**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH: 'G' NEW DELHI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**
**&**
**SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No.1189/Del/2013**
**ITA No.8049/Del/2018**
**Asstt. Years: 2009-10 & 2010-11**

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| Sahasra Electronics P. Ltd.,<br>House No33, Pocket -1,<br>Jasola, New Delhi.<br>PAN: AAFCS4634L<br>Appellant | vs | ACIT, Circle 7(1),<br>New Delhi.<br><br>Respondent |

Assessee by: Shri Salil Kapoor, Advocate
Department by: Shri N.K. Bansal, Sr. DR

**ORDER**

**PER NARASIMHA K. CHARY, JM**

Aggrieved by the orders dated 17.01.2013 and 16.10.2018 in Appeal No. 117/2011-12 and No.06/13-14/09/14-15 in respect of Asstt. Years 2009-10 and 2010-11 respectively passed by the Learned Commissioner of Income-tax (Appeals), New Delhi {"CIT(A)"}, assessee preferred these appeals. Since the facts involved and grounds raised in both these appeals are same and identical, for the sake of convenience taking into account the facts in ITA No.8049/Del/2013 for Asstt. Year 2010-11, we pass a consolidated order.

2. Brief facts of the case are that the assessee is a company and has been engaged in the business of importing of electronic goods and components, manufacturing and export of electronic assemblies/ populated PCBs. For the assessment year 2010-11, they have filed their return of income on 30/9/2010 declaring a total income of Rs.2,07,79,620/-. During the course of assessment proceedings, learned Assessing Officer noticed that the assessee had debited a sum of Rs.98,27,357/- towards commission paid to the foreign agents. On a perusal of the MOU signed by the assessee with the agents, learned Assessing Officer felt that the nature of services to be provided by the foreign agents are in the nature of managerial/technical services covered under section 9(1)(viii) of the Income-tax Act, 1961 ("the Act") being paid by a resident and these are not being utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any sources outside India.

3. Assessee pleaded that the sale commission paid to the non-residents for the services provided outside India and the amount was not chargeable to tax in India as the said companies were not having any permanent establishment in India and whatever services being rendered by them were outside India. It was further contended that the assessee had not complied with the provisions of section 195 of the Act for withholding of tax on remittances to

contended that the assessee had not complied with the provisions of section 195 of the Act for withholding of tax on remittances to the non-residents on account of commission/managerial services/technical services and consultancy etc relying on the circular No. 786, dated 7/2/2000 of the CBDT.

4. After hearing the assessee on this aspect and considering the reply of the assessee, learned Assessing Officer recorded that during the Assessment year 2007-08, an addition was made under section 40(a)(i) of the Act on account of commission paid to the two parties abroad namely M/s Cee-Jan Beevers, Belgium and M/s MK group on the ground of the assessee company not complying with the provisions of the withholding tax, but in appeal Ld. CIT(A) had deleted the addition relying on the judgement of the Hon'ble Apex Court in the case of GE India technology Centre private limited vs. CIT 327 ITR 456 (SC), wherein it was held that section 195 of the Act has to be read in conformity with the charging provisions, that is, section 4, 5 and 9 of the Act and that the obligation to deduct TDS arises only when there is a sum chargeable to tax.

5. Learned Assessing Officer further recorded that for the Assessment year 2009-10, Ld. CIT(A) vide order dated 17/1/2013 in Appeal No. 117/11-12 held that the payment relates to management and technical services covered under section 9(1)(vii)

of the Act and accordingly the disallowance made by the learned assessing officer was valid. Learned Assessing Officer held that in the case of payment of 'Fee for Technical Services' (FTS) or interest on royalty, it is not necessary to establish the territorial nexus between the income deemed to accrue or arise to the non-resident under the said clauses (v), (vi) or (vii) of subsection (1) of section 9 of the Act. Learned Assessing Officer, therefore, holding that the remittances made by the assessee on account of commission to foreign agent as "sales commission", are covered under the expression 'Fee for Technical Services' (FTS) as defined in Section 9(1)(vii) (b) of the Act and are to be deemed income of the payee accrued or arising in India and consequently is liable for withholding tax, disallowed the expense of Rs.98,27,357/-under section 40(a)(i) of the Act.

6. In the appeal preferred by the assessee, Ld. CIT(A) recorded a finding that on the identical facts and relevant terms and conditions of MOU, disallowance of commission expenses of Rs.56,92,085/-under section 40(a)(i) of the Act was made in Assessment year 2009-10 by treating the said expense in the nature of managerial/technical services covered under section 9(1)(viii) of the Act and the Ld. CIT(A) confirmed the said disallowance after discussing the facts and relevant provisions of MOU in the light of legal position. Following the said decision of Ld.

CIT(A) for the Assessment year 2009-10, Ld. CIT(A) for this year also upheld the disallowance of commission expenses of Rs.98,27,357/- made by the AO and accordingly dismissed the appeal of the assessee.

7. In the alternative, Ld. CIT(A) recorded that even the payments made by the assessee have to be considered as commission expenses, as claimed by the assessee, the same are not allowable as per the discussion of learned Assessing Officer in the remand report wherein he had clearly mentioned that the first commission agent namely MK group LLC, though working in USA but its control is within India as the managing director and sole proprietor of the assessee company, namely, Mr A. Manwani is having 50% stakes in the said company and, therefore, assessee is having control and management of the said commission agent company in India as per section 6(3) of the Act. Similarly in the case of M/s Cee-Jan Bevers, learned Assessing Officer had clearly mentioned that the assessee was having 50% shares in M/s Sahasra Europe BVBA after the completion of two years of agreement and Cee-Jan Bevers was simply a namesake to show that the payments were being made to a non-resident. On this premise, Ld. CIT(A) held that in case of both the commission agents, the control and management was with the assessee as per provisions of Section 6 (3) of Act and, therefore, these agents were

residents in India during the year under consideration and the payments made to them were liable for deduction to tax at source, and in such case also learned Assessing Officer was justified in disallowing the commission expense under section 40(a)(i) of the Act.

8. Assessee is, therefore, before us in this appeal challenging the findings of the authorities below as to the disallowance of Rs.98,27,357/-, being the amount of commission paid to the two non-resident sales agents namely Mr Cee-Jan Bevers, Belgium and M/s MK group LLC, USA.

9. It is the argument of the Ld. AR that in the Asstt. year 2007-08, learned Assessing Officer disallowed this expense, but the Ld. CIT(A) allowed the same while following the decision of the Hon'ble Apex Court in the case of GE India technology Centre private limited (supra) but in further appeal, a coordinate Bench of this Tribunal, by order dated 6.9.2013 in ITA No. 5101/Del/2011 found that the question whether the recipients of the commission has Permanent Establishment (PE) or not, was not looked into by the Ld. CIT(A) and for such purpose the matter had to go back to the file of the learned Assessing Officer for fresh adjudication with liberty to the assessee to submit any details he desire before the Assessing officer. Subsequently, learned Assessing Officer passed the fresh order dated 26/6/2014 making disallowance of 50% of

commission paid to M/s Cee-Jan Beevers on the ground that M/s Cee-Jan Beevers was not an independent agency and control and management of M/s Sahasra Europe rest with M/s Sahasra Electronics Private limited (Assessee). Likewise, learned Assessing Officer disallowed the commission paid to M/s MK group LLC in excess of 3%. Ld. AR submitted that such an order dated 26/6/2014 post remand by the Tribunal, is pending consideration in appeal before the Ld. CIT(A).

10. Ld. AR further submitted that though for the Asstt. Year 2011-12, learned Assessing Officer passed the assessment order similar to that of the order dated 26/6/2014 for assessment year 2007-08, however, for the Assessment Year 2012-13 to Assessment Year 2014-15, the contentions of the assessee were accepted and no disallowance was made in respect of the commission paid to the non-resident sales agents. Ld. AR submits that the fundamental facts for all these assessment years being similar, the conclusions reached by the learned Assessing Officer in the subsequent years to the effect that no technical services are involved in respect of the payments of commission to the non-resident sales agents, and the payments are only towards the commission for sales.

11. He placed reliance on the decisions reported in CIT vs. EON Technology (P) Ltd (2012) 343 ITR 366 (Delhi); DCIT vs. Divi's laboratories Ltd (2011) 10 ITR (T) 501 (Hyderabad), Ciena

Communications India Private Limited vs. ACIT (2018) 98 taxmann.com 458 (Delhi-Trib) in support of his contention that in the absence of the learned Assessing Officer establishing on the basis of relevant material that there is business connection, llearned Assessing Officer is not justified in treating the commission paid to the non-residents for the sales affected outside India, as 'Fee for Technical Services' (FTS).

12. Ld. DR placed reliance on the orders of the authorities below and submitted that that the circular No. 786 dated 7/2/2000 relied upon by the assessee has no application to the facts of the case but, on the other hand, the facts for the AY 2010-11 are covered by circular 7 dated 22/10/2009 issued by the CBDT and also the amendment to section 9 by way of Finance Act 2010. He submitted that circular No. 786 dated 7/2/2000 was withdrawn by the CBDT by issuing a fresh circular No. 7 dated 22/10/2009. He further submitted that through the Finance Act 2010 further explanation was inserted in Section 9 stating that even if the non-resident has not rendered any services in India and received any income by way of interest, royalty and fee for technical services, the income shall be deemed to accrue or arise in India and this explanation was inserted with retrospective effect from the year 1976 itself, being a clarificatory in nature. He, therefore, submitted that in the case of payment of 'Fee for Technical Services' (FTS) or interest on royalty,

it is not necessary to establish the territorial nexus between the income that were to accrue or arise to the non-resident under the clauses (v), (vi) or (vii) of subsection (1) of Section 9 of the Act and the territory of India or that the services were rendered in India.

13. We have gone through the record in the light of the submissions made on either side. The services provided by the non-resident sales agents are forwarding enquiry, obtaining quotes, processing purchase orders and payment etc. These services were held to be fee for technical services by the learned Assessing Officer for the assessment Year 2007-08 and upheld by the first appellate authority by following the decision of the Hon'ble Apex Court in the case of GE India Technology Centre Private Limited. In the second appeal, however, a coordinate Bench of this Tribunal thought it fit to remand the matter to the file of the learned Assessing Officer to make enquiries in respect of the existence of the Permanent Establishment (PE) of either or both of these non-resident sales agents.

14. Subsequent to the remand of the matter relating to the Assessment Year 2007-08 by the Tribunal, learned Assessing Officer did not bring to tax the commission amount on the ground of any 'Fee for Technical Services' (FTS), in such an order learned Assessing Officer did not dispute the contention of the assessee that the two commission agents were not rendering any services of

technical/managerial or consultancy nature so as to bring the payment within the mischief of Section 9(1)(vii) of the Act. There is no allegation that either M/s Cee-Jan Beevers or MK group have any Permanent Establishment (PE) in India. Additions were made on a different score. In respect of the addition on the commission paid to M/s Cee-Jan Beevers, learned Assessing Officer recorded a finding that M/s Cee-Jan Beevers is not an independent agency and control and management of M/s Sahasra Europe rest with M/s Sahasra Electronics Private limited, 50% of the commission paid to M/s Cee-Jan Beevers was disallowable on the ground that such 50% should be the income of the Permanent Establishment (PE) in Indian territory. So also in respect of the commission paid to M/s MK group, learned Assessing Officer disallowed the commission in excess of 3% stating that there was no reason or justification for making payment at any rate higher than the minimum commission agreed in the MOU at 3%.

15. Assessment order for the Assessment year 2010-11 was passed on 15/3/2013, whereas a coordinate Bench of this Tribunal remanded the matter for the assessment year 2007-08 on 6/9/2013. We are in agreement with the Ld. AR that as on the date of passing of the order for the Assessment year 2010-11 by the learned Assessing Officer on 15/3/2013 or the order for the Assessment year 2009-10 by the Ld. CIT(A) on 17/1/2013, Ld.

CIT(A) could not have the benefit of the findings of a coordinate Bench of this Tribunal in ITA No.5101/Del/2011 by order dated 6/9/2013 of the post remand assessment order passed by the learned Assessing Officer for the Assessment Year 2007-08 on 26/6/2014. Now, we shall proceed to look at the law laid down by the Hon'ble jurisdictional High Court and followed by the coordinate benches of this Tribunal.

16. In EON technology (supra), the assessee was in the business of development and export of software, paid commission to its British parent/holding company, namely, ETUK on the sales and amount is realised on export contracts procured by them. Learned Assessing Officer held that the commission income earned by the ETUK had accrued in India are was deemed to accrue in India and, therefore, the assessee was liable to deduct tax at source there from and as there was failure, the said expenditure should be disallowed under section 40(a)(ia) of the Act, whereas Ld. CIT(A) while placing reliance on the circular is issued by CBDT No. 23 dated 23/7/1969 and circular No. 786 dated 7/2/2000 deleted the same. Findings of Ld. CIT(A) were upheld by the Tribunal. During further appeal Hon'ble jurisdictional High Court held that where non-resident agent operates outside the country, no part of his income arises in India, and since payment is remitted directly abroad, and merely because an entry in the books of account was

made, it does not mean that the non-resident had received any payment in India and in circular No. 786 it was stated that in such cases, the Indian assessee is not liable to deduct the TDS under section 195 of the Act from the commission and other related charges payable to such non-resident having rendered services outside India. On this premise, Hon'ble judicial High Court held that there was no error in the orders of the first and second appellate authorities in deleting the disallowance.

17. In Divi's laboratories (supra) the assessee paid commission to the foreign agent for the services rendered outside India and the learned Assessing Officer disallowed the said expenditure under section 40(a)(ia) of the Act on the ground that the assessee had not deducted the tax at source on such payment. Assessee contended that the payment was made to foreign agent for services rendered outside India and payments were remitted to the banking channels as per the requirements of the RBI regulations and there was obligation to deduct the tax at source. The first appellate authority accepted the contention of the assessee and deleted the disallowance. In the appeal by the revenue, a Bench of Hyderabad Tribunal after noticing the CBDT circular No. 7, dated 22/10/2009 held that the withdrawal of the earlier circular No. 786, dated 7/2/2000 was of no assistance to the revenue in anyway in disallowing the expenditure and basing on

the decision of the Hon'ble Apex Court in the case of Toshoku Ltd (1980) 125 ITR 525 (SC), it was held that insofar as the overseas agent of Indian exporter operates in his own country and no part of his income arises in India and the commission is usually remitted directly to him, such overseas agent is not liable to income tax in India on the commission earned.

18. In Ciena communications (supra), the assessee was providing installation, commissioning services for equipment supplied by its group entities to customers and made several payments to foreign companies, on which no TDS was directed. Learned Assessing Officer made disallowance for non-deduction of TDS under section 195 of the Act read with section 40(a)(i) of the Act on payments so made. A coordinate Bench of this Tribunal held that the payments received by the associated enterprises for the services rendered outside India are not taxable in India and, therefore, the assessee was not expected to deduct TDS and section 195 of the Act has no application. Consequently, it was held that no disallowance under section 40(a)(i) of the Act was called for.

19. On application of the settled law to the facts involved in this matter, the irresistible inference that flows is that the commission received by the foreign sales agents is not taxable in India and consequently, the assessee is not under any obligation to deduct TDS, and, therefore, Section 195 has no application to the facts of

the case and consequently the disallowance made in this matter cannot be sustained.

20. Further, it could be seen from the record that in the order dated 30/3/2015 for the Assessment year 2011-12, learned Assessing Officer made the disallowance in respect of the commission paid to these two foreign entities not of the ground of 'Fee for Technical Services' (FTS) technical services requiring the tax deduction at source but on the grounds similar to those of the Assessment Year 2007-08. Page numbers 58 to 69 is the assessment order for the Assessment Year 2011-12. So also page No. 74-77 of the paper book contain the assessment order for the Assessment year 2013-14 and page No. 78 contain the assessment order for the Assessment Year 2014-15. These two orders also clearly show that the theory of fee for technical services is given a go bye and the learned Assessing Officer accepted the contentions of the assessee and it did not bring to tax any amount by disallowing any part of the commission paid to these two foreign entities. It is further seen that the assessment orders for the Assessment Years 2012-13, 2013-14 and 2014-15 are passed by the learned Assessing Officer after making enquiry in respect of the commission paid to M/s Cee-Jan Beevers and MK group LLC in those years. It could further be seen that in respect of those years it was represented by the assessee that an affidavit showing that

neither the assessee nor any of its directors/associated enterprises had any interest in the ownership or management of the agent namely M/s Cee-Jan Beevers and/or his associated enterprises namely M/s Sahasra Europe and the fact that neither he nor his enterprises had Permanent Establishment (PE) in India. This assertion of the assessee was accepted by the learned Assessing Officer in these three years and also was acted upon.

21. Even otherwise, M/s Cee-Jan Beevers is a non-resident Indian and resident of Belgium whereas M/s MK group LLC is a resident of USA. M/s Cee-Jan Beevers is covered by the India Belgium Double Taxation Avoidance Agreement which if read with the protocol dated 26/4/1993 and the Treaty between India and the USA is applicable. So also case of M/s MK group LLC is covered by the Double Taxation Avoidance Agreement between India and USA. In either case the payment of commission would not be 'Fee for Technical Services' (FTS) since such services did not "make available" any technical knowledge, experience, skill, know-how or processes or consists of the development and transfer of technical plan or a technical design.

22. In the circumstances, as a matter of fact, we find that the services rendered by these two foreign entities are outside India and in respect of the sales effected by them, and at the same time neither of these entities had any permanent establishment in India

nor does the assessee or its directors/associated enterprises had any interest in the ownership or management of these entities more particularly M/s Sahasra Europe. We, therefore, allow the grounds of appeal of the assessee.

23. Since the appeal of the assessee for the AY 2010-11 is allowed, as above, we, taking consistent view, allow ITA No.1189/Del/2013 for the AY 2009-10 also.

24. In the result appeals of the assessee for both the years are allowed.

**Order pronounced in the Open Court on 18th April, 2019.**

**(PRASHANT MAHARISHI)**
**ACCOUNTANT MEMBER**

**(K.NARASIMHA CHARY)**
**JUDICIAL MEMBER**

Dated: 18th **April, 2019.**
VJ

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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