**आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER**
**AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.1774/Mum/2013

(**निर्धारण वर्ष /** Assessment Year: 2009-10)

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|---|---|---|
| ITO 3(3)2,<br>R.No. 602,<br>Aayakar Bhavan,<br>M.K Road,<br>Mumbai 400020 | **बनाम**/<br><br>v. | M/s. Shamrock Pharmachemi Pvt. Ltd.,<br>83E,Hansraj Pragi Bldg.,<br>Opp. Dr. E Moses Road,<br>Worli, Mumbai-400018 |
| | स्थायी लेखा सं./PAN: AAACS6290H | |
| (अपीलार्थी **/Appellant**) | ·· | (प्रत्यर्थी / **Respondent**) |

| | |
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| Revenue by: | Shri. Ashim Kumar Modi (CIT-DR), Shri V. Justin and Ms. Chaitna Ajaria |
| Assessee by: | Shri. Bharat L. Gandhi |

सुनवाई की तारीख **/Date of Hearing : 01.03.2019**

घोषणा की तारीख **/Date of Pronouncement : 30.05.2019**

आदेश / ORDER

**PER RAMIT KOCHAR, Accountant Member:**

This appeal, filed by revenue, being ITA No. 1774/Mum/2013, is directed against appellate order dated 29.10.2012, passed by learned Commissioner of Income Tax (Appeals)-7, Mumbai (hereinafter called "the CIT(A)") in appeal number CIT(A)-7/ITO-3(3)(2)/IT-166/11-12, for assessment year 2009-10, the appellate proceedings had arisen before learned CIT(A) from the assessment order dated 29.12.2011 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2009-10.

2. The grounds of appeal raised by Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

> *1. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs.1,68,19,775/- without appreciating the fact that as per amended provision of section 195, the assessee has to file an application before the AO for determination of sum and rate of tax at which tax would be deducted on such foreign remittances and the said exercise has not been carried out by the assessee.*
>
> *2. "Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was justified in deleting addition of Rs.27,39,215/- u/s 68 of the I.T. Act, 1961 relying on the additional evidences filed by the assessee during the course of appellate proceedings without giving an opportunity to the AO, which is in contravention to rule 46A of I.T.Rules 1962."*
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> *3. "The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored".*
>
> *4. "The appellant craves leave to amend or alter any ground or add a new ground which may be necessary".*

3. The assessee is engaged in the business of dealing in Drugs & Pharmaceuticals. The first issue raised by revenue in its appeal is concerning deletion made by Ld. CIT(A) of the addition of Rs. 1,68,19,775/- for payments made to non-residents without complying with the mandate of amended Section 195 of the 1961 Act. The assessee has made payments towards commission to overseas agents . The assessee submitted details of said payments for last three years as under:-

| Financial Year | *Overseas Transaction Value (in Rs . )* | *Overseas Commission Value (in Rs . )* | *%age of Overseas Commission* |
|---|---|---|---|
| *2008-09* | *12,23,22,188.00* | *1,68,19,755.00* | *13. 75%* |

| | | | |
|---|---|---|---|
| *2009-10* | *16,93,05,845.00* | *1,05,30,824.00* | *6.22%* |
| *2010-11* | *6,00,73,432.00* | *12,01,469.00* | *2%* |

3.2. The assessee submitted copies of agency agreement/contract and exclusivity agreement pertaining to 4 major overseas agents based in USA & Europe as well copies of ledger account of these agents. The assessee submitted that it is into exports of pharmaceutical products and intermediaries due to which it has to incur high cost of registration involved for registering itself being new company abroad. The assessee submitted that from first and second year, marketing and promotional expenses on export sales are also to be incurred. It was submitted that in these registration costs, the sales and marketing costs which are higher in initial years is to be taken care of by the agents. It was submitted that in first and second year, the price realisation of the products are also higher compared to subsequent years. Thus, it was submitted that higher commissions in the range of 12-15% are required to be paid to agents in the first and second year. It was submitted that for the financial year 2008-09 i.e. impugned assessment year 2009-10 , the export sales were to the tune of Rs. 9.5 crores which was first year of exports as in the preceding financial year 2007-08(AY 2008-09) , the assessee submitted that its sales were Nil. The assessee submitted that overseas commission paid for exports sales were to the tune of 12-15% in the previous year relevant to the impugned AY 2009-10 and for financial year 2009-10(AY 2010-11) , the said overseas commission stood reduced to 6% which got further reduced to 2-3% in the AY 2011-12. The assessee also submitted that it is importing raw materials and intermediates directly from MNCs and their representative in USA, Germany etc.. It was submitted that these MNC's due to their internal policies sell their products to their agents or traders and received advance payments against sales. The assessee submitted that it did not give substantial advance payments to the suppliers for importing the produces for

which it involved services of the traders and agents who took care of the same and also arrange for supplies of the raw material directly from these companies. It was submitted that these agents and traders charge their commission as the overseas MNC companies as matter of their policy do not give them commission. The assessee submitted that these commission or agency charges includes expenses incurred by the overseas agents which included registration , vendor approval, quality approval, technical documentation, local analysis etc., which is maximum in the first year as all the registration and formalities have to be undertaken. It was submitted that prices or value generated is also on higher side in the first year in order to cover up the expenses mentioned above. The assessee submitted that these commission or agency charges also included out of pocket expenses which is the responsibility of the overseas agents to be incurred by them. It was also submitted that these overseas commission were paid to overseas agents only after completion of registration and other formalities and achievement of sales target in terms of value and volume .

3.3 The AO rejected the contention of the assessee that these commission on sales to overseas agents also included registration charges.It was observed by the AO that registration cost has no nexus with sales commission. The AO was of the view that even if the agents incurred registration charges on behalf of the assessee, then the same needed to be recovered in the first year itself and it is not possible that these overseas commissions were recovered by overseas agents in three years. The AO referred to agency contract and observed that it provided that the agents shall arrange for the annual order for the products from its customers in Europe and USA on regular basis for the minimum period of three years from the date of first sale. The AO also observed that agency contract with SRK Phamachemie (Europe) GMbH provides that target and payment condition within the above agency commission shall be claimed by SPEG after total volume is

achieved as per list of products attached for the total period of three years. The AO observed that agency contract with all the four agents are identically phrased. The AO was of the view that in view of the above clause, the assessee is not liable to pay overseas commission until targets are achieved by agents for all the three years. The AO was also of the view that whence the assessee has contended that when companies in Europe and USA are facing difficulties to sell their chemicals and intermediates , pharmaceutical products due to competition from India, China and other Asian Countries and they are now selling and disposing, making a distress sale of their stocks at much lower price , it is incomprehensible that the assessee is making payments for commission on its imports. The AO albeit noted that in subsequent years the overseas commission had been reduced to 6.25% and 2% in financial year 2009-10 and 2010-11 but there is no mention in the agreement that registration costs would be recovered in the first year itself or would be recoverable in the form of increased sales commission. The AO observed that rather exclusivity agreement entered by assessee with these agents provided that necessary charges/fee for registration shall be reimbursed as decided by mutual consent. Thus, the AO observed that these registration charges did not have any link with amount of sales . The AO thus observed that overseas commission paid to these four agents were found not to be reasonable and rather excessive , the AO show caused assessee as to why these overseas commission be not restricted to 6.25%. The assessee reiterated its arguments as were advanced earlier before the AO. It was observed by the AO that the out of four agents to whom overseas commissions are payable , the assessee did not made payment to two agents. The AO observed that it has also casted doubt on the claim of genuineness of the claim of these commission expenses. The AO also observed that the confirmations are not original and rather they are Xerox and E-mails received by the assessee. The AO also observed that these confirmations do not give the relevant details such as invoice number, date of sale , description of item , sale

value and basis of computation of commission charged. The AO observed that these confirmations are nothing but self serving documents obtained by the assessee during the course of assessment and all are dated December 2011. The AO held that these overseas commissions are not allowable expenses and are thus disallowed.

3.4 Without prejudice to the above discussions disallowing the aforesaid expenses towards overseas commissions, the AO also observed that provisions of Section 195 of the 1961 Act are not complied with. The AO also observed that w.e.f. 01.04.2008 , the provisions of Section 195 stood amended. It was observed by the AO that it is no more the discretion of the assessee or its CA to take a call whether to deduct income-tax at source before making any payments to Non-Residents or to a foreign company. The AO also referred to provisions of Section 195(2) of the 1961 Act. The AO observed that with effect from 01.04.2008, the assessee has to make an application to AO for determination of sum so chargeable to income-tax and accordingly deduct income-tax at source from such sum which is so chargeable. The AO also observed that the assessee is required to file a report in form no. 15CA/15CB , before making any remittance to such foreign party. The AO observed that such Form No. 15CA/15CB requires assessee to give exhaustive details in respect of the proposed remittance whether income is taxable in India or not. The AO observed that said Form No. 15CA/15CB in respect of overseas commission was filed by the assessee for the first time before the AO during the course of assessment proceedings , while the same was required to be filed prior to sending remittance outside India to such foreign party. The assessee submitted that these payments made to overseas agents are not chargeable to income-tax in India. It was submitted by assessee that all the four overseas agents are residents outside India and also carry on their business from other countries. The assessee submitted that these agents are residents in the following countries as well carry on their business in the said countries:

| S.No. | Name of the Company | Name of the Country |
|---|---|---|
| 1 | Regal Bank Limited | UK |
| 2 | SRK Pharmachemic (Europe) | GMBH |
| 3. | NJK Holdings LLC | USA |
| 4. | Roscio Alassandro | Italy |

3.5 The assessee referred to DTAA entered into by India with these countries and observed that taxability of such agency commission has therefore to be examined with the help of respective DTAA entered into by India with these countries and Section 90 of the 1961 Act. The AO observed that provisions relating to payment of commission to the overseas agents are dealt with by Article 12 relating to 'Independent personal services' or Article 7 relating to 'Business Profits' , thus such commission shall be taxable in the country of residence of the recipients and not in the country of source i.e. India. The assessee submitted that these payments are not liable to be taxed in India but in the countries to which these parties belong to. The assessee submitted that it has requested these foreign agents to provide proof of their residences and also confirm that these overseas commission are taxable outside India. The assessee submitted that no tax was deductible at source on these payments and the bankers also did not ask for proof of deduction of income-tax at source before making payments to these overseas agents for commission , which itself shows that no income-tax was deductible at source on these payments. The assessee relied upon the decision of Hon'ble Supreme Court in the case of G.E. India Technology Centre Private Limited v. CIT reported in (2010) 193 Taxman 234(SC) to contend that only if the payee is taxable in India, then only Section 195 can be invoked. Thus, prayers were made by assessee that Section 195 read with Section 40(1)(i) of the 1961 Act has no applicability to the instant case and no disallowance of the expenses are warranted. On deductibility of expenses on merits , the assessee claimed that there is a clear nexus

of these expenses with the business of the assessee and the AO cannot sit in the armchair of businessmen to decide how much expenses are reasonable. It was claimed by the assessee that these payments are genuine and were paid to selling agents , thus these expenses cannot be disallowed. The assessee claimed that these payments were made owing to commercial expediency. Thus, the assessee prayed that these expenses be allowed towards overseas commission fully as deduction u/s 37 of the 1961 Act, while computing income of the assessee.

3.6. The AO was pleased to reject the contentions of the assessee on merits of the deductibility of these expenses paid to overseas agents for commission vide assessment order dated 29.12.2011 passed by the AO u/s 143(3) of the 1961 Act, by holding as under:-

> " *6.3.7 The submission of the assessee has been carefully considered. The assessee's interpretation of the statute is a bit selective as well as outdated. The decision relied upon by the assessee are not correct and no longer valid to the amended provisions, In fact many of the decisions relied upon refers to section 194H which has no application to the case of the assessee. Section 194H relates to tax deduction at source on Commission payment to resident persons, and NOT to a non resident or foreign companies. The assessee has perhaps missed the provision of subsection (2) of the very same section 195 which assessee has so vehemently relied upon. As stated earlier, from 1.04.2008 the provisions of section 195 have changed to effect that it is the Assessing officer who would decide the quantum of payment which is chargeable to tax in India , and the rate at which tax from sum so chargeable has to be deducted. The assessee did not filed any application before the assessing officer for determination of such sum and the rate of tax at which tax would be deducted from the Overseas commission so credited to the party's account. It is pertinent to note that this exercise has to be undertaken before such Commission are credited/paid to the account of the Overseas agents. It is therefore clear that the assessee has not followed the provisions of section 195 and thus provisions of section 40(i) is therefore attracted to the case of the assessee.*

*6.4 To summarize, the Overseas Commission payment is thus not allowable as business expenses due to following reasons:-*

*-The assessee has failed to bring any material evidence on record to establish the nexus between Registration charges and Sales requiring higher commission expenses payable.*

*-The assessee failed to establish that Commission has accrued to the parties/agents, in view of the specific clause in the agreement which warranted fulfilling a target of Sales of respective items over next three years. The contention that Commission on Sales has not been accrued during the year, is evidenced by the fact that Commission to the 2 agents are still outstanding till date of this order.*

*-Without prejudice to the merit of the case as discussed above and ALTERNATIVELY, the Overseas Commission is not admissible as Business expense, as the assessee has violated the provision of section 195 and therefore invoking the provision of section 40(i) of The I. T. Act.*

*6.5 In view of the above, the entire overseas Commission of Rs.168,19,755/- is thus disallowed and added back to the total income of the assessee. Penalty proceedings u/s 271(1)(c) of I. T. Act 1961 is initiated separately for furnishing inaccurate particulars on income.*"

4. The assessee carried the matter in appeal before Ld. CIT(A) and detailed contentions were made by assessee before learned CIT(A) both on merits of allowability of deduction towards payments made to overseas agent towards commission as well on applicability of deduction u/s 195 of the 1961 Act. The learned CIT(A) accepted the contentions of the assessee both on merits as well on allowability of deduction in the midst of Section 195 read with Section 40(a)(ia) of the 1961 Act. So far as merits of the allowability of claim of deduction u/s 37(1) of the 1961 Act is concerned, the issue has attained finality as Revenue has not agitated the same before tribunal. However , the dispute which now remained between rival parties before tribunal is concerning deductibility of income-tax at source u/s. 195 for which

assessee has submitted that no income-tax is deductible on such payments made towards commission to overseas agents u/s. 195 as there is no income component which could be brought to tax in the hands of the payee as these payees did not have permanent establishment in India. We will be restricting our adjudication to the allowability of claim of deduction towards commission to overseas agents keeping in view provisions of Section 195 read with Seciton 40(a)(i) of the 1961 Act. The assessee in its defence submitted before learned CIT(A) as under:-

> *" 48. While disallowing the commission expenses of Rs. 1,68,19,755/- the Assessing Officer has observed that the said commission expenses is not genuine in nature. He has alternatively also observed that the commission is subjected to the provisions of TDS. Since the appellant has not deducted or paid the TDS as required by s. 195 of the Act, in view of the provisions of s.40(a)(i) of the Act, the said commission expenses is not allowable. The issue as regards the genuineness of the expenditure is dealt with by the appellant in ground no. 3 above. As regards, the applicability of s.195 and s. 40(a)(i) of the Act, we state and submit as under.*
>
> *49. Since the disallowance has been made by the Assessing Officer invoking s. 40(a)(i) of the Act , the relevant provisions of s. 40(a)(i) of the Act are reproduced below:*
>
> *"s. 40(a)(i) Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession", - (a) In the case of any assessee - (i) Any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable*
>
> *(A) outside India, or*
>
> *(B) In India to a non-resident, not being a company or to a foreign company,*
>
> *on which tax has not been paid or deducted under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year; or*

*in the subsequent year before the expiry of the time prescribed under subsection (1) of s. 200".*

*50. The perusal of the above provisions shows that any expenditure which is payable outside India on which tax is deductible at source but has not been deducted or after deduction has not been paid, shall not be allowed as deduction. Thus, these provisions are applicable in respect of the expenditure payable outside India on which either tax are not deducted or if deducted, not paid. We submit that in order to invoke the said provisions, it is necessary to make the payment outside India of income on which tax is deductible at source. If the tax is not deductible at source at all, the provisions of section 40(a)(i) shall not be applicable. Under these circumstances, it is necessary to consider whether the provisions of section 195 are applicable or not. The relevant provisions of section 195 are reproduced below:*

*"195. (I) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force. "*

*51. As per the said provisions, tax is to be deducted by any person who is responsible for payment of any sum which is chargeable under this Act. Thus, the said provisions require that the payment made outside India should be chargeable to tax under the provisions of the Act in order to deduct tax.*

*52. In the present case, the payment made to overseas agents is not chargeable to tax in India. The facts as already placed on record shows that all the 4 overseas agents are resident outside India and also carry on their business from the other countries. We submit that these agents are resident in the following countries as well as carry on the business in the said countries:*

| *Sr. No.* | *Name of the company* | *Name of the country* |
|---|---|---|
| *L* | *Regal Rank Ltd* | *UK* |

| | | |
|---|---|---|
| *2.* | *SRK Pharmachemie (Europe) GmBH* | *Germany* |
| *3,* | *NJK Holdings LLC* | *USA* |
| *4.* | *Roscio Alassandro* | *Italy* |

*53. The above chart shows that all these parties are subjected to tax outside India. The provisions relating to the taxability of such agency commission have therefore to be examined with the help of the respective Double Taxation Avoidance Agreement (DTAA) entered into by India with the respective countries and section 90 of the Act. The provisions relating to the payment of commission to the overseas agents are dealt with by Article 12 relating to "independent personnel services" or Article 7 relating to 'Business Profit" in all the DTAA. As per the provisions of the respective DTAA, the payment of such commission shall be taxable in the country of residence of the recipients and not in the country of source i.e. India. As such these payments shall be liable to tax not in India but in the countries to which these parties belong to.*

*54. In view of the above, we submit that these charges are not subjected to tax in India. This is also established in view of the fact that even at the time of making the payment/remittance of the commission; no deduction of tax was enforced by the bankers which itself proves that the payment is not subjected to tax.*

*55. Once it is established that these agents are not taxable in India, the provisions of TDS u/s. 195 of the Act shall not be applicable. It is categorically held by the Hon'ble Supreme Court in the case of GE India Technology Centre Pvt Ltd v. CIT [327 ITR 456] wherein it is held that only if, the payee is taxable in India, section 195 can be invoked. Thus, in view of the settled position, we submit that the provisions of section 195 and 40 (a) (i) cannot be made applicable in the case of the appellant,*

*56. The above submissions were also made before the Assessing Officer at the time of assessment proceedings. However, in the assessment order, the Assessing Officer has objected to the said submission on the ground that w.e.f. 01.04.2008, the provisions of s. 195 had undergone some changes according to which, it is not in discretion of the assessee or its chartered accountant to take call that*

*whether to deduct tax from any payment made to the non-resident. According to him, after 01.04.2008, the appellant has to compulsorily make an application to the Assessing Officer for determination of the tax so chargeable and deduct tax accordingly. Since such application was not made by the appellant, according to the Assessing Officer, the said expenses were not held allowable,*

*57. In this regard, we submit that the findings of the Assessing Officer are incorrect and without appreciating the correct legal position in the present case. We have already reproduced the provisions of s.195(1) which require that any person responsible for payment to non-resident of any sum which is chargeable under the Act, deduct the tax at the time of credit of such income to the account of such non-resident. Thus, the charging s. 195(1) of the Act clearly postulate the requirement of TDS to be deducted only when any income which chargeable under the provisions of the Act is credited or paid by the appellant. Undisputedly, in view of detailed submissions made above, the commission paid by the appellant to the foreign agents is not liable to tax in India.*

*58. The Assessing Officer has mainly referred to the provisions of s. 195(2) of the Act to come to conclusion that it is mandatory for every assessee to file an application to the Assessing Officer for making the payment of commission without TDS. Without such application, it is compulsorily on the part of the assessee to deduct TDS on every payment made to non- resident. We submit that the understanding of the provisions of s. 195(2) of the Assessing Officer is incorrect and unjustified. The said provisions are therefore reproduced for ready reference:*

*"195. (2) Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (I) only on that proportion of the sum which is so chargeable ".*

*59. The above provisions clearly shows that s. 195(2) of the Act would be applicable only in a case where the assessee, making payment to a non-resident, considers that the whole such sum would not be the income of the recipient, an application should be made to the Assessing Officer to determine the proportion of the total amount*

*which can be subjected to TDS. The said s. 195(2) of the Act clearly proves that it is only applied to a situation where the amount payable to the non-resident is taxable in India and the quantum of income out of the total amount payable to the non-resident cannot be ascertained reasonably. In other words, s. 195(2) would be applicable only in a case where the amount payable by the appellant to the overseas agents is otherwise liable to TDS. In order to invoke s. 195(2) of the Act, it is necessary to establish that the amount payable to the non-resident is otherwise liable to tax in India. It is only if the amount is liable to tax-in India, the provisions of s. 195(2) have to be invoked to determine the quantum of income embedded in the income on which TDS is to be deducted.*

*60. In the present case, admittedly the amount is not liable to TDS as the same is not chargeable to tax in India. This fact is also not disputed by the Assessing Officer in the assessment order. Since the amount claimed as the overseas commission is not chargeable to tax in India, the appellant was under no obligation to deduct tax on the said payment made by the appellant. In view of the above submissions and contentions, we submit that the disallowance of deduction on account of commission invoking s. 195 of the Act is incorrect and unjustified.*

*61. The Assessing Officer has also observed that the appellant had not obtained certificate in Form 15CB which is also mandatory for the purpose of remittance. We submit that the said certificate is merely procedural requirement and the same cannot be equated with the conditions for allowing deduction. By way of such certificate, the chartered accountant merely confirms that the amount is not liable to TDS or if the amount is liable to TDS, the quantum of tax thereon. These certificates are mandatorily to be filed before making any remittance. The bank usually calls for these certificates at the time when the remittance is being made. It is only upon called upon the said certificates; the appellant is required to make the remittances. In the present case, the appellant had not made remittance of all the payments towards commission during the year. Hence, the appellant was not under any obligation to file the said Form 15CB.*

*62. In any case, we submit that since furnishing of Form 15CB is merely a procedural requirement, the same cannot be brought in the way of allowing the deduction when all other conditions are fulfilled by the appellant. In view of the above submissions and contentions, we pray Your*

*Honour to kindly direct the Assessing Officer to allow the deduction on account of commission payment."*

4.2 . The assessee also submitted that these payments are governed by DTAA wherein the further contentions were made by the assessee before learned CIT(A), as under:-

*"1. DISALLOWANCE OF THE OVERSEAS COMMISSION*

*a) There is no requirement of deducting the TDS as on the commission paid to the non resident abroad as they are not having any permanent establishment in India they are domicile of the respective Countries i.e. Germany, U.K. and U.S.A. They are covered by double tax Avoidance Agreement entered by the respective Countries with India. They are also not domiciled in India and are domiciled in their respective countries.*

*b) Neither they can be termed as an associated enterprises with the appellant.*

*D.T.A.A. WITH GERMANY:*

*a) It is issued in the notification No.GSR-836 (E) dated 29.11.1996. On perusal of article 4 (1) r/w article 7 (1) and article 14 (1) they are not required to pay any tax in India as stated in the D.T.A.A agreement entered by India with Germany.*

***D.T.A.A WITH U.S.A.***

*a) The said agreement is reproduced in the notification bearing No.GSR 990(E) dated 20.12.1990. On perusal of the clause article 4(1), 7(1), 15 (1) and 23 (1) it will clearly reveal that the abroad non resident commission agent is not required to pay tax in India vide the said agreement.*

*D.T.A.A WITH U.K*

*a) The said agreement is being reproduced in the notification No.GSR 19 (E) dated 11.02.1994. On perusal of the article 7 (1) and article 15 (1) it will clearly reveal that the transaction is clearly covered under the said notification and D.T.A.A. agreement entered by India with U.K. and the non resident commission agent is not required to pay the taxes in India,*

*b) On perusal of circular No. 786 dated 07.02.2000 reported in 241 ITR (St.) 132 where it is been clearly stated that there is no need to deduct the Tax i.e TDS u/s 195 would arise if the payment of commission is to the non resident agent is chargeable to tax in India. Further attention is drawn on the CBDT circular No. 23 dated 23.07.1969 where the taxability of foreign agent of Indian export was considered along with other specific situation and it was clarified that the non resident agents operate outside India no part of income arises in India further since the payment is usually remitted directly abroad, it cannot be held to have been received by or on behalf of the agent in India. Such payments was therefore held to be not taxable in India. The relevant section namely section 5 (2) and section 9 of the Income Tax Act 1961 not having undergone any change in this regard a clarification in circular No. 23 still prevails and there is no tax is therefore deductible u/s 195 and consequently the expenditure on export commission and other related charges payable to a Non Resident to service rendered outside India becomes allowable expenditure. Hereto annexed and marked as Exhibit "A" is the copy of the said Circular.*

*c) In a judgment reported in 305 ITR AT 122 Guwahati joint CIT V/s George Willamson Assam Ltd, it is clearly held that when commission is paid to the non resident for services abroad such income is not taxable so that there would be no TDS for such payment. Similar view has been upheld in Dy. Director of Income Tax (IT) V/s Samsung Engineering Co. Ltd. in ITA Nos. 3006, 3700 of 2005 and 4262 of 2008 the view has been upheld. The copy of the said judgment is annexed as Exhibit "B".*

*d) The above view is further upheld in the judgment reported in 267 ITR page 725 given by the authority of advance ruling.*

*e) As held in 125 ITR page 525 by the Hon'ble Supreme Court the commission amount which were earned by the non resident for services rendered outside India could not be deemed to be income which has either accrued or arisen in India. The above contentions if*

*further supported in the judgment reported in 64 DTR 257.*

*f) Relying on the judgment reported in 263 ITR 706 that the Offshore Companies can take the exemption and benefit of double taxation avoidance agreement between the respective countries and such types of interpretation has to be done beneficial to the Assessee.*

*g) It is also settled law that the circulars issued by the Central Board of Direct taxes are binding upon the Income Tax Authorities u/s 119. The above contentions are supporting by the following judgments reported in:*

*55 ITR 198,*

*237 ITR 889,*

*Based on the above submission and since the payment was subsequently remitted to the respective parties through Banking channels this clearly established the genuinely of the transaction and the Ld. Assessing Officer has not discharged his burden of proof."*

Thus, in nut-shell the assessee prayed before learned CIT(A) that additions made on account of expenditure incurred for overseas commission on the grounds of non deductibility of income-tax at source u/s 195 read with Section 40(a)(i) of the 1961 Act by the AO , be deleted.

4.3 The learned CIT(A) was pleased to delete the additions as were made by the AO on merits vide appellate order dated 29.10.2012 passed by learned CIT(A) , by holding that these are business expenses which are incurred wholly and exclusively for the purposes of the business of the assessee. There is no dispute as to it as Revenue has accepted this part of the appellate order dated 29.10.2012 passed by learned CIT(A).

4.4. The dispute between rival parties is with respect to appellate order dated 29.10.2012 passed by learned CIT(A) granting relief to the

assessee on this ground of non deductibility of income-tax at Source u/s 195 of the 1961 Act read with Section 40(a)(i) of the 1961 Act, by holding as under:-

> *" **6.8** In addition to this, it is also warranted to mention here that the A.O. made the disallowance alternatively taking note of the provisions of section 195 of the Act for non deduction of tax at source as envisaged u/s 40(a)(ia) of the Act. But however the perusal of the appellant submission, which clearly suggests that the payee were non-resident and the services rendered by them were outside India for which the commission were paid by the appellant company. Hence the said payment were not covered u/s 195 of the Act due to the absence of pre-condition for applicability of section 195 of the Act i.e. "Sum chargeable under the provisions of the Act". Thus, taking note of the decision of Apex Court in the case of GE India Technology Centre Pvt Ltd v. CIT [327 ITR 456], I am of the considered view that the A.O.'s this observation was also misconceived on account of applicability of section 195 r.w.s 40(a)(ia) of the Act. Accordingly taking note of all the facts and submission available on record and also after keeping reliance on decisions cited by the appellant's A/R in its submission as extracted above, I consider it proper and appropriate to hold that the A.O. was not correct in disallowing the claim of expenditure of the appellant company, which was incurred for the business purposes. Accordingly the addition so made by the A.O. is deleted on this pretext also. Accordingly these grounds of appeal are allowed."*

5. Aggrieved by appellate order dated 29.10.2012 passed by learned CIT(A), the Revenue has come in appeal before the tribunal. The Ld. DR submitted that assessee made payments to overseas agents for commission of Rs. 1.68 crores . Our attention was drawn to the orders of the authorities below. The Ld. DR submitted that Revenue has only challenged as to applicability of Section 195 read with Section 40(a)(i) of the 1961 Act to the payments made for commissions to non resident agents and non compliance of provision

of Section 195 committed by the assessee . It was explained that even if assessee contemplates that there is no requirement to deduct income-tax at source on these payments made to overseas agents towards commission but still the assessee is required to approach AO u/s 195(2) to obtain certificate for non deduction of income-tax at source or for deduction of income-tax at source at lower rates than prescribed rates. It was submitted that decision of Hon'ble Supreme Court in the case of G.E India Technical Centre P. Ltd.(supra) is a decision prior to amendments being made in Section 195 of the 1961 Act , and the assessee in the instant case has failed to comply with the requirements of amended Section 195 of the 1961 Act. It was submitted by Ld. DR that the assessee was required to make application before the AO u/s 195(2) for grant of certificate for no deduction/lower deduction of income-tax at source than prescribed rates but no such application was made by the assessee and hence provisions of Section 195 were clearly infringed leading to infringement of Section 40(a)(i) of 1961 Act. Our attention was also drawn to Sub-section 195(6) of the 1961 Act and it was submitted that vide amended provisions , the assessee has clearly defaulted by non-deducting income tax at source while making payments for commissions to overseas agents or else the assessee was required to approach the AO for grant of certificate for non deduction of income-tax at source or for deduction of income-tax at source at lower rates u/s 195(2) of the 1961 Act and hence the additions were rightly made by the AO.

5.2 The Ld. Counsel for the assessee on the other hand submitted that the assessee has made payments to overseas agents towards commission for securing orders in favour of the assessee. It was submitted that higher commission was paid in the first year i.e. impugned assessment year as registration was done for the product of the assessee in foreign countries for which costs were incurred. Our attention was drawn to decision of Hon'ble Madras High Court in the

case of CIT v. Farida Leather Company in Tax Case Appeal No. 484 of 2015, order dated 20.01.2016. The assessee also relied on the Special Bench decision of Chennai Tribunal in the case of ITO v. Prasad Production Ltd., reported in (2010) 129 TTJ 641(SB)(Chennai-trib.) and Hon'ble Gujarat High Court decision in the case of PCIT v. Nova Technocast in R/Tax Appeal no. 290 of 2018 , dated 09.04.2018.

6. We have considered rival contentions and perused the material on record including cited case laws. We have observed that the assessee is engaged in the business of dealing in Drugs & Pharmaceuticals. The assessee made payments of Rs. 1,68,19,775/- toward commission to four non-residents who are overseas agents of the assessee for generating export orders of the drugs and intermediates dealt in by the assessee as well for arranging imports of the raw material required by the assessee. It is an accepted position between the rival parties that these four overseas agents to whom commissions are paid do not have permanent establishment or fixed place of business in Indi as there is no material to contrary on records. These four overseas agents are stated to be working from abroad. These overseas agents have rendered services towards procuring export orders as well for arranging imports from outside India. The assessee has made payments towards commission to overseas agents by remitting payments from India through banking channel abroad to two agents while for two agents payments were not yet remitted till the year end. The assessee had submitted details of said payments for last three years as under:-

| Financial Year | *Overseas Transaction Value (in Rs . )* | *Overseas Commission Value (in Rs . )* | *%age of Overseas Commission* |
|---|---|---|---|
| *2008-09* | *12,23,22,188.00* | *1,68,19,755.00* | *13. 75%* |
| *2009-10* | *16,93,05,845.00* | *1,05,30,824.00* | *6.22%* |
| *2010-11* | *6,00,73,432.00* | *12,01,469.00* | *2%* |

| | | | |
|---|---|---|---|

The assessee had duly submitted copies of agency agreement/contract and exclusivity agreement pertaining to 4 major overseas agents based in USA & Europe as well copies of ledger account of these agents. The four foreign agents to whom aforesaid payment of commission of Rs. 1.68 crore were made are as under:

| Sr. No. | Name of the company | Name of the country |
|---|---|---|
| L | Regal Rank Ltd | UK |
| 2. | SRK Pharmachemie (Europe) GmBH | Germany |
| 3, | NJK Holdings LLC | USA |
| 4. | Roscio Alassandro | Italy |

The Revenue is not doubting the genuineness of these commissions to overseas agents which was claimed by assessee as business expenses u/s 37(1) as that part of appellate order holding the issue in favour of the assessee has attained finality as Revenue has not challenged the said part of finding of learned CIT(A). The Revenue is mainly aggrieved in this appeal by infringement of Section 195(2) read with Section 40(a)(i) of the 1961 Act. It is also explained by the assessee that it is into exports of pharmaceutical products and intermediaries due to which it has to incur high cost of registration involved for registering itself in foreign countries being new company abroad. The assessee submitted that from first and second year, marketing and promotional expenses on export sales are also to be incurred. It was also claimed by assessee that in these registration costs, the sales and marketing costs which are higher in initial years is to be taken care of by the

agents. It was submitted that in first and second year, the price realisation of the products are also higher compared to subsequent years. Thus, it was submitted that higher commissions in the range of 12-15% are required to be paid to agents in the first and second year. As detailed in the chart produced above , the percentile of commission payable on the export orders came down significantly in succeeding assessment years . The assessee also submitted that it is importing raw materials and intermediates directly from MNCs and their representative in USA, Germany etc.. It was submitted that these MNC's due to their internal policies sell their products to their agents or traders and received advance payments against sales. The assessee submitted that it did not give substantial advance payments to the suppliers for importing the produces for which it involved services of the traders and agents who took care of the same and also arrange for supplies of the raw material directly from these companies. It was submitted that these agents and traders charge their commission as the overseas MNC companies as matter of their policy do not give them commission. The assessee submitted that these commission or agency charges includes expenses incurred by the overseas agents which included registration , vendor approval, quality approval, technical documentation, local analysis etc., which is maximum in the first year as all the registration and formalities have to be undertaken. It was submitted that prices or value generated is also on higher side in the first year in order to cover up the expenses mentioned above. The assessee submitted that these commission or agency charges also included out of pocket expenses which is the responsibility of the overseas agents to be incurred by them. It was also submitted that these overseas commission were paid to overseas agents only after completion of registration and other formalities and achievement of sales target in terms of value and volume . The authorities below have perused the agency agreements. It is provided in the agreements that targets as to value and volumes are fixed for overseas agents to get commission and in case the performances are

not forthcoming, the assessee will not be liable to pay these commissions. Thus, these commissions paid to overseas agents are linked to performance by way of export orders generated or import of raw material etc facilitated for the assessee. The assessee was new to export business and as this being the first year of exports , hence the assessee was required to get registration done with various authorities/agencies in foreign countries . The said overseas agents assisted assessee in getting itself registered and undertook work for marketing and sales of assessee's products for which necessarily expenses were incurred by these overseas agents but the pith and substance of the agency agreement and the work performed in substance was to generate export orders and to facilitate imports of the products dealt in by the assessee and the work of registration of the assessee with various authorities/agencies in foreign country or to undertake marketing and sales promotion was all incidental to generating export orders or facilitating imports for the assessee. The commission certainly was higher in the initial years due to requirements of getting assessee registered with various authorities/ agencies in foreign countries but the liability of the assessee to pay the said costs were linked to performance achieved by these overseas agents in generating export orders or facilitating import for the assessee. Thus, what is relevant is pith and substance of the transaction which clearly establishes the generation of export orders in favour of the assessee or facilitating imports for the assessee, while all the other activities undertaken by these agents were incidental to the main activity of export/import orders. It is not brought on record by Revenue that these agents had permanent establishment or any fixed place of business in India and as per material on record these non resident foreign agents were rendering services to assessee from outside India.The payments are also made by the assessee to these foreign agents by sending remittance abroad and no part of payment is made in India or to any person in India on behalf of these overseas agents. It is not brought on record by Revenue as to how this income

earned by way of commission by these overseas agents is taxable in India , even under the deeming fiction of Section 9 of the 1961 Act . The only contention of the Revenue is that keeping in view newly amended provisions of Section 195(2) of the 1961 Act, the assessee was required to make an application to the AO for seeking permission for lower deduction of income-tax at source or for no deduction of income tax at source u/s 195 which was not done by the assessee. Admittedly , the assessee while making payments to these overseas agents towards commissions did not deducted income-tax at source under the provisions of Section 195 of the 1961 Act but it is a matter of record that the assessee did produce certified Form No. 15CA/15CB before AO during assessment proceedings wherein it is certified by CA that no sum so paid by assessee towards commission to these overseas agents is liable to be taxed under provisions of the 1961 Act. the Revenue could not controvert this position. It is important at this stage to refer to decision of Hon'ble Madras High Court in the case of Evolv Clothing Company Private Limited v. ACIT reported in (2018) 407 ITR 72(Mad.), wherein it was held as under:

> ***"19.*** *From the judgment and order of the learned Tribunal under appeal, it appears that the Revenue only contended that the payee in question had rendered technical services in the nature of systematic research to the appellant and received fee in lieu thereof, which was liable to be taxed as per Article 13 (Clause 4) of the Indo-Italian Double Taxation Avoidance Agreement (DTAA).*
>
> ***20.*** *The learned Tribunal took note of the agreement between the appellant and the payee which, inter alia, provided as follows:*
>
> *"The SECOND PARTY agrees to undertake and carryout the following services on behalf of the FIRST PARTY:*
>
> 1. *To procure orders for the FIRST PARTY and to negotiate the terms of such orders and contracts with said foreign buyers but the terms thereof shall be subject to prior, written concurrence of the FIRST PARTY.*
>
> 2. *To carry out systematic market research with regard to the needs of the products in the territory and to send to the FIRST PARTY reports and suggestions for adopting necessary measure in order to increase sale of the products.*

3. *To co-ordinate with the FIRST PARTY for the timely completion of all export obligations and to render all assistance in the fulfillment of the terms of the supply contract.*

4. *To take all necessary efforts and ensure timely payment by the buyers for all exports performed by the FIRST PARTY which have been negotiated by the SECOND PARTY.*

5. *To render all other assistance to the FIRST PARTY and its representatives while on visits to the territory and to make available the agency office for all secretarial and other assistance."*

***21.*** *On consideration of the terms and conditions of the said agreement, the learned Tribunal formulated the question of whether systematic research giving rise to payment in question made by the assessee could be termed as "fee for technical services" or not. The question was answered in the affirmative. The learned Tribunal held that the word "technical services" would imply an operation involving skilled precision, which "systematic research" also involves. The learned Tribunal, thus, concluded that the assessee's agreements in question leading to payment to the overseas entity amounted to fees for technical services, for which the appellant was liable to deduct TDS, failure of which would entail disallowance under Section 40(a)(ia) of the IT Act.*

***22.*** *The appeal was admitted by a Division Bench comprising Chitra Venkataraman and K.B.K.Vasuki, JJ. The substantial questions of law on which the appeal was admitted need to be re-framed and are re-framed as follows:*

(i) *Whether commission paid by an exporter to a non-resident agent and/or a foreign agent for service provided outside India for procuring orders is taxable in India?*

(ii) *Whether rendering of the service of market survey abroad would tantamount to rendering of technical service so as to attract taxes in India?*

(iii) *Whether an assessee is liable to deduct TDS on commission paid to overseas agents operating abroad?*

(iv) *Whether the amendment of the Income Tax Act with retrospective effect from 1.6.1976 by the Finance Act, 2010 clarifying that income of non resident would be deemed to accrue or arise in India under Clause (v) or clause (vi) or clause (vii) of sub-section(1) and be included in the total income of the non-resident whether or not the non-resident has a residence or place of business or business connection in India, and whether or not the non-resident has rendered services in India is attracted in the facts and*

*circumstances of this case?*

***23.*** *The first question necessarily and obviously has to be answered in favour of the appellant/assessee and against the Revenue, the question being covered by the judgment of Supreme Court in Toshoku Ltd., supra. The issue before the learned Tribunal was whether the appellant/assessee had paid for systematic research or for procuring export orders. It was all along the contention of the appellant/assessee that the foreign agent was paid for procuring orders and assessing the market. The learned Tribunal erred in concluding that there was no issue between the parties that the assessee had paid for systematic research. For the sake of convenience, the second, the third and the fourth questions are dealt with together.*

***24.*** *The learned Tribunal found, on facts, on perusal of the agreement copies filed by the appellant/assessee that commission was paid to the foreign agents for (i) marketing the products of the assessee company; (ii) to procure orders for the assessee company; and (iii) for systematic market research with regard to the needs of the products, etc.*

***25.*** *There is no factual finding of any activity on the part of the payee in India. The Assessing Officer proceeded on the basis that the business of the appellant/assessee was in India and payments were made from India.*

***26.*** *Having found that the payments were for marketing the products of the assessee company, for procuring of orders for the assessee company and for systematic research with regard to the demand for the products of the assessee. The Assessing Officer erred in arriving at the conclusion that payments made by the appellant assessee could not be said to have been made for the purpose of overseas commission. The Assessing Officer as also the learned Tribunal misinterpreted the Explanation 2 of Section 9(1)(vii) of the IT Act, whereunder "fee for technical services" means any managerial, technical or consultancy services. It is nobody's case that the service rendered by the overseas agent was either managerial or technical. As held by the Appellate Commissioner, payment for research with regard to need for products was incidental to the job of procuring orders on commission basis. Consultancy services contemplate comprehensive expert technical advisory services based on technical expertise and research, of business and marketing strategies as a whole, including adoption of cost effective measures, organizational and infrastructural requirements, business management, personnel management and other strategies, for business efficacy of a business entity as a whole and not mere market survey of the need for any particular product. The amendment with retrospective effect from 1.6.1976 by insertion of Explanation to Section 9(2) can only apply to income by way of interest, by way of royalty and by way of fees for technical services and not to brokerage or job wise commission on activities incidental to procurement of orders.*

***27.*** *The Assessing Officer, in effect, held that income could be deemed to accrue or arise in India under Section 9(1)(vii) of the IT Act even if the non-resident did not have place of business or business connection in*

*India or had not rendered services in India. The exceptions provided under Section 9(1)(vi)(b)/ 9(1)(vii)(b) of the IT Act, which apply to utilization of services of business outside India, did not cover the assessee's case.*

***28.*** *The Assessing Officer had also taken note of withdrawal of two circulars: (i) Circular No.786, dated 7.2.2000, dealing with payment of export commission, opining that withdrawal, being procedural in nature, would apply to proceedings pending; and (ii) Circular No.23 of 1969, which exhaustively dealt with subject of "Non residents Income accruing or arising through or from business connection in India – Liability to tax – Section 9 of the Income Tax Act, 1961".*

***29.*** *From the Service Agreement with the agents abroad, it is clear that the service rendered is essentially brokerage service. The very first clause of the agreement states "to procure orders". The reference to market research abroad or co-ordination with the supplier or to ensure timely payment or making available its office space for visit by the suppliers, were ordinarily things which any agent or broker undertook incidental to brokerage service.*

***30.*** *There is no finding that any of the commission agents had any place of business in India. Explanation 1 to Section 9(1)(i) of the IT Act would attract liability to Indian tax for a non-resident with business connections in India, only in respect of income attributable to his operations in India. In this case, there is nothing which shows that the income in question was attributable to operations in India. That was not even the factual finding of the Assessing Officer. The Assessing Officer proceeded on the basis that the situs of the rendering of services was not relevant. It was only the situs of the payer and the situs of the utilization of services which determine taxability of such services in India.*

***31.*** *Section 195 of the IT Act attracts tax only on chargeable income, if any, paid to a non-resident. Where there is no liability, the question of tax deduction does not arise. Where no part of the income is chargeable in India, even clearance under Section 195(2) or 195(3) of the IT Act is not necessary. The decision of the Karnataka High Court in CIT (International Taxation) v. Samsung Electronics Co. Ltd., [2010] 320 ITR 209/[2009] 185 Taxman 313 (Kar), has been overruled by the Supreme Court in GE India Technology Centre (P.) Ltd. v. CIT [2010] 327 ITR 456/ 193 Taxman 234/ 7 taxmann.com 18. The Supreme Court held as under:*

> *"This reasoning flows from the words 'sum chargeable under the provisions of the Act' in Section 195(1). The fact that the Revenue had not obtained any information per se cannot be a ground to construe Section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read Section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the*

*expression "sum chargeable under the provisions of the Act" from Section 195(1)."*

***32.*** *Where there is no liability in India, there can be no question of disallowance under Section 40(a)(i) or Section 40(a)(ia) of the IT Act on the ground of non-deduction of tax at source. Moreover, where a non-resident has no permanent establishment in India, there can be no liability either under the domestic law or under Double Taxation Avoidance Agreement. In any case, even if a non-resident Indian did have a permanent establishment, but income was earned without availing of such permanent establishment, the income for services rendered abroad could not have been liable for tax deduction at source.*

***33.*** *Under Section 9(1)(vii)(b), income by way of fees for technical services payable by a person, who is a resident, is taxable income except where the fees are payable in respect of services 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 source outside India. In view of Explanation (2) to Section 9(1)(vii), technical services means any consideration, including lumpsum consideration, for rendering of any managerial, technical or consultancy services, including the provision of services of technical or other personnel, but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient. Service of market survey only to ascertain the demand for the product in the market is incidental to the function of a commission agent of procuring orders and is, in any case, not managerial, technical or consultancy service.*

***34.*** *In GE India Technology Centre P. Ltd., supra, the Supreme Court clearly held that no tax is deductible under Section 195 of the IT Act on commission payments and consequently the expenditure on export commission payable to non-residents for services rendered outside India becomes allowable expenditure. In Toshoku Ltd., supra, the Supreme Court held that payments to agents for performance of services outside India are not liable to be taxed in India.*

***35.*** *In CIT v. EON Technology (P.) Ltd. [2011] 15 Taxmann.com 391/203 Taxman 266/[2012] 343 ITR 366 (Delhi), the High Court of Delhi held that payment of sales commission to non-resident who operates outside the country would not attract tax, if payment was remitted abroad directly. Merely because an entry had been made in the books of accounts of the appellant/assessee, that would not mean that the non-resident agent had received payment in India and, therefore, disallowance under Section 40(a)(i) of the IT Act was found uncalled for.*

***36.*** *The expression "fees for technical services" has been defined in Explanation (2) of Section 9(1)(vii) of the Income Tax Act to mean any consideration (including any lumpsum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personal) but does not include consideration for any*

*construction, assembly, mining or like project undertaken by the recipient or consideration, which would be income of the recipient chargeable under the head salaries. Explanation (B) to Section 40(a)(i) provides that the expression "fees for technical services" in Section 40(a)(i) shall have the same meaning as in Explanation 2 to Clause (vii) of sub-section (1) of Section 9.*

***37.*** *On a reading of Explanation (2) to Section 9(1)(vii), fees for technical services means consideration, including lumpsum consideration for rendering any managerial, technical or consultancy services.*

***38.*** *In the instant case, the Assessing Officer has, in the assessment order, accepted that the appellant assessee has paid commission charges to overseas agents. It is not the case of the Assessing Officer that any lumpsum consideration has been made for any specific managerial, technical or consultancy services.*

***39.*** *On a overall reading of the Explanation, it is apparent that fees for technical services does not contemplate commission which is order specific and computable at a small percentage of the order value. Section 40(a)(i) does not contemplate order wise commission based on the order value.*

***40.*** *For the reasons discussed above, the appeal is allowed and the questions framed are answered in favour of the assessee against the Revenue. No costs. Consequently, connected miscellaneous petition is closed."*

The aforesaid is the decision of Hon'ble Madras High Court in the case of Evolv Clothing Company Private Limited(supra) for AY 2009-10 wherein the Hon'ble Madras High Court has referred to decision of Hon'ble Supreme Court in the case of GE Technology Centre Private Limited v. CIT (2010) 327 ITR 456(SC) , wherein Hon'ble Supreme Court held that what is relevant is the sum chargeable to income-tax under the provisions of the 1961 Act before provisions for deduction of income-tax at source u/s 195 come into service. Thus merely because the assessee has not made an application u/s 195(2), it will not bring the said sum chargeable to income-tax which otherwise is not chargeable to income-tax within provisions of the 1961 Act and provisions of Section 40(a)(i) cannot be invoked to disallow the expenses. The assessee in any case has produced before the AO form no. 15CA and 15CB certified by CA that no income tax was required to

be deducted on these commissions paid to overseas agents and it is not shown by the AO as to how the said sum is chargeable to income-tax within provisions of the 1961 Act . The taxes can be levied and collected only under authority of law (Art. 265 of Constitution of India). It is for the Revenue to show that as to how the said sum is chargeable to income-tax under the provisions of the 1961 Act. Secondly, Hon'ble Madras High Court has also in aforesaid case after perusing the agreements held that marketing research abroad or co-ordination with suppliers were ordinary things which any agent or broker undertook which is incidental to brokerage services and the same were not held to be technical services. The overseas agents in the instant case before us have rendered assistance in getting assessee registered with various authorities and agencies in foreign country as well undertook marketing and sales services which were all incidental to agency business of generating export orders or facilitating imports for the assessee undertook by an agent in foreign country. It is not shown by Revenue that the assessee has made payment separately to these overseas agents towards getting itself registered with authorities/agencies abroad or for getting sales and marketing promotion done for the assessee. These overseas agents are based in foreign countries and have no PE / fixed place of business in India, as there is no material to contrary on record. These agents were not shown by Revenue to be working from India. It is also not shown by Revenue that lumpsum payments were made to these overseas agents but instead these payments were linked to the targets in terms of value and volume of export orders generated or imports facilitated by these overseas agents for the assessee.These overseas agents were not paid commission in India and payments were remitted abroad by assessee from India through banking channel and in case of two overseas agents it is stated that payments were not made by year end. Attention is also drawn to recent decision of Hon'ble Gujarat High Court in the case of PCIT v. Ferromatic Milacron India Private Limited (2018) 99 taxmann.com 154(Guj.) , wherein Hon'ble Gujarat High

Court held that on payments made to overseas agents towards commission for export orders will not entail deduction of income-tax at source u/s 195 and no disallowance u/s 40(a)(i) is warranted by holding, as under:

> *"Revenue is in appeal against the judgment of the Income Tax Appellate Tribunal dated 19.04.2018 raising following questions for our consideration:*
>
> *"A. Whether the Appellate Tribunal had erred in law and on facts in upholding the order of the CIT(A) deleting the addition made on account of disallowance u/s. 40(a)(ia) of the Act for non deduction of tax on commission payable to foreign agents of Rs. 1,20,72,972/-?*
>
> *B. *** "*
>
> ***2.*** *Question A pertains to disallowance made by the Assessing Officer under section 40(a)(ia) of the Income-tax Act, 1961 ['the Act' for short] for the failure of the assessee to deduct tax at source on exemption paid to foreign agents. This issue has been considered in Tax Appeal No. 1232 of 2018 in following manner:*
>
> *"1. The issue arises in relation to assessment year 2011-12. During the course of assessment proceedings, the Assessing Officer noticed that the assessee had paid payment of Rs. 1.20 crore (rounded off) to non-resident out of the total commission of Rs. 1.49 crores (rounded off) paid during the year. On such commission paid to non-residents, the assessee had not deducted any tax at source. The Assessing Officer therefore, inquired with the assessee, who responded by suggesting that all services were rendered by the non-residents outside India and therefore, no part of the income had accrued or arose in India. Such income was therefore, not taxable in India. The assessee relied on the decision of Supreme Court in case of GE India Technology Center P. Ltd v. Commissioner of Income Tax and anr reported in 327 ITR 456 and contended that, in such a case, there was no liability to deduct tax at source.*
>
> *2. The Assessing Officer did not accept such explanation and made the addition of entire amount in terms of section 40(a)(ia) of the Act. The assessee carried the matter in appeal. CIT(A) gave substantial relief to the assessee. All additions, barring commission payment of Rs. 18.80 lakhs (rounded off) were deleted. With respect to the said sum of Rs. 18.80 lacs, Commissioner was of the opinion that this related to the machines which were sold in India. He did not accept the assessee's contention that the non-resident commission agents did not have any permanent establishment in India and the services were also rendered by them outside India. He was of the opinion that the activity of the sale had taken place in India and that therefore the case would fall within section 9(1)(i) of the Act.*
>
> *3. The assessee carried the matter in appeal before the Tribunal. The Tribunal allowed the appeal on the ground that no part of the income had arisen or accrued in India. The payee was not liable to pay tax at such income. Requirement of TDS therefore would not arise.*

4. *As is well known, section 195 of the Act imposes requirement of deduction of tax at source on any person responsible for paying to a non-resident any sum chargeable under the provisions of the Act. The prime requirement therefore for applicability of the section is that the payment to the non-resident should be a sum chargeable under the provisions of the Act. In other words, the payment is not an income which is chargeable to tax in India. Requirement of deducting tax at source under section 195 of the Act would not arise. This aspect was elaborated by the Supreme Court in case of GE India Technology Center P. Ltd (supra) holding that on mere remittances of an amount to non-resident, duty to deduct tax at source would not arise unless such remittances contains wholly or partly taxable income.*

5. *Section 9 of the Act carries the heading "income deemed to accrue or arise in India. Sub-section (1) of section 9 provides that in following incomes, contained in various clauses therein, shall be deemed to accrue or arise in India. Clause (i) of sub section (1) provides 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 or through the transfer of a capital asset situate in India shall be deemed to accrue or arise in India.*

6. *In the present case, as noted, admitted facts are that the non-resident agents appointed by the assessee for procuring export orders do not have permanent establishment in India. Their agents are situated outside India. Their activities as commission agents are being carried out outside India. The Tribunal therefore correctly held that there was no liability on the assessee to deduct tax at source. Merely because a portion of the sale to the overseas purchasers took place in India, would not change situation vis-a-vis the commission agents.*

7. *In the result, Tax Appeal is dismissed."*

***3.*** *This question is therefore not entertained."*

Attention is also drawn to decision of Hon'ble Gujarat High Court in the case of PCIT v. Nova Technoplast Private Limited (2018) 94 taxmann.com 322(Guj.) , wherein Hon'ble Gujarat High Court held as under:

*"Revenue is in appeal against the judgment of the Income Tax Appellate Tribunal, Rajkot Bench dated 28th August 2017, raising the following question for our consideration :—*

*"Whether the Appellate Tribunal is right in law and on facts in not appreciating the fact that, the persons to whom commission of Rs.81,96,111/- was paid by the assessee, had earned such commission from the business activity accruing and airing in India and hence, the same is taxable in India, for which no TDS was made by the assessee and as such, the same is disallowance u/s. 40[a](ia) of the Act ?"*

***2.*** *The issue pertains to the obligation on the part of the respondent-assessee to deduct tax at source in relation to the commission payment made to its foreign Commission Agent. After the Assessing Officer in the order of assessment disallowed such commission expenditure, for the failure of the assessee to deduct tax at source, the assessee carried the matter in appeal before the Appellate Commissioner. The Appellate Commissioner observed that keeping in mind the facts, circulars and legal position, the commission paid to NRI Agent whose income was not taxable in India did not incur TDS requirement. It was on this basis that the Appellate Commissioner deleted disallowances made by the Assessing Officer under Section 40 [a](ia) of the Income-tax Act, 1961.*

***3.*** *Revenue carried the matter in appeal before the Tribunal. The Tribunal, by the impugned judgment, dismissed such appeal making the following observations :*

> *"We have heard the rival contentions and perused the material on record carefully. Section 195 required that any person responsible for paying to a non resident any some chargeable to tax shall deduct tax there on at the rate in force. We noticed that assessee has paid commission to non-residents for services rendered in sales and marketing of assessee's product as commission agent outside India. We observe that the agents were notarized and not having fixed base in India and have rendered all the sales and marketing services outside India. We have also perused the judicial pronouncements of the Hon'ble Supreme Court in the case of GE India Technology CEN Private Limited v. CIT [2010]193 Taxman 234(SC), wherein, it was held that section 195 gets attracted in cases where payment made is a composite payment in which a certain proportion of payment has an element of income chargeable to tax in India and prayer seeks a determination of appropriate proportion of sum chargeable. We are of the considered view that the assessee has paid commission to non-residents in respect of services rendered abroad and the non-residents has not carried any business operation in India, therefore, we find that the assessee is not liable to deduct tax at source. We have also noticed that the assessing officer has not controverted the claim of the assessee that commission was paid to non-residents in respect of services rendered abroad. After looking to the fact as stated supra and judicial finding, we consider that disallowance of commission paid to the aforesaid non-residents under the above circumstances is not appropriate under the provisions of Section 40(a)(ia) of the Act. Therefore, the appeal of the revenue is dismissed."*

***4.*** *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.) Ltd. v. CIT [2010] 7 taxmann.com 18/193 Taxman 234/327 ITR 456 (SC). 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 sub-section (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.*

***5.*** *It is indisputably true that such explanation inserted with retrospective effect provides that obligation to comply with sub-section [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.) Ltd. (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.*

***6.*** *Tax Appeal is therefore dismissed."*

We have observed that the assessee has rightly relied on the decision of Hon'ble Madars High Court in CIT v. Farida Leather Company in Tax Case Appeal No. 484 of 2015 , wherein Hon'ble Madras High Court decided the appeal in favour of the taxpayer on the ground that even if the taxpayer has not applied for certificate from AO u/s 195(2) but since the sum paid to non resident is not chargeable to income-tax under the provisions of the 1961 Act, no disallowance u/s 40(a)(i) is warranted, by holding as under:

**"2.4** Aggrieved over the order of the Income Tax Appellate Tribunal, the Revenue has preferred this Appeal, raising the following substantial questions of law:—

"1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that no disallowance can be made as per Section 40(a)(i) of the Act with respect to payment of commission to non-resident foreign agents without deduction of tax at source?

2. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the disallowance cannot be made by following the decision G.E India Technology Cen. (P.) Ltd., v. CIT [2010] 327 ITR 456 (SC), inspite of insertion of Explanation 4 to Section 9(1)(i) and Explanation 2 to Section 195(1) of the Act, which was introduced by Finance Act, 2012, w.e.f. 01.04.1962 to overcome the said judgment?

3. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the income of the payee, the foreign agent, is not taxable in India

inspite of insertion of Explanation below Section 9(2) of the Act, which was introduced by Finance Act, 2010, w.e.f. 01.06.1976?

4. Whether on the facts and in the circumstances of the case, the income of foreign agent is not taxable in India, as fee for technical services under Section 9 (1) (vii) of the Act and consequently, the tax need not be deducted at source while paying the foreign agents?"

**3.** It is not in dispute that the assessee / company, engaged in the business of manufacturing and export of leather goods, availed the services of certain non-resident foreign agents for the purpose of procuring export orders and the assessee was paying commission for them. It is equally not disputed that even though they are rendering services to the assessee (Indian company), these services are rendered totally outside the country.

**4.** Under such circumstances, whether the commission payment made to such agents are liable to be taxed in India, is the main issue to be decided in this appeal.

**5.** The main contention of the learned counsel for the assessee / respondent is that the agency commission / sales commission paid by the assessee to non-resident agents, for the services rendered by them, outside India, in procuring export orders for the assessee, would not attract or partake the character of "fees for technical services" as explained in the context of 9 (1) (vii) of the Act and therefore, there is no scope for the application of the provisions of Section 195 of the Act (Tax Deducted at Source). It is also contended that as the non-resident agents have neither business connection in India nor they have permanent establishment in India, they are liable to be taxed in India.

**5.1** Yet another contention of the learned counsel for the assessee is that: (a) the assessee paid the amount by way of commission to foreign agents for the services rendered outside India; (b) the Tax Deduction at Source (TDS) is required to be made on all payments to non-residents, only if such payments are liable to be taxed in India. (c) following the decision of this Court, CIT v. Faizan Shoes (P.) Ltd. [2014] 367 ITR 155/226 Taxman 115/48 taxmann.com 48 (Mad.), the assessee is not liable to deduct tax at source, when the non-resident agent provides services outside India on payment of commission.

**5.2** The contention of the Revenue is that such services are attracted by Explanation (2) to Section 9 (1) (vii) of the Act and therefore TDS certificate is essential.

**6.** Whether this contention is correct, is the issue to be decided.

**7.** In order to appreciate this contention, it is necessary to consider the relevant provisions of the Act:—

(i) Section 40(a)(i) of the Act :—

"Section 40 - Amounts not deductible:

Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession", —

(a) in the case of any assessee —

(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,—

(A) outside India; or

(B) in India to a non-resident, not being a company or to a foreign company, on which tax is deductible at source under Chapter XVIIB and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139:

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation: For the purposes of this sub-clause,—

(A) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9:

(B) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9:

(ia) thirty per cent of any sum payable to a resident, on which tax is deductible at source under Chapter XVIIB and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139.

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub section (1) of section 139 thirty per cent of, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso.'

(ii) Explanation 2 to Section 195(1) of the Act :—

'Section 195 - Other sums: (1) Any person responsible for paying to a non-resident not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time

of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :

Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-O.

[Explanation 1] :.....

[Explanation 2.- For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (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."

Explanation 4 to Section 9 (1) (i) of the Act:—

"Section 9 - Income deemed to accrue or arise in India —

(1) The following incomes shall be deemed to accrue or arise in India : (i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

** ** **

Explanation 4.- For the removal of doubts, it is hereby clarified that the expression "through" shall mean and include and shall be deemed to have always meant and included ''by means of", "in consequence of" or "by reason of".'

**7.1** Section 40 of the Act spells out what amounts are not deductable from the income charged to tax under the profits and gains of business or profession.

**7.2** Section 40(a)(i) of the Act deals with interest and other sums payable outside India. The provisions of this sub-clause made applicable to interest have been extended to payment of royalty, technical fees and any other sum chargeable under this Act. The section provides that the sums covered by the sub-clause, which are chargeable under the Act and are payable outside India, shall not be allowed as an expenditure to the assessee, unless tax is paid thereon or is deducted therefrom under Chapter XVII-B of the Act.

**7.3** Section 195(1) of the Act deals with deduction of tax from payment to non-residents and foreign companies. Section 195(1) of the Act comes into play at a stage where the payer, who is enjoined to deduct the tax, either credit such income to the account of the payee or make payment thereof, whether in cash / cheque / draft or any other mode. The taxability of such amount in the hands of the payee or occasioning of the taxable event is alien for the purpose of Section 195(1) of the Act.

**7.4** Section 195(2) is an enabling provision, enabling an assessee to file an application before the Assessing Officer to determine the appropriate proportion of the sum chargeable and upon such determination, the tax has to be deducted under Section 195(1) of the Act. The payment is made credited to the account of the payee.

**8.** The question now is, whether the assessee ought to have deducted tax at source as contemplated under Section 195 of the Act, when the assessee paid commission to foreign agent.

**9.** This question has been answered by the Hon 'ble Supreme Court, in the case of G.E.India Technology Centre (P.) Ltd. (supra), in which, it is very categorically held that the tax deducted at source obligations under Section 195(1) of the Act arises, only if the payment is chargeable to tax in the hands of the non-resident recipient.

**9.1** Therefore, merely because a person has not deducted tax at source or a remittance abroad, it cannot be inferred that the person making the remittance, namely, the assessee, in the instant case, has committed a default in discharging his tax withholding obligations because such obligations come into existence only when the recipient has a tax liability in India.

**9.2** The underlying principle is that, the tax withholding liability of the payer is inherently a vicarious liability on behalf of the receipient 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 recipent / 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.

**10.** Further, just because, the payer / assessee has not obtained a specified declaration from the Revenue Authorities to the effect that the recipent is not liable to be taxed in India, in respect of the income embedded in the particular payment, the Assessing Officer cannot proceed on the basis that the payer has an obligation to deduct tax at source. He still has to demonstrate and establish that the payee has a tax liability in respect of the income embedded in the impugned payment.

**11.** In the instant case, it is seen, admittedly that the nonresident agents were only procuring orders abroad and following up payments with buyers. No other services are rendered other than the above. Sourcing orders abroad, for which payments have been made directly to the non-residents abroad, does not involve any technical knowledge or assistance in technical operations or other support in respect of any other technical matters. It also does not require any contribution of technical knowledge, experience, expertise, skill or technical know-how of the processes involved or consist in the

development and transfer of a technical plan or design. The parties merely source the prospective buyers for effecting sales by the assessee, and is analogous to a land or a house / real estate agent / broker, who will be involved in merely identifying the right property for the prospective buyer / seller and once he completes the deal, he gets the commission. Thus, by no stretch of imagination, it cannot be said that the transaction partakes the character of "fees for technical services" as explained in the context of Section 9(1)(vii) of the Act.

**12.** As the non-residents were not providing any technical services to the assessee, as held above and as held by the Commissioner of Income Tax (Appeals), the commission payment made to them does not fall into the category of "fees of technical services" and therefore, explanation (2) to Section 9(1)(vii) of the Act, as invoked by the Assessing Officer, has no application to the facts of the assessee's case.

**13.** In this case, the commission payments to the non resident agents are not taxable in India, as the agents are remaining outside, services are rendered abroad and payments are also made abroad.

**14.** The contention of the learned counsel for the Revenue is that the Tribunal ought not to have relied upon the decision G.E.India Technology's case, cited supra, in view of insertion of Explanation 4 to Section 9(1)(i) of the Act with corresponding introduction of Explanation 2 to Section 195(1) of the Act, both by the Finance Act, 2012, with retrospective effect from 01.04.1962.

**15.** The issue raised in this case has been the subject matter of the decision, in the recent case, CIT v. Kikani Exports (P.) Ltd. [2014] 369 ITR 96/[2015] 232 Taxman 255/49 taxmann.com 601 (Mad.) wherein the contention of the Revenue has been rejected and assessee has been upheld and the relevant observation reads as under:—

> '... the services rendered by the non-resident agent could at best be called as a service for completion of the export commitment and would not fall within the definition of "fees for technical services" and, therefore, section 9 was not applicable and, consequently, section 195 did not come into play. Therefore, the disallowance made by the Assessing Officer towards export commission paid by the assessee to the non-resident was rightly deleted.'

**16.** When the transaction does not atract the provisions of Section 9 of the Act, then there is no question of applying Explanation 4 to Section 9 of the Act. Therefore, the Revenue has no case and the Tax Case Appeal is liable to be dismissed.

**17.** In the result, this Tax Case Appeal is dismissed. The order passed by the Income Tax Appellate Tribunal is confirmed."

The aforesaid judgment of Hon'ble Madras High Court in the case of Farida Leather Company (supra) directly covers the dispute between rival parties. The Hon'ble Madras High Court was seized for AY 2010-11 in the above case. Thus, based on our detailed discussions and reasoning, we hold that under factual matrix of the case no additions u/s 40(a)(i) of the 1961 Act read with Section 195 are warranted in the

instant case on payments made by assessee to four overseas agents towards commission expenses for generating export orders or facilitating import for the assessee. We affirm the decision of learned CIT(A) and Revenue fails in this appeal. We order accordingly.

7. The second issue raised by Revenue in its appeal concerns itself with the deletion by learned CIT(A) of addition to the tune of Rs. 27,39,215/- which was made by AO u/s. 68 of the 1961 Act, relying on the additional evidences filed by the assessee before learned CIT(A) during the course of appellate proceeding , wherein Ld. CIT(A) deleted the additions without calling for remand report from the AO as is mandated under Rule 46A of the Income-tax Rule, 1962. We have observed that there were differences in the reconciliation of the balance outstanding in the books of accounts of the assessee to credit of one M/s Chikhloli Chemicals Pvt. Ltd vis-a-vis ledger account filed by the said party which the assessee was not able to explain before the AO. The AO observed that the assessee is contending that it purchased goods to the tune of Rs. 27,39,215/- from the said party namely M/s Chikhloli Chemicals Pvt. Ltd. while sales made to the said party namely M/s Chikhloli Chemicals Pvt. Ltd. were to the tune of Rs. 47,37,752/- , but as per ledger account filed by the said party, the said party namely the said party namely M/s Chikhloli Chemicals Pvt. Ltd only confirmed to have made purchases from the assessee to the tune of Rs. 47,37,752/- but the said party never confirmed sales made by it to the assessee to the tune of Rs. 27,39,215/-. The sssessee filed a copy of computer generated ledger account of the assessee in the books of accounts of said party namely the said party namely M/s Chikhloli Chemicals Pvt. Ltd but as per said ledger account , the said party has shown to have made sales to the assessee on 23.09.2008 to the tune of Rs. 23,94,000/- , while the assessee was contending to have made purchases to the tune of Rs. 27,39,215/- . Thus, there was also an difference in the balance as is appearing in books of accounts of the assessee and the balance as was appearing in books of

accounts of the said party. The said copy of ledger account was signed by some third party one M/s Purva Inorganics Private Limited and hence this piece of evidence being confirmation from said party filed by the assessee was discarded by the AO. The assessee could not file proper reconciliation statements/certificates from the said party before the AO which led to additions been made by the AO vide assessment order dated 29.12.2011 passed by the AO u/s 68 of the 1961 Act.

7.2 The assessee being aggrieved by the additions as were made by the AO vide assessment order dated 29.12.2011 passed u/s 143(3) of the 1961 Act filed first appeal with learned CIT(A). During the course of appellate proceedings before the learned CIT(A), the assessee filed fresh confirmations from the said parties Chikhloli Chemicals Pvt. Ltd. as an additional evidence. The said conformation so filed before Ld. CIT(A) was duly signed and stamped by said party M/s Chikhloli Chemicals Private Limited. The assessee also explained before the learned CIT(A) that differences in the balances were on account of difference in treatment done in the books of accounts towards duties and taxes by the said party and the assessee. It was explained that M/s Purva Inorganics Pvt. Ltd., who earlier signed the confirmation which was filed before the AO was sister concern of said M/s Chikhloli Chemicals Pvt. Ltd and it was explained that this was due to the clerical error, rubber stamp of M/s Purva Inorganics Pvt. Ltd., got affixed in the confirmation given by Chikhloli Chemicals Pvt. Ltd which was filed before the AO . It was submitted before learned CIT(A) that since the AO called this information just before the conclusion of assessment order when the assessment was getting time barred, there was no time left to file fresh confirmation and the assessee was not given adequate time to file fresh confirmation from said party namely M/s Chikhloli Chemicals Private Limited. It was explained that now assessee has filed proper confirmation before the learned CIT(A). The difference in confirmation account of 27,39,215/- being shown in the

books of accounts of the assessee for purchases made from said M/s Chikhloli Chemicals Private Limited vis-a-vis sale of Rs.23,94,000/- shown by said M/s Chikhloli Chemicals Private Limited in its books of accounts, was explained by assessee to be due to different treatment in accounting for taxes and duties by assessee and the said party. The Ld. CIT(A) accepted the contention of the assessee and allowed relief to the assessee vide appellate order dated 29.10.2012 passed by learned CIT(A) deleting the aforesaid additions to income as were made by the AO.

7.3 Now being aggrieved by appellate order dated 29.10.2012 passed by learned CIT(A), the Revenue has filed an appeal before the tribunal. The learned DR claimed that there is an infringement of Rule 46A of the Income-tax Rules, 1962 by Ld. CIT(A) who did not forward additional evidences by way of fresh confirmation filed by assessee for the first time before learned CIT(A), to AO for his comments and verification as no remand report was called by learned CIT(A) from the AO. The learned DR submitted that learned CIT(A) did not called for remand report from the AO on the additional evidence by way of confirmation from M/s Chikhloli Chemicals Private Limited filed by the assssee before learned CIT(A) for the first time and clearly there is an breach of Rule 46A of the 1962 Rules. It was submitted that under these circumstances , the matter need to go back to the file of the AO for fresh adjudication so that necessary verifications of these additional evidences can be done by the AO. The Ld. Counsel for the assessee on the other hand submitted that that it was merely an clerical error wherein wrong stamp of sister concern of the assessee namely M/s Purva Inorganics Pvt. Ltd., was engrossed on the confirmation given by M/s Chikhloli Chemicals Private Limited which was filed before the AO and it was only due to shortage of time as the matter was getting time barred, the fresh confirmation from M/s Chikhloli Chemicals Private Limited could not be filed by the assessee before the AO during the course of assessment proceedings.

7.4. We have considered rival contentions and perused the material on record .We have observed that the assessee has claimed to have made purchases and sales to M/s Chikhloli Chemicals Pvt. Ltd . The assessee had made sales to the tune of Rs. 47,37,752/- to said party M/s Chikhloli Chemicals Private Limited which admittedly were confirmed by the said party. There is no dispute between rival parties on this issue. The dispute has arisen between rival parties as to purchases to the tune of Rs. 27,39,215/- made by assessee from said party namely M/s Chikhloli Chemicals Private Limited which were found to be not appearing in the statement of account filed by said party . The assessee has filed ledger account of the assessee in the books of accounts of said M/s Chikhloli Chemicals Private Limited which showed figure of Rs. 23,94,000/- of sales made by said M/s Chikhloli Chemicals Private Limited to assessee as against purchases of Rs. 27,39,215/- claimed by the assessee to have been made from said party. Further , this ledger account was also not signed by the said M/s Chikhloli Chemicals Private Limited but by one M/s Purva Inorganics Pvt. Ltd.. This led AO to discard this piece of evidences as inadmissible and additions to the tune of Rs. 27,39,215/- were made by the AO u/s 68 of the 1961 Act to the income of the assessee vide assessment framed u/s 143(3) of the 1961 Act. Later on before Ld. CIT(A), the assessee filed fresh confirmation from said M/s Chikhloli Chemicals Private Limited duly signed by said M/s Chikhloli Chemicals Private Limited as an additional evidence which was accepted by Ld. CIT(A) and additions to the income as were made by the AO were deleted by learned CIT(A). However the Ld. CIT(A) did not forward these additional evidences to AO for his comments/ verification as no remand report was called for by learned CIT(A) before accepting the contentions of the assessee and deleting the additions to the income as were earlier made by the AO vide assessment framed u/s 143(3), which led to infringement of Rule 46A(3) of 1962 Rules. The Rule 46A of the 1962 Rules is reproduced hereunder:

***Production of additional evidence before the [Deputy Commissioner (Appeals)] [and Commissioner (Appeals)].***

***46A .*** *(1) The appellant shall not be entitled to produce before the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)], any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the [Assessing Officer], except in the following circumstances, namely :—*

*(a) where the [Assessing Officer] has refused to admit evidence which ought to have been admitted ; or*

*(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the [Assessing Officer] ; or*

*(c) where the appellant was prevented by sufficient cause from producing before the [Assessing Officer] any evidence which is relevant to any ground of appeal ; or*

*(d) where the [Assessing Officer] has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.*

*(2) No evidence shall be admitted under sub-rule (1) unless the [Deputy Commissioner (Appeals)] or, as the case may be, the Commissioner (Appeals)] records in writing the reasons for its admission.*

*(3) The [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] shall not take into account any evidence produced under sub-rule (1) unless the [Assessing Officer] has been allowed a reasonable opportunity—*

*(a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or*

*(b) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.*

*(4) Nothing contained in this rule shall affect the power of the [Deputy Commissioner (Appeals)] [or, as the case may be, the Commissioner (Appeals)] to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the Assessing Officer]) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271.]*

In our considered view in terms of Rule 46A(3) of the 1962 Rules, it was incumbent upon Ld. CIT(A) to have forwarded additional evidences to AO for necessary verifications/ comments . The Principles of Natural justice are clearly breached by learned CIT(A) by non affording AO to rebut additional evidence filed by assessee for the first time before learned CIT(A). Rule 46A(3) of the 1962 Rule is not merely an empty formality as principles of natural justice are embedded in it as clearly Revenue is entitled to rebut any additional evidence filed by the taxpayer for the first time before learned CIT(A) and violation thereof will clearly vitiate the order. It is also observed that learned CIT(A) accepted this additional evidence filed by the

assessee for the first time before learned CIT(A) without making any enquiry or verification itself as to the veracity of this additional evidences filed by the assessee for the first time before learned CIT(A). It is now settled proposition that the powers of learned CIT(A) are co-terminus with powers of the AO keeping in view provisions of Section 251(1)(a) of the 1961 Act. Reference is drawn to decision of Hon'ble Delhi High Court in the case of CIT v. Jansampark Advertising and Marketing Private Limited (2015) 375 ITR 373(Delhi). Under these circumstances keeping in view factual matrix of the case, we are inclined to set aside and restore this issue to file of the AO for fresh adjudication. The assessee is directed to file confirmations from M/s Chikhloli Chemicals Private Limited and other relevant evidences/explanation in its defence before the AO for necessary verifications and adjudication. The AO is directed to denovo adjudicate this issue on merits in accordance with law after considering evidences/ explanations filed by the assessee in its defence. Needless to say that the AO shall grant proper and adequate opportunity of being heard to the assessee in accordance with principles of natural justice in accordance with law. We order accordingly.

8. In the result appeal of the Revenue in ITA No.1774/Mum/2013 for AY 2009-10 is partly allowed in the manner indicated above.

Order pronounced in the open court on 30.05.2019.

आदेश की घोषणा खुले न्यायालय में दिनांकः 30.05.2019 को की गई

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|---|---|
| Sd/- | Sd/- |
| (SAKTIJIT DEY) | (RAMIT KOCHAR) |
| JUDICIAL MEMBER | ACCOUNTANT MEMBER |

Mumbai, dated: 30.05.2019

*Nishant Verma*
*Sr. Private Secretary*

copy to…

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI