आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCH 'B' JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 1494/JP/2018
निर्धारण वर्ष/Assessment Year :2013-14

M/s JLC Electromet Pvt. Ltd. E-153-A, Road No. 11-H, V.K.I, Area, Jaipur	बनाम Vs.	ACIT, Circle-4, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCJ8786A		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 23/JP/2019
निर्धारण वर्ष/Assessment Year :2014-15

M/s JLC Electromet Pvt. Ltd. E-153-A, Road No. 11-H, V.K.I, Area, Jaipur	बनाम Vs.	ACIT, Circle-4, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCJ8786A		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Mahendra Gargieya &
Shri Devang Gargieya
राजस्व की ओर से/ Revenue by : Shri Jai Singh (JCIT)

सुनवाई की तारीख/ Date of Hearing : 29/07/2019
उदघोषणा की तारीख/Date of Pronouncement: 04/09/2019

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

These are two appeals filed by the assessee against the orders of ld. CIT(A), Ajmer dated 19.11.2018 for AY 2013-14 and 2014-15 respectively. Since the common issues are involved, both these appeals were heard together and are being disposed off by this consolidated order.

2. In ITA No. 1494/JP/2018 for A.Y 2013-14, the assessee has taken the following grounds of appeal as under:

"1. The impugned additions and disallowance made in the order u/s 143(3) dated 29.10.2009 are bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly be deleted.

2. 1,73,17,260/- The ld. CIT(A) erred in law as well as on the facts of the case in confirming the disallowance u/s 40(a)(ia) r.w.s 195 of the Act of Rs. 1,73,17,260/- on account of non-deduction of TDS for payment made to non-resident having no PE. The disallowance so made & confirmed by the ld. CIT(A), is contrary to the provisions of law and facts.

3. 23,54,230/- : The ld. CIT(A) erred in law as well as on the facts of the case in confirming charging of interest u/s 234B & 234C of the Act. The appellant totally denies it liability of charging of any such interest. The interest, so charged, being contrary to the provisions of law and facts, kindly be deleted in full."

3. In ITA No. 23/JP/2019 for A.Y 2014-15, the assessee has taken the following grounds of appeal as under:

"1. The impugned additions and disallowance made in the order u/s 143(3) dated 17.12.2016 are bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly be deleted.

2. 1,94,35,485/- The ld. CIT(A) erred in law as well as on the facts of the case in confirming the disallowance u/s 40(a)(ia) r.w.s 195 of the Act of Rs. 1,94,35,485/- on account of non-deduction of TDS for payment

made to non-resident having no PE. The disallowance so made & confirmed by the ld. CIT(A), is contrary to the provisions of law and facts.

3. 20,67,054/- : The ld. CIT(A) erred in law as well as on the facts of the case in confirming charging of interest u/s 234B & 234C of the Act. The appellant totally denies it liability of charging of any such interest. The interest, so charged, being contrary to the provisions of law and facts, kindly be deleted in full."

4. With the consent of both the parties, the matter relating to AY 2013-14 *(In ITA No. 1494/JP/2018)* is taken as the lead case for the purposes of present discussions.

5. Briefly stated, the facts of the case are that the assessee firm is engaged in the business of manufacturing of wire and other products made of various metals including Nickel, Copper, Iron, Chromium etc. During the year under consideration, the assessee has made payment of Rs.1,54,37,362/- towards Selling Commission on export sales, Rs.17,91,586/- for payment of Exhibition Expenses and Rs.88,410/- for payment of Testing Expenses to various non-resident entities, without deduction of tax at source.

6. During the course of assessment proceedings, the assessee was asked to explain as to why these payments should not be disallowed u/s 40(a)(ia) in view of insertion of Explanation 2 to Section 195 by the Finance Act, 2012 with retrospective effect from 01.04.1962. In its submission, the assessee vide letter dated 11.01.2016 (reproduced at pg-2 to pg-6 of the impugned assessment order) submitted that the payments were made to the non-residents towards the services rendered outside India hence, no income has accrued or arisen in India, therefore, no tax was required to be deducted

u/s 195 of the Act. However, the AO rejected the submission so filed by the assessee company and the relevant findings of the Assessing officer read as under:

"I have considered the reply of the assessee carefully. I have considered the case laws cited by the assessee. It may be submitted that the decision of Hon`ble ITAT, Panaji Bench is relevant and clearly applicable in the case of the assessee. As far as the case referred by the department in ground number-4, as highlighted by the assessee are concerned, it may mentioned that the Hon`ble Tribunal has not discussed these cases while deciding appeal in favour of revenue. Hon`ble ITAT only discussed Explanation-II to the Section 195 and upheld the disallowance. The assessee has not deducted TDS on selling commission payment of Rs.1,54,37,262/-, exhibition expenses of Rs.17,91,586/- and testing charges of Rs.88,410/- paid to non-resident. As per section 195 of the Act, the assessee was liable to make the above payment after making TDS. But the assessee has failed to do so.

.....x x x x x.....

Considering the amended provisions of section with insertion of Explanation-II with retrospective effect from 01.04.1962, the assessee was required to deduct TDS from selling commission, exhibition expenses and testing expenses paid to non-residents. Since the assessee failed to deduct TDS therefore as per provisions of section 195 read with section 40(a)(ia) the expenses of Rs. Rs.1,54,37,262/- on account of selling commission, Rs.17,91,586/- on account of exhibition expenses and Rs.88,410/- on account of testing expenses paid to non-residents cannot be allowed. Thus Rs.1,73,17,258/- are disallowed u/s 40(a)(ia) and hereby added to the total income of the assessee."

7. Being aggrieved, the assessee carried the matter in appeal before the ld. CIT(A) who has since confirmed the addition and the relevant findings read as under:

"I have gone through the assessment order, statement of facts, grounds of appeal and written submission carefully. It is seen that the AO after discussing the provisions of S. 195, including the Explanation 2, has concluded that the appellant was required to deduct the tax at source while making the payment of above referred expenses even, to the non-resident persons, whether or not the non-resident person had a residence or place of business or business connection in India or any other presence in any manner whatsoever in India. The Exp. 2 has been inserted by the Finance Act of 2012 with retrospective effect from 01.04.1962. I am of the considered view that the argument of the appellant that since the non-resident persons whom the payments were made did not have place of business or business connection in India, therefore, the appellant was not required to deduct tax at source on the above referred payments, is not correct. Regarding the second argument of the appellant that the income of the recipients of the above referred expenses was not "sum chargeable under the provisions of Income Tax Act, 1961 therefore the provisions of S. 195(1) are not applicable to these payments", the A/R of the appellant was specifically requested to clarify whether any ruling was obtained from the Authority for Advance Ruling u/s 245R(2), regarding non taxability of the income of the recipient in India under the Income Tax Act. The A/R submitted that no such ruling was obtained from A/R by the recipients of the above referred expenses. There is no other evidence on record to show that the sum received by the non-residents in the form of selling commission (Rs. 1,54,37,262), exhibition commission (Rs. 17,91,586) and testing expenses (Rs. 88,410) was not chargeable to tax under the Income Tax

Act. There is no order or finding by any Income Tax Authority that the above referred sum of Rs. 1,73,17,258/- was not chargeable to tax under I.T. Act, 1961. Therefore, I am of the considered view that the appellant was required to deduct tax at source while making payment of selling commission (1,54,37,262/-), exhibition commission (Rs. 17,91,586/-) and testing expenses (Rs. 88,410/-) to non-resident, whether or not the non-residents had a residence or place of business or business connection in India. The decision relied upon by the appellant are applicable only when there is evidence on record to show that the sum paid by the assessee was not chargeable to tax under the Income Tax Act. Therefore, disallowance of Rs. 1,73,17,258/- made by the AO is hereby confirmed."

8. Against the aforesaid findings, the assessee company is in appeal before us. During the course of hearing, the ld AR submitted that the crux of various judicial pronouncements is that before applying Section 195, it was obligatory on the part of the Assessing officer to establish beyond all reasonable doubts that the subjected payments were taxable under the provision of the Income Tax Act, 1961, then only it could be said that tax at source was deductible w.r.t. such payment/s. In other words, Section 195 r/w 40(a)(ia) of the Act could be invoked only if the subjected payment/s are found to be a sum chargeable under the provisions of this Act but not otherwise. In the context of Section 195 of the Act which deals with the liability of the payer to deduct tax at source on the specified payment/s made to a non-resident, such payment/s can be said to be sum chargeable under the provisions of this Act only if it is established that such payment was taxable u/s 4, 5 and 9 of the Act.

9. It was further submitted that Section 5(2) of the Act provides that any income received or is deemed to be received in India or any income which

accrues or arises or deemed to accrue or arise in India shall be taxable. Furthermore S. 9 of the Act deems certain incomes to accrue or arise in India. Therefore, the AO is bound to show that the subjected payment/s made to the non-resident/s is liable to be taxed in India on one ground or the other. The AO however, solely relied upon the Explanation 2 to S. 195 of the Act and the ld. CIT(A) held the subjected payments as chargeable to tax because no advance ruling from AAR was produced before him.

10. It was further submitted that the assessee had already submitted in a great detail, duly supported with all the evidences that all the subjected expenses viz. Selling Commission Exp., Exhibition Exp., Testing Exp. were incurred outside India and in all the three cases, the respective services were also rendered by the respective payees, only outside India.

11. Regarding Commission expenses of Rs.1.54 crore, it was submitted that the same were paid to the foreign selling agents who rendered their services to the appellant outside India in procuring orders effecting sales and done other incidental tasks as per agreements between assessee & payees. The payments in this respect were also made outside India only. Kindly refer a detailed ledger account on day to day basis providing the complete detail as regard the name of the payee, reference to the export invoice of the appellant, the rate / amount of commission etc. and when the same was credited to the account of the payee or paid to him, which were submitted. In the case of CIT vs. Toshoku Ltd (1980) 125 ITR 0525 (SC) it was held:

> *"This contention overlooks the effect of cl. (a) of the Explanation to cl. (i) of sub-ection (1) of s. 9 of the Act which provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under that clause to accrue or arise in India shall be only such part of the income as is reasonably attributable*

to the operations carried out in India. If all such operations are out in India, the entire income accruing therefrom shall be deemed to have accrued in India. If, however, all the operations are not carried out in the taxable territories, the profits and gains of business deemed to accrue in India through and from business connection in India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in the taxable territories. If no operations of business are carried out in the taxable territories, it follows that the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India."

12. The assessee further submitted a chart (at APB page 21) along with all the relevant papers and various evidences, in case of each of the payees as under:

- Copies of Ledger account of the payee in the books of assessee,
- Agency agreement (providing for rendering of services out of India only.
- Certificate of the payee (to the effect that they had no PE in India u/s 6 r/w 9 of the Act nor any business connection/activity in India),
- Foreign bills transaction advice,
- Letter by the assessee to the concerned bank with enclosure to make payment outside India.

It was submitted that the above sets of papers were made available to the lower authorities, in case of all the parties to whom the subjected amount of commission has been paid and are also available, in the paper book.

13. Regarding Exhibition expenses, it was submitted that the same were incurred in making payment to various non-residents outside India on account of the stall booking in different conferences exhibitions held outside India.

Thus, the services were rendered outside India and respective payments were also made outside India. Kindly refer the detailed ledger account containing the relevant details. The appellant also submitted copies of Ledger a/c's, Bills, Bank advice, correspondence and Form A2 under FEMA in respect of each and every expense.

14. Regarding testing expenses, it was submitted that these were also paid to the non-resident outside India for getting the Samples / Goods which were tested by the non-resident outside India. Payments to these persons were also made outside India. Copy of the detailed ledger accounts w.r.t. laboratory expenses and transaction receipt on day to basis containing the relevant details, in respect of every expense were submitted.

15. It was accordingly submitted that from a perusal of the above submissions and the voluminous evidences, it is evidently clear that undisputedly:

- All the payees actually rendered the services outside India only,
- The payments were made to him outside India only,
- None of the payees had any office or other fixed place of business in India.
- The payee did not have any dependent employee/ correspondent performing any business connection/activity in India.
- They did not have any permanent establishment (PE) or any sort of business connection, directly or indirectly, in India

16. It was submitted that all these details and the evidences were admittedly submitted vide our letter dated 18.11.2015 to the AO and also before the ld. CIT(A) through a voluminous paper book. The AO examined the details thoroughly however, these facts & evidences were neither rebutted nor disproved. Unfortunately, the ld. CIT(A) completely overlooked the same. He

did not apply his mind on the factual aspects though fully established and completely lacking contrary evidences. He did not even appreciate that the onus lay upon the AO u/s 195 of the Act was not at all discharged. However, once the jurisdictional facts are not denied and duly admitted, it cannot be said that any income was chargeable to tax, accrued or arose in respect of all the three subjected payments u/s 4, 5 or 9 of the Act or under any other provisions of the Act in India. Thus, it is not a case where non-resident agents are carrying out any business activity in India as enumerated in Explanation 2 to Section 9(1) and consequently there is no business connection between the assessee and the Non-Resident Payees. Moreover, all the countries of the respective payees and India have already entered into DTAAs providing the taxing of the income, if any, in the hands of the concerned payee. Thus, it is fully established that the subjected amounts so received by the respective payees, were not the income chargeable to tax in India in any manner whatsoever, hence s. 195 of the Act was not applicable in this case.

17. It was further submitted that even Explanation 2 to S. 195 is not applicable in the instant case. It was submitted that the AO has completely misread and misapplied Explanation-2 in as much as S.195 of the Act requires "Any person responsible for paying…." Any person includes all the persons be a resident or non-resident as defined u/s 2(31) of the Act. Therefore, even a non-resident person responsible for paying to a non-resident was liable to deduct TDS u/s 195 however, certain judicial pronouncements had created doubts about the scope and purpose of S.195 in the contract of non- residents. It is only, with a view to clarify that the obligation to make TDS u/s 195(1) applies to all the persons whether resident or non-resident if such person is responsible for making payment to a non-resident (payee whose income is chargeable to tax in India), therefore, Explanation 2 was inserted through the Finance Act, 2012 w.r.t. 01.04.1962. This is evident from the following extract

taken from Part F-Rationalization of International Taxation Provisions in the Memorandum explaining the provisions of the Finance Bill, 2012:

> *"Section 195 of the Income-tax Act requires any person to deduct tax at source before making payments to a non-resident if the income of such non-resident is chargeable to tax in India. "Person", here, will take its meaning from section 2 and would include all persons, whether resident or non-resident. Therefore, a non-resident person is also required to deduct tax at source before making payments to another non-resident, if the payment represents income of the payee non-resident, chargeable to tax in India. There are no other conditions specified in the Act and if the income of the payee non-resident is chargeable to tax, then tax has to be deducted at source, whether the payment is made by a resident or a non-resident.*
>
> *Certain judicial pronouncements have created doubts about the scope and purpose of sections 9 and 195. Further, there are certain issues in respect of income deemed to accrue or arise where there are conflicting decisions of various judicial authorities.*
>
> *Therefore, there is a need to provide clarificatory retrospective amendment to restate the legislative intent in respect of scope and applicability of section 9 and 195 and also to make other clarificatory amendments for providing certainty in law.*
>
> *I. It is, therefore, proposed to amend the Income Tax Act in the following manner:-*
>
> *x x x x*

(v) Amend section 195(1) to clarify that 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 has:-

(a) a residence or place of business or business connection in India; or

(b) any other presence in any manner whatsoever in India.

These amendments will take effect retrospectively from 1st April, 1962 and will accordingly apply in relation to the assessment year 1962-63 and subsequent assessment years."

Thus, the Explanation 2 does not at all positively say that despite the fact that income of the non-resident payee is not chargeable to tax in India yet however, S.195 shall applies on the payer resident.

18. Further, reliance was placed on the Co-ordinate Bench decision in case of M/s Classic Enterprises Ltd. Vs. JCIT *(in ITA No. 808/JP/2014 dated 21.12.2016)* wherein it was held as under:-

"2. In respect of ground No.1 of the assessee's appeal, briefly the facts of the case are that a disallowance of Rs. 4,40,820/- has been made by the AO u/s 40(a)(ia) of the IT Act on account of non deduction of TDS u/s 195 of the Act on commission paid to two foreign parties. Undisputedly, the commission has been paid to two foreign parties outside India on account of sales orders procured by them for the assessee. The orders were obtained by them from outside India and no services have been rendered by them in India. Payments have also been made outside India. Under the provisions of section 5 and section 9 of the Act, the said commission payment on export sales cannot be held

chargeable to tax in India. In view of that, the provisions of section 195 are not applicable and thus the provisions of section 40(a)(ia) have wrongly been applied by the AO. The addition thus made under section 40(a)(ia) is thus deleted and ground of appeal is allowed."

19. Further, reliance was placed on the Co-ordinate Bench decision in the case of Subhash Chand Gupta vs. ACIT *(ITA No. 1122/JP/2016 dated 26.12.2017)* wherein it was held as under:-

"7. We have heard both the sides on this issue. During the year, the assessee has paid commission of Rs. 37,09,646/- to Salwa Mohammad Abdul Rehman, Jeddah, Kingdom of Saudi Arabia and no TDS was deducted. The lower authorities has sustained the disallowance of payment of sales commission to an NRI without deducting TDS by taking a view that circular has been withdrawn and treating the sales commission as fee for technical services. It is pertinent to note that this commission was given for procuring the export orders from outside India. Sourcing orders abroad for which payment had been made directly to the nonresident does not fall in the category of technical services and transactions do not partakes the character of fee for technical services as explained in Section 9(ii)(vii) of the Act. Thus the commission has been paid for the services rendered outside the India. The person to whom the commission paid was not having any business connection in the India and commission so earned by him is not taxable in the India. Therefore, the provisions of Section 195 of the Act are not applicable. The Hon'ble Madras High Court in its order dated 20/1/2016 in Tax case Appeal No. 484 of 2015 has held as under:

"9. This question has been answered by the Hon'ble Supreme Court, in the case of G.E. India Technology Centre Pvt. Ltd. v. CIT (2010) 327 I.T.R. 456, 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 recipient and therefore, when the recipient/ foreign agent does not have the primary liability to be taxed in respect of income embedded in the receipt, the vicarious liability of the payer to deduct tax does not arise. This vicarious tax withholding liability cannot be invoked, unless primary tax liability of the 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 nonresident 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 reported in*

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, reported in (2014) 369 I.T.R. 96 (Mad) (Commissioner of Income Tax v. Kikani Exports Pvt. Ltd.) 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 attract 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."

Considering the decision of the Hon'ble Madras High Court and the also the factual aspect of the case, we allow the appeal of the assessee."

20. Further, reliance was placed on the Co-ordinate Bench decision in the case of ITO vs. Kulbeer Singh *(ITA No. 5204/Del/2014 dated 03.10.2018)* wherein it was held as under:-

"7. In the present case, the commission is paid to the two parties for export sales. The foreign agents are non-resident and the services have been rendered undisputedly by them outside India. The commission payment was also supported by the copy of the agreement and confirmation of commission paid. The copy of the passport of the commission agents were also submitted along with the party wise and invoice wise details resulting into payment of commission. Therefore, it is not the case that the payment has been made to on identified parties. Further, The revenue has not brought any material on record to show that either of these commission agents has rendered any of their services in India and the payments have been made to them in India. In view of the finding of the learned Commissioner appeals, we are of the opinion that the income of the foreign agents is not chargeable to tax in India, as they do not have any 'business connection' as per provisions of section 9 of the income tax act. In absence of any business connection, the income is not chargeable to tax under section 5 of the income tax act of the non-resident foreign agents. Thereafter, the natural consequences are that on such payment assessee is not obliged to deduct tax at source under section 195 of the income tax act. The learned Commissioner of income tax appeals has relied upon the decision of the Jurisdictional High Court in 343 ITR 366 wherein it has been held that when a non-resident agent operates outside the country no part of his income arises in India and since payment is remitted directly abroad and merely because an entry in the books of accounts of the assessee is made, it did not mean that non-resident has received any payment in India. Therefore, no business connection is established and income tax was not deductible at source and hence no disallowance is called for. In view of this, we do not find any infirmity in the order of the learned first appellate authority as it

followed the decision of the jurisdictional High Court. Therefore, we dismiss the appeal of the learned assessing officer and confirm the finding of the Commissioner appeals. Accordingly, we direct learned assessing officer to delete the disallowance of Rs. 4,41,40,860/- on account of commission paid to foreign agent who did not render any services in India."

21. Further, reliance was placed on the Co-ordinate Bench decision in the case of Satyam Polyplast vs. DCIT, Circle-04, Jaipur *(ITA No. 158/JP/2019 dated 14.05.2019)* wherein it was held as under:-

"5. We have considered the rival submissions as well as the relevant material on record. The assessee has paid commission to non-resident persons against the service of procuring orders for the assessee. The details of the commission paid by the assessee are as under:-

S. No.	*Name of Agent*	*Address*	*Commission*
1.	*Mr. Claudio Haberl A/c*	*AV. Sesquicentenario 4540 CP1613, Buenos Aires, Argentina*	*22,06,46,7.00*
2.	*Md. Habibur Rahman*	*Kalibarl, Azizabad, Patharghata Barguna*	*3,31,442.00*
3.	*Nadia Anwar hasan Ali*	*AL-Shekh, Othman, Snafer Building Yemen*	*4,68,120.00*
4.	*Reinhard Bosse*	*UND Geschaftskunden Ag, Bahnhofstrabe 17,49525 Lengerich, Germany*	*7,10,060.00*
5.	*Shamlan Naseer Ali*	*Doha, Qatar, YEMEN*	*1,76,698.00*
	Total		*38,92,787.00*

The AO has disallowed the said amount U/s 40(a)(i)on the ground that the assessee has not deducted the tax at source as required U/s 195(1) of the Act. The AO has given much emphasis to explanation-II to Section 195(1) of the Act. The AO also held that the payment in question is Fee for Technical Services (FTS) because the non-residents have rendered the service of managerial in the nature which falls in the ambit of definition of Fee for Technical Services U/s 9a(1)(vii) of the Act. It is pertinent to note that the provisions of Section 40(a)(i) can be applied

only respect of sum payable or paid to a non-resident towards interest, royalty or Fee for Technical Services (FTS) or other sum chargeable under this Act which is payable to non-resident. For ready reference we quote the provisions of Section 40(a)(i) of the act as under:-

"chargeable under the head "Profits and gains of business or profession",—

(a) in the case of any assessee—

[42][(i)[43] [44]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 XVII-B and such tax has not been deducted or, after deduction, has not been paid [45][on or before the due date specified in sub-section (1) of section 139] :

*[46][**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 Explanation2 to clause (vi) of sub-section (1) of section 9;

(B) "fees for technical services" shall have the same meaning as in Explanation2 to clause (vii) of sub-section (1)

of section 9;"

The payment in question is commission and prima facie not royalty or Fee for Technical Services (FTS). The AO though observed that the payment in the nature of FTS, however the AO has not examined or not given the finding as to how the payment in question is FTS and what is the nature of service rendered by the non-resident. Even otherwise the issue of FTS has to be considered in light of definition provided in respect the DTAA. We find that the ld. CIT(A) for the assessment year 2013-14 has clearly given a finding that the payment in question is not fee for technical services but it is a regular payment to the non-resident in the nature of ordinary course of business. Even otherwise the ld. CIT(A) has upheld the order of the AO only on the ground that as per the explanation-II of Section 195(1) of the Act the assessee was under obligation to deduct the tax at source for making the payment of commission to non-resident. Therefore, the ld. CIT(A) has accepted the nature of payment as commission and not fee for technical service. The relevant finding of the ld. CIT(A) in para 4.3 as under:-

> *"4.3 I have gone through the assessment order, statement of facts, grounds of appeal and written submissions carefully. It is seen that the AO after discussing the provisions of Section 195, including the Explanation 2, has concluded that the appellant was required to deduct the tax at source while making the payment of above referred expenses even, to the non-resident persons, whether or not the non-resident person had a residence or place of business or business connection in India or any other presence in any manner whatsoever in India. The explanation 2 has been inserted by the Finance Act of 2012 with retrospective effect from 01.04.1962. I am of the considered view that the argument of the appellant that since the non-resident persons whom the payments were made did not have place of business or business connection in India, therefore, the appellant was not required to deduct tax at source on the above referred payments, is not correct. Regarding*

the second argument of the appellant that the income of the recipients of the above referred expenses was not "sum chargeable under the provisions of income Tax Act, 1961 therefore the provisions of Section 195(1) are not applicable to these payments" the A/R of the appellant was specifically requested to clarify whether any ruling was obtained from the Authority for Advance Ruling u/s 245(2), regarding non taxability of the income of the recipient in India under the Income Tax Act. The A/R submitted that no such ruling was obtained from AAR by the recipients of the above referred expenses. There is no other evidence on record to show that the sum received by the non-residents in the form of selling commission (Rs. 38,92,787/-) was not chargeable to tax under the Income Tax Act. There is no order or finding by any Income Tax Authority that the above referred sum of Rs. 38,92,787/- was not chargeable to tax under I. T. Act, 1961. Therefore, I am of the considered view that the appellant was required to deduct tax at source while making payment of selling commission (Rs. 38,92,787/-) to non-resident, whether or not the non-resident had a residence or place of business or business connection in India. The decision relied upon by the appellant are applicable only when there is evidence on record to show that the sum paid by the assessee was not chargeable to tax under the Income Tax Act. Therefore, disallowance of Rs. 38,92,787/- made by the AO is hereby confirmed."

Once the payment in question is commission then the provisions of Section 40 (a)(i) of the Act are applicable only if such sum is chargeable to tax under this Act. As per provisions of Section 5(2) of the Act the total income of non-resident includes all income from whatsoever sources derived which is received or deemed to be received in India accrues or arises or is deemed to accrue or arise to him in India during such year. For ready reference we quote to Section 5(2) reproduced as under:-

"5(2) Subject to[11] the provisions of this Act, the total income[12] of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received[14] or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises[14] or is [14]deemed to accrue or arise to him in India during such year.

Explanation 1.—Income accruing or arising outside India shall not be deemed to be received[14] in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued[15] or arisen[15] or is deemed to have accrued[15] or arisen[15] to him shall not again be so included on the basis that it is received or deemed to be received by him in India.

Therefore, commission paid to non-resident outside India for the services rendered outside India will not fall in the category of the income received for deemed or received in India as well as accrues or arises or is deemed to accrue or arise in India. Thus, the said amount paid to non-resident does not fall in the scope of total income of non-resident and consequently it is not chargeable to tax in India under the provisions of the Act. Even otherwise the said income in the hands of non-resident has to be considered in the light of the provisions of DTAA between India and the Country of the non-resident. In the absence of P.E. of the non-resident in India such business income is not chargeable to tax in India. Accordingly, in the facts and circumstances of the case when the amount paid by the assessee is not chargeable to tax in India then the assessee is not liable to deduct TDS and consequently the provisions of Section 40(a)(i) of the Act cannot be invoked for making the disallowance. In the

facts and circumstances of the case the disallowance made by the AO U/s 40(a)(i) of the Act is deleted. In the result, the appeal filed by the assessee is allowed."

22. The ld DR is heard who has vehemently argued the matter and has relied on the findings of the lower authorities which we have already noted above and have not been reproduced for sake of brevity.

23. We have heard the rival contentions and perused the material available on record. During the course of assessment proceedings, the Assessing Officer found that the assessee has made payment of selling commission, exhibition expenses and testing expenses to various non-resident entities, without deducting tax at source and a show cause was issued as to why this payment should not be disallowed u/s 40(a)(ia) in view of insertion of Explanation 2 to section 195 by the Finance Act, 2012 with retrospective effect from 01.04.1962. In response, the assessee submitted that it is not required to deduct any tax at source as per provisions of section 195(1) since these payments are not chargeable to tax in India as no income accrues or arises in India in respect of these transactions in the hands of the non-resident entities, the services have been rendered outside India by these non-resident entities and the payment have also been made outside of India. It was submitted that the commission has been paid in respect of export sales made to non-resident outside of India and the services for earning commission income by the non-resident has been rendered outside of India. It was further submitted that the exhibition expenses have been incurred in respect of participation in various exhibition outside of India and the testing charges were paid to non-resident for getting the samples/goods tested outside India. We therefore find that the Assessing Officer has not disputed the nature of the payments so made by the assessee to the non-resident entities and also the fact that the services have

been rendered outside of India and the payment have been made outside of India. The only reason why the Assessing officer has disallowed these expenses is in view of the Explanation 2 to Section 195 which 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 there under 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."*

24. Further, the Assessing officer has placed reliance was placed on the decision of the Co-ordinate Bench decision in case of M/s Sesa Resources Ltd. *(ITA No. 267-PNJ-2015 dated 20.08.2015).* The ld. CIT(A) has also not disputed the nature of commission payment which have been made in respect of sales made outside of India as well as the exhibition and testing expenses.

25. Section 195 (1) provides that 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 shall deduct income tax thereon at the rates in force. Therefore, what needs to be examined in the instant case is whether the payment of commission and other charges are chargeable under the provisions of this Act. In Explanation 2, it has been clarified that the obligation to comply under sub-section (1) to make deduction applies to all person resident or non-resident whether or not the non-resident has a residence or place of business or business connection in India or any other presence in any manner whatsoever in India.

26. We therefore find that the explanation 2 to section 195 talks about the person who is making/crediting the payment rather than the person who is receiving the payment as the obligation to comply with sub-section (1) is on the person who has to deduct tax at source while making or crediting the payment to the account of the payee. The explanation provides that the obligation to deduct tax at source applies to all persons but it doesn't and cannot take away the fundamental requirement under law which is that the sum has to be chargeable under the provisions of the Act and therefore, only in a scenario, the sum is chargeable under the Act, the obligation is cast on all persons to deduct tax at source irrespective of the residential status or business connection or presence in India. We therefore find that reading of the said explanation by the lower authorities is not correct and only in a scenario, the payment is chargeable to tax, the tax is required to be deducted at source. The said position has also been clarified in the memorandum explaining the provisions of the Finance Bill, 2012 which reads as under:-

> *"Section 195 of the Income-tax Act requires any person to deduct tax at source before making payments to a non-resident if the income of the such non-resident is chargeable to tax in India. "Person", here, will take its meaning from section 2 and would include all persons, whether resident or non-resident. Therefore, a non-resident person is also required to deduct tax at source before making payments to another non-resident, if the payment represents income of the payee non-resident, chargeable to tax in India. There are no other conditions specified in the Act and if the income of the payee non-resident is chargeable to tax, then tax has to be deducted at source, whether the payment is made by a resident or a non-resident."*

27. Further, regarding the decision of the Co-ordinate Bench in case of M/s Sesa Resources Ltd (supra) relied upon by the Assessing Officer, we find that the same has been set aside by the Hon'ble Bombay High Court *(Tax Appeal No. 11 of 2016 dated 07th March, 2016)* wherein it was held as under:-

> *"8. With regard to substantial question of law referred to above, we find that in the judgment of the learned Division Bench in the case of Gujarat Reclaim & Rubber Products Ltd (supra) it has been, inter alia, held that before effecting deduction at source one of the aspects to be examined is whether such income is taxable in terms of the Income Tax Act. This aspect has not been considered by learned Tribunal while concluding that the Appellant has committed a default in not deducting the tax at source. As the said learned Division Bench Judgment was not available while passing the impugned order by the learned Tribunal, we find it appropriate, in the interest of justice, to quash and set aside the impugned order of the learned Tribunal to the extent it holds that the Appellant has defaulted in not deducting tax at source and remand the matter to the learned Tribunal to examine the said aspect afresh in the light of the judgment of this Court after hearing the parties in accordance with law. All contentions on that count are kept open."*

28. Now coming to the provisions of section 40(a)(ia) of the Act, the said section also provides that any interest, royalty, fees for technical services or other sum chargeable under this Act on which tax is deductible at source under chapter XVII-B and such tax has not been deducted or after deduction has not been paid on or before the due date specified in section 139(1) of the Act. We therefore find that both the provisions of section 195(1) as well as 40(a)(ia) of the Act talks about deduction of tax at source where the sum is chargeable under this Act.

29. The taxability of commission payment has recently been examined by the Co-ordinate Bench in case of Satyam Polyplast vs. DCIT, Jaipur (Supra) wherein it was held as under:-

"Once the payment in question is commission then the provisions of Section 40 (a)(i) of the Act are applicable only if such sum is chargeable to tax under this Act. As per provisions of Section 5(2) of the Act the total income of non-resident includes all income from whatsoever sources derived which is received or deemed to be received in India accrues or arises or is deemed to accrue or arise to him in India during such year. For ready reference we quote to Section 5(2) reproduced as under:-

> *"5(2) Subject to[11] the provisions of this Act, the total income[12] of any previous year of a person who is a non-resident includes all income from whatever source derived which—*
>
> *(a) is received[14] or is deemed to be received in India in such year by or on behalf of such person ; or*
>
> *(b) accrues or arises[14] or is [14]deemed to accrue or arise to him in India during such year.*
>
> *Explanation 1.—Income accruing or arising outside India shall not be deemed to be received[14] in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.*
>
> *Explanation 2.—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued[15] or arisen[15] or is deemed to have accrued[15] or arisen[15] to him shall not again be so included on the basis that it is received or deemed to be received by him in India.*

Therefore, commission paid to non-resident outside India for the services rendered outside India will not fall in the category of the income received for deemed or received in India as well as accrues or arises or is deemed to accrue or arise in India. Thus, the said amount paid to non-resident

does not fall in the scope of total income of non-resident and consequently it is not chargeable to tax in India under the provisions of the Act. Even otherwise the said income in the hands of non-resident has to be considered in the light of the provisions of DTAA between India and the Country of the non-resident. In the absence of P.E. of the non-resident in India such business income is not chargeable to tax in India. Accordingly, in the facts and circumstances of the case when the amount paid by the assessee is not chargeable to tax in India then the assessee is not liable to deduct TDS and consequently the provisions of Section 40(a)(i) of the Act cannot be invoked for making the disallowance. In the facts and circumstances of the case the disallowance made by the AO U/s 40(a)(i) of the Act is deleted. In the result, the appeal filed by the assessee is allowed."

30. In the present case, undisputed facts are that the commission has been paid to various non-resident entities in respect of sales affected by the assessee outside of India, the services have been rendered outside of India and the payments have been made outside of India. In light of these undisputed facts, the legal proposition laid down in the aforesaid decision equally applies in the instant case and such commission payment cannot be held chargeable to tax in India. Similarly the exhibition expenses have been paid in respect of participation in various exhibitions held outside of India and even the testing charges have been paid for testing services outside of India. Therefore, these payments will not fall in the category of income which has accrued or arisen or deemed to accrued or arise in India. Further, payments have been made outside of India. Accordingly, we are of the considered view that there was no liability to deduct tax at source u/s 195(1) as these payments are not chargeable to tax and the provisions of section 40(a)(ia) cannot be invoked in the instant case.

31. In light of above discussions and and considering the entirety of facts and circumstances of the case, the disallowance made by the Assessing officer is directed to be deleted.

32. Now, coming to ITA No. 23/JP/19 for AY 2014-15, undisputedly, the facts and circumstances of the case are exactly identical to facts and circumstances of the case in ITA No. 1494/JP/2018, our findings and directions contained therein shall apply *mutatis mutandis* to this appeal.

In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the Open Court on 04/09/2019.

Sd/-	Sd/-
(विजय पाल राव)	(विक्रम सिंह यादव)
(Vijay Pal Rao)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 04/09/2019
*Ganesh Kr.
आदेश की प्रतिलिपि अग्रेशित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- M/s JLC Electromet Pvt. Ltd., Jaipur
2. प्रत्यर्थी/ The Respondent- ACIT, Circle-04, Jaipur
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur.
6. गार्ड फाईल/ Guard File {ITA No. 1499/JP/2018 & 23/JP/2019}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar