आयकर अपीलीय अधिकरण ,'ए' न्यायपीठ,चेन्नई

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

श्री एन.आर.एस .गणेशन**,** न्यायिक सदस्य एवं

श्री एस जयरामन**,** लेखासदस्य के समक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND

SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकरअपीलसं/.**ITA Nos. 1543, 1544 & 1545/Chny/2019**

निर्धारणवर्ष/ Assessment Years : 2012-13, 2013-14 & 2014-15

The Joint Commissioner of Income Tax (OSD), Large Taxpayer Unit -2, Room No. 711, 7th Floor, Wanaparthy Block, No. 121, M.G. Road, Chennai – 600 034.	v.	M/s. Brakes India Private Limited, 21, Patullos Road, Chennai – 600 002. **PAN : [AAACB 2533Q]**
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

आयकरअपीलसं/.**ITA Nos. 1463, 1464 & 1465/Chny/2019**

निर्धारणवर्ष/ Assessment Years : 2012-13, 2013-14 & 2014-15

M/s. Brakes India Private Limited, 21, Patullos Road, Chennai – 600 002. **PAN : [AAACB 2533Q]**	v.	The Deputy Commissioner of Income Tax, Large Tax Payer Unit 2, 121, Nungambakkam High Road, Chennai 600 034.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

राजस्वकी ओर से /Revenue by : Shri S. Bharath, CIT

निर्धारिती की ओर से /Assessee by : Shri R. Vijayaraghavan, Advocate

नवाईकीतारीख/Date of Hearing : 27.11.2019

घोषणाकीतारीख/Date of Pronouncement : 24.02.2020

आदेश/ O R D E R

PER S. JAYARAMAN, ACCOUNTANT MEMBER:

The Cross Appeals filed by the Revenue and assessee are directed against the common order passed by the Commissioner of Income Tax (Appeals)-5, Chennai in ITA Nos. 36, 34 & 35/CIT(A)-5/2016-17 dated 20.02.2019 for the assessment years 2012-13, 2013-14 & 2014-15, respectively.

2. M/s. Brakes India Ltd., the assessee, is a manufacture of complete Brake Systems & Components. While making the assessments for the assessment years 2012-13, 2013-14 & 2014-15, the A O , inter alia, disallowed additional depreciation claimed u/s. 32(1)(iia) on the assets added during the II half of the preceding respective previous years, disallowed higher rate of depreciation claimed on UPS, printers and scanners @ 60% by the assessee , disallowed certain payments made to Non-residents u/s. 40(a) (i) for the reason that the TDS was not deducted in those assessment years and made additional disallowances u/s 14A rwr 8D in those assessment years. Further, while making the assessment for the assessment year 2012-13, the AO found the assessee remitted the employees contribution to the ESI after 5 days from the due date specified in that ACT but fully remitted before the due date specified in the Income-tax Act for filing the return u/s 139(1) of the Act and hence disallowed the sum claimed by the assessee. Aggrieved, the assessee filed appeals before the CIT(A) and

the ld CIT(A) partly allowed the appeals . Aggrieved against the orders of the Revenue as well as the assessee files these cross appeals .

3. The ld D R presented the cases on the lines of grounds appeals and pleaded to restore the respective orders of the A O. However, the Ld. AR submitted that the ld CIT(A) following the Jurisdictional High Court's decision in the assessee's own case/ other case and the Jurisdictional ITAT decisions in the assessee's own case allowed these appeals and hence pleaded to dismiss the Revenue's appeals, issue wise as under.

4. The Ld. AR submitted that while making the assessments for the assessment years 2012-13, 2013-14 & 2014-15, the AO disallowed additional depreciation claimed u/s. 32(1)(iia) on the assets added during the II half of the preceding respective previous year. In this regard, the Ld. AR submitted that this issue is already decided in its favour by the Jurisdictional High Court in the order in TCA No. 551/2013 dt 14.03.2017 for the assessment year 2006-07 and hence relying on it , the ld CIT(A) allowed the corresponding appeals of the assessee . Therefore, the ld AR pleaded to dismiss the corresponding grounds of the Revenue.

5. We heard the rival submissions. The relevant portion of the order of the Jurisdictional High Court on this issue is extracted as under:

> *"5.In order to appreciate the aforesaid submissions, the following facts are required to be noticed:*
>
> *5.1.The Assessee had claimed additional depreciation under Section 32(1)(iia) amounting to Rs.1,89,67,159/- during the relevant assessment year, i.e., AY 2006-07.*
>
> *5.2.The additional depreciation was claimed at the rate of 7.5% being 50% of the prescribed rate, which was 15%.*
>
> *5.3.The depreciation was claimed at the said rate as the subject asset was used for less than 180 days.*
>
> *5.4.The said depreciation was claimed in the preceding assessment year, i.e., AY 2005-06, which is, when the asset was installed and put to use.*
>
> *5.5.In the relevant assessment year i.e., AY 2006-07, the Assessee sought to claim the balance depreciation equivalent to 7.5%. The Assessing Officer, however, rejected the claim made by the Assessee qua the balance additional depreciation.*
>
> *5.6.Being aggrieved, the Assessee carried the matter in appeal to the Commissioner of Income Tax (Appeals) [in short, CIT(A)]. The CIT(A) sustained the order of the Assessing Officer. The Tribunal, did likewise and therefore, the Assessee, is in appeal, before us.*
>
> *6.As indicated right at the outset, the issue is covered in favour of the Assessee, by virtue of our judgment in the matter of Commissioner of Income Tax, Madurai Vs. M/s.Shri T.P.Textiles Private Limited. As noticed above, the Karnataka High Court in CIT V. Rittal India (P.) Ltd., [2016] 66 taxmann.com 4 (Karnataka), has also taken the same view.*
>
> *6.1.We are informed that the Revenue has not assailed the judgment of the Karnataka High Court.*
>
> *6.2.In our judgment in the matter of Commissioner of Income Tax, Madurai Vs. M/s.Shri T.P.Textiles Private Limited, we have noticed the aforementioned judgment of the Karnataka High Court.*
>
> *7.In so far as the first submission advanced by Mr.Ravi is concerned, according to us, the same is completely untenable.*

7.1.The judgment of the Division Bench of this Court in M.M.Forgings Limited Vs. Additional Commissioner of Income Tax, did not deal the issue, which is at hand.

7.2.The issue, in hand, is as to whether balance additional depreciation could be carried forward to the year, following the previous year, in which, additional depreciation was claimed.

7.3.The Division Bench in M.M.Forgings case the said case was not concerned with the issue, with which, we are faced, that is, the right to carry forward the balance additional depreciation. Therefore, the judgment is completely distinguishable.

8.The second submission of Mr.Ravi, that Circular no.8 of 2002 dated 27.08.2002 and Circular no.281 dated 29.11.1979, have not been taken note of, in our judgment rendered in Commissioner of Income Tax, Madurai Vs. M/s.Shri T.P.Textiles Private Limited, according to us, will not impact, either the reasoning or the conclusion reached by us, in the said matter.

8.1.It is pertinent to note that the Circular no.281 dated 29.11.1979, pre-dates the insertion of the relevant provision, i.e., second clause to Section 32 (1) (iia). The said clause (iia), admittedly, was inserted by virtue of the Finance (No.2) Act, 2002, with effect from 01.04.2003.

8.2.In so far as the second Circular is concerned, i.e, Circular no.8 of 2002 dated 27.08.2002, in our view, in no way, helps the case of the Revenue. The Circular does not dwell on the point which we are confronted with.

8.3.In any case, according to us, the Circulars are not binding on the Court, though, they may be binding on the Revenue. [See CIT V. Hero Cycles Pvt. Ltd., (1997) 228 ITR 463 (SC)].

9.The last submission that Mr.Ravi advanced, was, in fact, predicated on the reasoning given by the Assessing Officer, which, according to us, is misconceived, as the manner of calculation of depreciation, cannot, to our minds, impede the claim of the Assessee for balance additional depreciation, in the year following the previous year, in which, the said asset is installed and put to use.

10.Therefore, for the aforesaid reasons, we find no merit in the submissions advanced by the Revenue.

11.The appeal is accordingly, allowed and the impugned judgment of the Tribunal is set aside. However, there shall be no order as to costs. "

Following the above Jurisdictional High Court's decision, the ld CIT(A) allowed the corresponding grounds of the assessee for the respective

assessment year. Therefore, we do not find any reason to interfere with the orders of the ld CIT(A) and hence dismiss the corresponding grounds of the Revenue for the assessment years 2012-13, 2013-14 & 2014-15 , respectively.

6. The Ld. AR submitted that while making the assessments for the assessment years 2012-13, 2013-14 & 2014-15, the AO disallowed higher rate of depreciation claimed on UPS, printers and scanners @ 60% by the assessee. On this issue, the Ld. AR submitted that the Hon'ble ITAT D Bench of Chennai has decided in its favour in ITA No. 760/Mds/2016 dated 06.03.2017 for the assessment year 2011-12. Relying on it , the ld CIT(A) allowed the corresponding appeals of the assessee . Therefore, the ld AR pleaded to dismiss the corresponding grounds of the Revenue.

7. We heard the rival submissions. The relevant portion of the order relied on by the assessee is extracted as under:

> *"36. The next issue in ITA No.760/Mds/16 for the assessment year 2011-12 is with regard to depreciation on printers and UPS. The facts of the case are that the AO has disallowed depreciation claimed by the assessee at 60% on printers, scanners and UPS treating the same as office equipment eligible for depreciation at 15%. The assessee submitted that the AO should have allowed a higher rate of depreciation at 60% on UPS, since it is now fairly settled that UPS is an energy saving device. Similarly,*

printers which form part of data processing equipment should have been allowed depreciation at 60% as per the rate specified under the Income-tax Act and not at 60%. The assessee has submitted that it has grouped UPS, printers and scanners under the block of assets 'computers' and claimed depreciation at 60%. According to the AO, these items are eligible for depreciation at 15% being office equipment. However, the DRP observed, by considering the case laws cited by the assessee that in respect of printers, scanners, UPS, etc. networking equipment, the judicial decisions are strongly weighed in favour of the taxpayer on the ground that these hardware items become operational only through 'computer functions' and these computer hardware when used as component of the computer become part and parcel of the computer. Accordingly, the claim of higher depreciation at 60% on these items is allowed by the DRP. Aggrieved, the Revenue is in appeal before us. - -

37. We have heard both the sides and perused the material on record. Similar issue was considered by the Tribunal in assessee's own case in ITA Nos.266/Mds/12 and 656/Mds/12 for the AY 2007-08 wherein held that:- "58. We find that this issue had come up in assessee's appeal for assessment year 2006-07. This Tribunal at para 16 of its order dated 6.1.2012 (supra), had held as under:- "16. In regard to ground No.2 it was submitted by the learned authorized representative that the issue was against the action of the learned CIT(A) in confirming the disallowance of higher depreciation on the UPS which was energy saving device. It was fairly agreed by both the sides that the issue was now covered by the decision of the co-ordinate Bench of this Tribunal in the case of DCIT v. Surface Finishing and Equipment reported in 81 TTJ 448 (Jodh). As it is noticed that the issue is squarely covered by the decision of the co-ordinate Bench of this Tribunal, referred to supra, the Assessing Officer is directed to grant the assessee higher rate of depreciation on the UPS, which is an energy saving device. In the circumstances ground No.2 in the assessee's appeal stands allowed. 17. In the result appeals of the Revenue in ITA Nos. 249 and 1166/Mds/2010 are partly allowed for statistical purposes and the appeal of the assessee in ITA No.1069/Mds/2010 is partly allowed." 59. Respectfully following the co-

ordinate Bench order, we hold that assessee was eligible for higher rate of depreciation on UPS treating it an energy saving device."

37.1 Respectfully following the aforesaid order of the Tribunal, we are inclined to dismiss the ground taken by the Revenue."

Following the above order in the assessee's own case , the ld CIT(A) allowed the corresponding grounds of the assessee for the respective assessment year. Therefore , we do not find any reason to interfere with the orders of the ld CIT(A) and hence dismiss the corresponding grounds of the Revenue for the assessment years 2012-13, 2013-14 & 2014-15 , respectively.

8. The Ld. AR submitted that while making the assessments for the assessment years 2012-13, 2013-14 & 2014-15, the AO made disallowance on certain payments made to Non-residents u/s. 40(a)(i) for the reason that the TDS was not deducted in the respective assessment year. In this regard, the Ld. AR submitted that this Hon'ble Tribunal D Bench has decided this issue in assessee's favour in ITA No. 416/Mds/2016 for assessment year 2010-11 dated 06.03.2017. Relying on it , the ld CIT(A) allowed the corresponding appeals of the assesssee. Therefore, the ld AR pleaded to dismiss the corresponding grounds of the Revenue.

9. We heard the rival submissions. The relevant portion of the order relied on by the assessee is extracted as under:

> *"33. The next issue in Revenue's appeal in ITA No.416/Mds/15 is with regard to deletion of addition made by AO u/s.40(a)(i) being agency commission, professional consultancy charges, warehousing charges, emballage cost, tool development charges etc . 34. The facts of the case are that as the assessee company has not deducted/remitted any TDS while making the above payments to non-residents, the AO invoked the provisions of sec.40(a)(i) of the Act and disallowed the same in his draft assessment order. The assessee submitted before the Panel that the agency commission, warehousing charges, freight/logistic/ emballage charges etc. paid for non-residents for the services availed outside India are not liable tax in India in the hands of the recipients. Therefore, the assessee (the remitter of the sums) is not under obligation to deduct any TDS on such payments. Consequently, the provisions of sec.40(a)(i) have no application. Further, the assessee submitted that the issue is covered in favour of the assessee by the decision of the Tribunal in assessee's own case for the AY 2007-08 in ITA Nos.266 & 656/Mds/2012 dated 22.3.2013. Regarding the interest payment, the assessee submitted that though the interest was paid to a Hong Kong Branch of SBI, the legal entity, i.e. State Bank of India is an Indian Public Sector Scheduled Bank and hence there was no need to deduct any TDS on the interest payments. Regarding the leased telephone line charges, the assessee submitted that they are only reimbursement of expenses and hence, the provisions of sec.40(a)(i) of the Act are not applicable. Regarding the tool development charges, the assessee claimed that these expenses represent the development charges of certain tools including the procurement of raw material for development of the said tools. The non-residents procure the material, develop them into tools and use the tools in the manufacturing activity outside the country. Since the procurement of the material, development of the tools and their use was totally outside India and also the persons procuring the material and developing the tools are non-residents and the services are rendered outside India, the payments are liable for tax in India. Hence, the assessee claimed that these expenses are outside the purview of provisions of sec.40(a)(i) of the Act. 34.1 The assessee claimed in its return of income agency commission of ₹ 55,19,350/- and professional and consultancy charges of ₹ 41,71,575/-. As claimed by the assessee, these services are rendered by the non-residents and outside India and hence, its payments are not liable to tax in India. The*

warehousing charges of ₹ 3,44,98,431/- are paid to non-residents for the warehousing services rendered outside India. Similarly, the emballage cost of ₹ 1,17,59,919/- were also paid to the non-residents for hiring of containers outside India9for transporting the exports outside India). These emballage costs are akin to logistics cost. None of the persons who are rendering the agency commission, consultancy, warehousing, emballage costs have PE in India. These persons are rendering the services outside the country and the services were also availed/utilized outside India only. Consequently, the payments are not liable for tax in India in the hands of the respective recipients. Therefore, the assessee is not under the obligation to deduct any TDS on these payments. Similar issues were considered by the Tribunal in assessees's own case as stated above, wherein it was held that the above payments rendered by the non-residents are not liable for TDS u/s.195 of the Act and consequently, outside the purview of sec.40(a)(i) of the Act. Against this, the Revenue is in appeal before us. 35. We have heard both the sides and perused the material on record. Similar issue came for consideration in assessee's own case in ITA No.266 & 656/Mds./2012 (supra) wherein held that:-

"46. We have perused the orders and heard the rival submissions. Purposes for which assessee had made payments to non-residents have already been given by us in the table at para 42 above. Assessee had not deducted tax at source while effecting such payments. As per the A.O., these expenditure were nothing but for managerial services rendered by the non-residents outside India. Further, as per the Revenue, explanation inserted by Finance Act, 2010 under Section 9(2) of the Act with retrospective effect from 1.6.1976,had dispensed with the condition regarding residence or place of business or business connection in India, for attracting rigours of Section 9(1)(vii). Therefore, according to them, CIT(Appeals) fell in error in holding that assessee was not liable to deduct tax at source. In this regard it is important to have a look at the explanations given by the assessee on the payments effected by it to the Non-residents. With regard to commission, assessee had before Assessing Officer, given a copy of the letter issued to the non-resident party which read as follows:- "Assistance You will render full assistance and co-operation with regard to the follow up of schedules and other correspondence that emanate from customers from time to time regarding the agreed products. You will also be required to ensure the consignments are cleared, warehoused and distributed by nominated agents for onward delivery to customers. Expenses incurred on account of the above will be reimbursed by Brakes India and shall be supported by relevant basic documents. All other expenses related to the specific products including ASN (Advance

Shipment Note) submission, sample certification, training and other direct expenses related to subject merchandise will be reimbursed. Supporting documents will have to be provided with the invoices. A copy of the agreement entered with nominated agent is to be forwarded to us for our approval/records. You will have to arrange for monthly Stock Statement – part number wise for us to cover insurance and for monitoring the Stock levels." With regard to warehousing charges including logistics charges, explanation given by the assessee to the A.O. was as under:- "Freight and warehousing charges – The entire expenditure were wholly incurred outside India in terms of transportation, delivery and logistics costs. Those expenditure being incurred outside India are not liable for deduction of tax at source and those income are not liable for tax in India. Further all those agents do not have any PE's in India. Separate sheet detailing the break-up along with remarks is attached for your perusal. we enclose sample copies for distribution and logistics costs to substantiate that the expenditure were wholly incurred outside India." Assessing Officer had also extracted the pertinent parts of the agreement assessee entered with M/s Volvo, which read as under:- " "Services" means sea freight of the container from the port of departure, India to the port of Gothenburg, Sweden custom clearance, haulage of the container to VLCs warehouse at Arendal, Gothenburg, storage of the Products for an average period of five weeks and on time delivery according to VCTs call offs to VLCs factories in Gothenburg, Sweden and Ghent, Belgium. Consolidation of incoming delinses from VTC and material control. Scope During the terms of this Agreement VLC undertakes to carry out Services in accordance with the working instructions, specifications, quality requirements and procedures given to VLC by or on behalf of BRAKES INDIA and in such way that the work satisfies VTCs specifications and requirements as stated in the Customer Contracts or the Appendices hereto including the weekly inventory to be sent to BRAKES INDIA and the on time delivery of the Products to VTC in the quantities agreed upon. VLC and BRAKES INDIA will, until the termination of this Agreement meet together at agreed intervals but in any event no less than once every half year at an agreed location to review the progress of the Services." 47. In our opinion, nature of services mentioned above will come not within the definition of "fees for technical services" given under explanation 2 to Section 9(1)(vii) of the Act. By virtue of such services, the concerned recipients had not made available to the assessee any new technical or skill which assessee could use in its business. The services rendered by the said parties related to clearing, warehousing and freight charges, outside India. The logistics service rendered was essentially warehousing facility. In our opinion, this cannot be equated with

managerial, technical or consultancy services. Even if it is considered as technical service, the fee was payable only for services utilized by the assessee in the business or profession carried on by the said non-residents outside India. Such business or profession of the non-residents, earned them income outside India. Thus, it would fall within the exception given under sub-clause (b) of Section 9(1) of the Act. In any case, under Section 195 of the Act, assessee is liable to deduct tax only where the payment made to non-residents is chargeable to tax under the provisions of the Act. In the circumstances mentioned above, assessee was justified in having a bonafide belief that the payments did not warrant application of Section 195 of the Act. In such circumstances, we are of the opinion that it could not have been saddled with the consequences mentioned under Section 40(a)(i) of the Act. Disallowances were rightly deleted by the ld. CIT(Appeals). No interference is called for. "

35.1 In view of the above order of the Tribunal, this ground of appeal by the Revenue is dismissed."

Following the above order in the assessee's own case , the ld CIT(A) allowed the corresponding grounds of the assessee for the respective assessment year. Therefore , we do not find any reason to interfere with the orders of the ld CIT(A) and hence dismiss the corresponding grounds of the Revenue for the assessment years 2012-13, 2013-14 & 2014-15 , respectively.

10. While making the assessment for the assessment year 2012-13, the AO found that the assessee has remitted the employees contribution to the ESI after 5 days from the due date specified in that Act but it fully remitted before the due date specified in the Income-tac Act for filing the return u/s 139(1) and hence disallowed the sum

claimed by the assessee. Aggrieved, the assessee filed an appeal before the CIT(A) and the ld CIT(A) relying on the Jurisdictional High Court decision in the case of M/s Industrial Security and Intelligence India P Ltd in TCA 585 & 586 of 2015 & M P No 1 of 2015. Aggrieved against that order, the Revenue filed this appeal and pleaded to restore the order of the AO on the lines of grounds of appeal .

11. We heard the rival submissions. Since, the ld CIT(A) following the above Jurisdictional High Court's decision allowed the appeal , we do not find any reason to interfere with the order of the ld CIT(A) and hence dismiss the corresponding grounds of the Revenue for the assessment years 2012-13.

12. Thus, the Revenue's appeals for the assessment years 2012-13, 2013-14 & 2014-15 are dismissed .

ITA Nos. 1463, 1464 & 1465/Chny/2019 for the ays 2012-13, 2013-14 & 2014-15

13. Now, let us take the Assessee's above appeals. The Ld. AR submitted that while making the assessments for the assessment years 2012-13, 2013-14 & 2014-15, the A O made additional disallowances u/s. 14A rwr 8D over and above the quantum of disallowances made by the assessee in the respective assessment year. In this regard, the Ld.

AR submitted that though the assessee pleaded before the ld CIT(A) that the assessee had huge interest free funds in the form of capital, reserves, surplus etc and hence no interest disallowance could be made and for the purposes of quantifying the average value of investments , only those investments which yielded exempt income alone should be considered etc, the ld CIT(A) without considering them simply held that the disallowances made by the AO in the respective assessment year is lower than the exempt income and accordingly confirmed the disallowances made by the A O. Therefore, the ld AR pleaded to allow the assessee's appeals. In this regard , he relied on the decision of the special bench of the ITAT in the case of Vireet Investments P Ltd 165 ITD 27 and the Hon'ble Madras High Court in the case of Chettinad Logistics P Ltd in TCA No. 24 of 2017. Per contra, the ld DR supported the orders of the lower authorities.

14. We heard the rival submissions and gone through relevant material. We find that the assessee's plea that it had huge interest free funds in the form of capital, reserves, surplus etc and hence no interest disallowances could be made in its case remain unexamined and hence we deem it fit to remit this issue back to the AO for a fresh examination. The assessee shall lay relevant material in support of its contentions and comply with the requirements of the A O in accordance with law.

The AO shall after affording effective opportunity to the assessee shall decide this issue in accordance with law. The assessee's plea that for the purposes of quantifying the average value of investments, only those investments which yielded exempt income alone should be considered is in accordance with the decision of the special bench of the ITAT decision in the case of Vireet Investments P Ltd 165 ITD 27 and hence we direct the AO to recompute the disallowance in accordance with that decision. Therefore, the assessee's appeals for the assessment years 2012-13, 2013-14 & 2014-15 are treated as partly allowed .

15. Thus, the assessee's appeals for the assessment years 2012-13, 2013-14 & 2014-15 are treated as partly allowed .

Order pronounced on 24th February, 2020 at Chennai.

Sd/-	**Sd/-**
(एन.आर.एस .गणेशन)	**(एस.जयरामन)**
(N.R.S. GANESAN)	**(S. JAYARAMAN)**
न्यायिकसदस्य/Judicial Member	**लेखासदस्य/Accountant Member**

चेन्नई/Chennai,
दिनांक/Dated: 24th February, 2020
JPV
आदेशकीप्रतिलिपिअग्रेषित/Copy to:
1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकरआयुक्त) अपील(/CIT(A)
4. आयकरआयुक्त/CIT 5. विभागीयप्रतिनिधि/DR 6. गार्डफाईल/GF