delete the addition made by him. Hence the ground of appeal of the Revenue is dismissed.''

In view of the above, there remains no ambiguity that the assessee is not liable to deduct the TDS on the payment made to foreign parties in the light of the above discussion. Accordingly, we hold that no disallowance of the expenses under section 195 r.w.s. 40(a)(i) of the Act is warranted. Hence we do not find any reason to interfere in the order of ld. CIT-A. Thus the ground of appeal of the Revenue is dismissed.

15. Coming to the ITA 1246/AHD/2016 an appeal by the Revenue pertaining to the A/Y 2010-11

16. The Revenue has raised the following grounds of appeal:

1. *The CIT(A) has erred in law in facts and deleting the disallowance made u/s 40(a)(i) in respect of consultancy and supervision charges of Rs.87,57,593/-.*

2. *The CIT(A) has erred in law and in facts in deleting the disallowance made on additional depreciation of Rs.85,75,341/-*

17. The 1st issue raised by the Revenue is that learned CIT (A) erred in deleting the addition made by the AO for rupees 87,57,593.00 on account of non-deduction of TDS under section 195 read with section 40(a)(i) of the Act.

18. At the outset, we note that the issue raised is identical to the issue raised by the Revenue in ITA 539/Ahd/2018 which we have decided against the Revenue and in favor of the assessee vide Paragraph No. 14 of this order. Therefore respectfully following the same we do not find any reason to

disturb the finding of the learned CIT-A. Hence the ground of Revenueôs appeal is dismissed.

19. The 2nd issue raised by the revenue is that learners CIT (A) erred in deleting the addition made by the AO for ₹85,75,341.00 on account of additional depreciation under section 32(iia) of the Act.

20. AO during the assessment proceedings noted that assessee had purchased plant & machinery of Rs. 8,57,53,410/- on which additional depreciation of Rs. 85,75,341/- (less than 180 days) has been claimed. The AO also noted that assessee during the year has leased the plant & machinery and declared rental income of Rs. 3,91,68,000/-. Thus AO was of the view that since assessee is engaged in the business of leasing; therefore, additional depreciation is not available to the assessee. Accordingly, the AO issued show cause notice to the assessee.

21. In response to the notice, the assessee submitted that it has rightly claimed additional depreciation at the rate of 10% since it was used for less than 180 days. As per the provision of section 32(iia) of Act assessee is required to be engaged in the business of manufacture or production of any article or thing and it is not necessary whether new machinery is used for the business of manufacture or production.

22. Further, it is also important to note that assessee is engaged in manufacture or production and on this account also assessee is eligible for the additional depreciation.

23. The assets have been used in the business of leasing the assets of the assessee. Accordingly, the assessee is eligible for additional depreciation.

24. However, AO disregarded the contention of the assessee by holding that the assets were used in the business of leasing and not in the business of manufacture. Thus the assessee is not entitled to the additional depreciation.

24.1 Thus the AO after having a reliance on the judgment of Hon'ble Gujrat high court in case of Bhagwati Appliances vs. ITO (337 ITR 286) added Rs. 85,75,341/- to the total income of the assessee.

25. Aggrieved assessee preferred an appeal to ld. CIT-A, who deleted the addition made by the AO following the co-ordinate bench order in the case of Heavy Metal and tubes Ltd in ITA no. 1951/A/2011. The ld. CIT-A also relied on the judgment of Hon'ble Gujarat High court in the case of Diamines & Chemicals Ltd reported 42 Taxman.com 193 where depreciation was allowed by holding that there is no requirement of correlation between the assets acquired and manufacturing activity.

26. The learned DR before us vehemently supported the order of the AO whereas the learned AR before us reiterated the submissions as made before the learned CIT-A. The learned AR vehemently supported the order of learned CIT-A.

27. We have heard the rival contentions and perused the materials available on record. The issue in the instant case relates to the fact whether the assessee is eligible for additional depreciation on the machinery which have been given on lease. The AO was of the view that the assessee has not used the

machineries in connection with the manufacturing activity. Therefore the AO disallowed the additional depreciation claimed by the assessee.

27.1 However, the learned CIT (A) subsequently reversed the order of the AO by observing that it is not the precondition for claiming the additional depreciation that the assessee should be engaged in the business of manufacturing activity.

27.2 It is an undisputed fact that the assessee is engaged in the manufacturing business as well as in the business of leasing. Therefore the condition imposed under section 32(iia) of the Act gets fulfilled for claiming the additional depreciation. Regarding this we find support and guidance from the judgment of Hon'ble Gujarat High Court in the case of Diamines & Chemicals Ltd (supra) wherein it was held as under:

> *"At the outset, it is required to be noted that the assessee claimed the deduction under Section 32(1)(iia) of the Income-tax Act with respect to the cost incurred by it for installation of the Wind Electric Generator. The Assessing Officer disallowed the same and made the addition of Rs.1,17,98,030/- by observing that as the assessee is not in the business of generation and distribution of power, the assessee shall not be entitled to deduction under Section 32(1)(iia) of the Income-tax Act of Rs.1,17,98,030/-. The said addition has been deleted by the CIT(A) relying upon the decisions of the Madras High Court in the case of VTM Ltd (Supra) and in the case of Hi Tech Arai Ltd. (Supra). In both the aforesaid decisions, the Madras High Court had an occasion to consider the similar issue and it is held that while claiming the deduction under Section 32(1)(iia) of the Income-tax Act setting up wind-mill has nothing to do with the power industry and what is required to be satisfied in order to claim additional depreciation is that the setting up of new machinery or plant should have been acquired and installed by an assessee, who was already engaged in the business of manufacture or production of any article or thing. Considering the aforesaid facts and circumstances and considering the relevant provisions of Section 32(1)(iia) of the Income-tax Act, which was prevailing at the relevant time, i.e. during the year*

under consideration, it cannot be said that the ITAT by applying the ratio of decision of the Madras High Court in the case of VTM Ltd. (Supra) and in the case of Hi Tech Arai Ltd. (Supra) has committed any error in deleting the addition of Rs.1,17,98,030/- on account of disallowance of additional depreciation of Wind Electric Generator.

3. *We see no reason to interfere with the impugned judgment and order passed by the ITAT. No question of law, much less substantial question of law arises in the present Tax Appeal. Hence, the present Tax Appeal deserves to be dismissed and is accordingly dismissed."*

27.3 We also find support and guidance from the order of this tribunal in the case of Heavy Metal and tubes Ltd (supra) wherein it was held as under:

"7. We have heard the rival submissions and perused the material on record. It is an undisputed fact that Assessee has installed a Windmill during the year under review. We further find that CIT(A) while deciding the issue has given a finding that the Assessee is already engaged in the business of manufacturing of production of Pipes and Tubes and has also fulfilled all the conditions laid down for claim of additional depreciation. We further find that the Hon'ble Gujarat High Court in the case of CIT vs. Diamines and Chemicals Ltd. (supra) has concluded that while claiming the deduction u/s. 32(1)(iia) setting up Windmill has nothing to do with the power industry and what is required to be satisfied in order to claim additional depreciation is that setting up of new machinery or plant should have been acquired and installed by an Assessee who was already engaged in the business of manufacture or production of any article or thing. Further before us Revenue has not brought 4 ITA No 1951/A/2011 & CO No. 232/A/2011 . A.Y. 2008-09 any binding contrary decision in its support. Considering the fact that Assessee is already engaged in the business of manufacturing and the Assessee has installed a windmill during the year and seen in the light of the decision of Hon'ble Gujarat High Court we find no reason to interfere with the order of CIT(A). In view of the aforesaid facts, this ground of Revenue is dismissed."

In view of the above, we are of the considered opinion that the assessee is eligible for the additional depreciation under section 32(iia) of the Act. Accordingly, we hold that there is no infirmity in the order of learned CIT-A and accordingly no interference is required. Thus the AO is directed to delete

the addition made by him. Hence the ground of appeal of the revenue is dismissed.

27.4 In the result the appeal of the Revenue is dismissed.

28. In the combined result, both the appeals of the Revenue are dismissed.

Order pronounced in the Court on 27/03/2019 at Ahmedabad.

-Sd-	**-Sd-**
(Ms MADHUMITA ROY)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 27/03/2019

Manish

आदेश क□ □ितिलप □ेषत/Copy of the Order forwarded to :

1. अपीलाथ□ / The Appellant
2. □□यथ□ / The Respondent.
3. संबं□धत आयकर आयु□त / Concerned CIT
4. आयकर आयु□त(अपील) / The CIT
5. □वभागीय □ितिनिध, आयकर अपीला□य अ□धकरण / DR, ITAT,
6. गाड□फाईल / Guard file.

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीला□य अ□धकरण, अहमदाबाद / ITAT, Ahmedabad