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

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA Nos. 198/JP/2019
निर्धारण वर्ष/Assessment Year :2014-15

Modern Threads India Limited, A-4, Vijay Path, Tilak Nagar, Jaipur	बनाम Vs.	ACIT, Circle-6, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCM1850A		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA Nos. 199/JP/2019
निर्धारण वर्ष/Assessment Year :2015-16

Modern Threads India Limited, A-4, Vijay Path, Tilak Nagar, Jaipur	बनाम Vs.	DCIT, Circle-6, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCM1850A		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Madhukar Garg (CA)
राजस्व की ओर से/ Revenue by : Smt. Runi Pal (JCIT)

सुनवाई की तारीख/ Date of Hearing : 21/12/2020
उदघोषणा की तारीख/Date of Pronouncement: 15/02/2021

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 10.12.2018 & 14.12.2018 for AY 2014-15 & 2015-16 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. 198/JP/2019 for A.Y 2014-15, the assessee has taken the following grounds of appeal:-

"1. That the learned CIT(Appeals) has erred in holding that 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 and the A/R submitted that no such ruling was obtained from AAR. The said finding is incorrect as no such clarification was sought for during the course of appellate proceedings.

2. That the learned CIT(Appeals) has erred in holding that argument of the appellant that since non-resident persons to whom payments were made did not have any place of business or business connection in India and therefore, the appellant was not required to deduct tax at source is not correct. The said finding is illegal and unjustified.

3. That the learned CIT(Appeals) has erred in holding that there is no evidence on record to show that the sum received by the non-residents in the form of sales commission of Rs. 99,84,435/- was not chargeable to tax under the Income-tax Act. The said finding is illegal and unjustified.

4. That the learned CIT(Appeals) has erred in confirming disallowance of Rs. 99,84,435/- on account of non-deduction of tax at source while making payment of sale commission to non-residents. The disallowance confirmed is illegal and unjustified."

3. During the course of hearing, the ld. AR submitted that first ground of appeal has been taken against the action of the ld CIT(Appeals) in holding that 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 income of the recipients and the A/R submitted that no such ruling was obtained from AAR. In this regard, it was submitted that the ld

CIT(Appeals) had never required the assessee to clarify regarding any ruling u/s 245R(2) and finding of the learned CIT(Appeals) is therefore unjustified.

4. Grounds No. 2-4 of assessee's appeal are against the action of the ld CIT(Appeals) in confirming the disallowance of Rs.99,84,435/- u/s 40(a)(i) on account of non-deduction of tax at source while paying sales commission to non-residents.

5. In this regard, the ld AR submitted that the appellant company is a public limited company deriving income from polyester viscose, blended woolen yarn etc. and the company was declared a sick company by the Board of Financial Reconstruction on 21.5.2005. The Assessing Officer while completing the assessment has mentioned that the company had paid commission of Rs.99,84,435/- to foreign agents as sales commission during the year and no tax was deducted at source as per the provisions of section 195. The assessee in response to the show cause notice has filed a detailed reply which has been reproduced by the Assessing Officer from pages 3-7 of the order. However, the Assessing Officer had not accepted the contention of the assessee that no tax was required to be deducted at source and relying on Explanation 2 to Section 195(1) introduced by the Finance Act, 2012 with retrospective effect from 1.4.1962 held that the payment of commission by the assessee is nothing but a fee which has been paid by the resident assessee to non-resident for technical services rendered by him holding that the commission was fee for technical services and the assessee was required to deduct tax at source on the said payment. He, therefore, disallowed the sum of Rs.99,84,435/- by applying the provisions of section 40(a)(i) of the Act.

6. The assessee had preferred an appeal against the said order and it was pointed out to the ld CIT(Appeals) that as per the provisions of section 195(1),

it is clear that tax is required to be deducted at source under the provisions of section 195(1) only in respect of sum chargeable to tax under the provisions of the Act. It was also contended that the amount paid by the assessee not being chargeable to tax in India in respect of payee, no tax was required to be deducted at source and reliance was placed on the decision of Supreme Court in the case of G.E.(India) Technology Centre (P) Limited vs. CIT reported in 327 ITR 456 as well as another decision of Supreme Court in the case of Vijay Ship Breaking Corporation vs. CIT 314 ITR 309. The assessee had also relied on number of cases of various High Courts in which it was held that no tax was required to be deducted at source in respect of payment of commission to non-resident agents. The assessee had also filed complete details of commission paid as well as certificate from the payees that commission received by them was in the nature of their business income and they were not having any permanent establishment in India. The ld CIT(Appeals) has discussed this matter in para 6 of his order and his finding has been given in para 6.3 on page 13 wherein he has held that argument of the assessee that since the non-resident persons to whom payments were made do not have a place of business or business connection in India and therefore, he was not required to deduct tax at source is not correct. The ld CIT(Appeals) has held that there is no order or finding by any Income-tax authority that the sum of Rs.99,84,435/- was not chargeable to tax under the Income-tax Act, 1961. The assessee was required to deduct tax at source whether or not the non-resident had a residence or place of business or business connection in India, he had therefore, confirmed the disallowance of Rs.99,84,435/-.

7. In the aforesaid factual background, it was submitted that reliance placed by the Assessing Officer as well as the learned CIT(Appeals) on Explanation 2 to section 195(1) of the IT Act which has been introduced by the Finance Act, 2012 with retrospective effect from 1.4.62 is misplaced. The

learned CIT(Appeals) as well as the Assessing Officer has failed to appreciate the provisions of section 195 of the IT Act. From the provisions of section 195(1), it is clear that any person responsible for paying to a non-resident any interest or any other sum chargeable to tax under the provisions of the Act, shall, at the time of credit of such income to the account of the payee, deduct income tax thereon at the rates in force. Thus, it is quite clear that tax is required to be deducted at source from the element of income embedded in the total payment being made by the person responsible in respect thereof, to the non-resident entity. If the amount paid by the assessee is not chargeable to tax in India in respect of the payee, no tax is required to be deducted at source. Reliance in this regard is placed on the decision of Hon'ble Supreme Court in the case of GE(India) Technology Centre (P) Ltd. Vs. CIT reported in 327 ITR 456 wherein it has been held by the Hon'ble Supreme Court that *"The most important expression in section 195(1) of the Income-tax Act, 1961, dealing with deduction of tax at source consists of the words "chargeable under the provisions of the Act."* 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. Section 195 contemplates not merely amounts, the whole of which are pure income payments; it also covers composite payments which have an element of income imbedded or incorporated in them. The obligation to deduct tax at source, is, however, limited to appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. It is for this reason that the CBDT has clarified in Circular No.728 dated October, 31, 1995, that the tax deductor can take into consideration the effect of the DTAA in respect of payments of royalties and technical fees while deducting TDS.

8. It was submitted that the expression "chargeable under the provisions of the Act" in section 195(1) shows that the remittance has got to be of a trading

receipt, the whole or part of which is liable to tax in India. If tax is not so assessable, there is no question of tax at source being deducted. The Hon'ble Supreme Court has also referred to its another decision in the case of Vijay Ship Breaking Corporation vs. CIT reported in 314 ITR 309. It was held by the Supreme Court that if the contention of the Department that the moment there is a remittance the obligation to deduct TDS arises is to be accepted, then we are obliterating the words "chargeable under the provisions of the Act" in section 195(1). The said expression in section 195(1) shows that remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. The payer is bound to deduct TDS only if tax is assessable in India. If tax was not assessable, there is no question of TDS being deducted.

9. Your attention in this regard is also invited to Instruction No.2/2014 dated 26.2.2014 issued by the CBDT. From the perusal of the same, it would be observed that in para 3 of the Instruction, it has clearly been mentioned that in a case where the assessee fails to deduct tax under section 195 of the Act, the Assessing Officer shall determine the appropriate proportion of the sum chargeable to tax as mentioned in sub-section (1) of section 195 to ascertain the tax liability on which the deductor shall be deemed to be an assessee in default under section 201 of the Act, and the appropriate proportion of the sum will depend on the facts and circumstances of each case taking into account nature of remittances, income component therein or any other fact relevant to determine such appropriate proportion. Thus, the CBDT has also mentioned that tax is only required to be deducted at source in respect of the amount of remittance which is in the nature of income.

10. Further attention is invited to Circular No.3/2015 dated 12.02.2015 in which the Board has clarified regarding disallowance to be made u/s 40(a)(i). It has clearly been mentioned in the Circular as follows:-

"As disallowance of amount under section 40(a)(i) of the Act in case of a deductor is interlinked with the sum chargeable under the Act as mentioned in section 195 of the Act for the purpose of tax deduction at source, the Central Board of Direct Taxes, in exercise of powers conferred under section 119 of the Act, hereby clarifies that for the purpose of making disallowance of 'other sum chargeable' under section 40(a)(i) of the Act, the appropriate portion of the sum which is chargeable to tax under the Act shall form the basis of such disallowance and shall be the same as determined by the Assessing Officer having jurisdiction for the purpose of sub- section (1) of section 195 of the Act as per Instruction No.2/2014, dated 26.2.2014 of CBDT. Further, where determination of 'other sum chargeable' has been made under sub-section (2), (3) or (7) of section 195 of the Act, such a determination will form the basis for disallowance, if any, under section 40(a)(i) of the Act."

Thus, in both the circulars the Board has also mentioned that tax is required to be deducted only in respect of sum chargeable to tax.

11. It has been held by the Assessing Officer that the payment of commission by the assessee to non-resident agents is fee for technical services and hence the assessee was required to deduct tax at source. In this connection, it is submitted that it has been held in number of cases that payment of commission to foreign agents is not fee for technical services. Foreign commission agents have neither any control over the export activity of the assessee nor they are final authority in respect of the same. They only perform subsidiary function outsourced to them for saving the cost and convenience. The assessee had duly filed certificates from the recipients of commission that the commission received by them was their business income and they were not having any permanent establishment in India. Thus, it is

very clear that the commission which is being paid by the assessee to non-residents and received by the non-residents is not chargeable to tax under the provisions of Income-tax Act and hence, no tax is required to be deducted at source under the provisions of section 195. In support, reliance was placed on following decisions:

- Pr.CIT vs. Motif India Infotech 409 ITR 178 (Guj)
- Nova Technocast reported in 166 DTR (Guj) 426
- CIT vs. Farida Leather Company reported in 287 CTR 565(Madras)
- Evolv Clothing Company vs. ACIT 407 ITR 729 (Mad).
- Subhash Chand Gupta vs. ACIT 58 Tax World 176 (Jp)

12. Without prejudice to above, it was further submitted that the payment of commission to agents by the assessee is in the nature of business profit in the hands of the recipients and as per the relevant article of Double Taxation Avoidance Agreement (Article 7) business profits are taxable only in the country of such enterprise unless enterprise has a permanent establishment situated in India. As mentioned earlier, the parties to whom payments have been made by the assessee company are not having any permanent establishment in India. This matter has been considered by the ITAT, Jaipur Bench, Jaipur in the case of Satyam Polyplast vs. DCIT reported in 106 Taxmann.com 145(Jpr.Trib) wherein it was held as under:-

> *"The payment in question is commission and prima facie not royalty or fee for technical services (FTS). The Assessing Officer though observed that the payment in the nature of FTS, however, the Assessing Officer 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. It is found that the*

Commissioner(Appeals) 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 Commissioner(Appeals) has upheld the order of the Assessing Officer only on the ground that as per the Explanation II of section 195(1), the assessee was under obligation to deduct the tax at source for making the payment of commission to non-resident. Therefore, the Commissioner(Appeals) has accepted the nature of payment as commission and not fee for technical service(Para 5).

Once the payment in question is commission then the provisions of section 40(a)(i) are applicable only if such sum is chargeable to tax under the Act. As per the provisions of section 5(2), 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….

Therefore, the commission paid to non-resident outside India for the services rendered outside India will not fall in the category of the income received or deemed to be 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 resident. In the absence of PE 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) cannot be invoked for making the disallowance. In the facts and circumstances of the case the disallowance made by the Assessing Officer under section 40(a)(i) is deleted(Para 5)".

Further, reliance was placed on ITAT Jaipur Bench decision in case of JLC Electromet P Ltd vs ACIT reported in [2019] 75 ITR (Trib)13. In view of above, it was submitted that there was no liability on the part of the assessee to deduct any tax at source in respect of commission paid to foreign agents and the disallowance made by the Assessing Officer which has been confirmed by the learned CIT(Appeals) deserves to be deleted.

13. It was also submitted that out of the total payment of commission amounting to Rs.99,84,436/-, a sum of Rs.1,55,867/- has been paid to Aumlrya Marketing Services Pvt. Ltd., who is an Indian agent and tax has duly been deducted at source in respect of the said payment and hence, the same cannot be considered for disallowance under the provisions of section 40(a)(i) of the Act.

14. In her submissions, the ld D/R submitted that the assessee company has paid commission of Rs. 99,84,435/- to foreign agents as sales commission during the year on which TDS was not done as per provisions of section 195 read with Explanation II to the said section wherein it is clarified that:

"the obligation to comply with sub section (I) 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 nonresident, 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'.

15. It was further submitted that section 9(1) (vii) would classify and cover all incomes as accruing and arising in India which partake the character of payment on account of 'Fee for technical services', which in turn, has been defined to include any payment for rendering of any managerial or consultancy services rendered by the non-resident agent. In the instant case, since the assessee was not able to sell his goods on his own offshore, he has to engage the managerial acumen and expertise of the non-resident in lieu of a consideration, termed as 'Commission'. This is to say that the payment by the resident assessee in connection with his business in India to a person outside India making use of his expertise in sale of similar goods in a particular country is nothing but a fee which has been paid by the resident assessee to the non-resident for the technical services rendered by him. This being the stated position and the factum of the case, the payment made by the assessee to a non-resident is squarely covered by the provisions of Section 195 of the Income Tax Act, 1961 which call for deduction of tax at appropriate rate at the time of payment to a non-resident. In view of these provisions which find place in the Statute, the provisions of Section 40(a)(ia) are also attracted wherever TDS on payment of commission to a non-resident has not been made at appropriate rates. These provisions bar deduction of any payment on account of commission [fee for technical services] made to a non-resident, without TDS. In these circumstances, there is absolutely no basis to conclude that income, which is commission in the present case, is not taxable under Income Tax Act, 1961. The assessee in these circumstances is liable to deduct tax at the time of credit of such income to the account of payee or at the time of payment whichever is earlier. Alternatively, the assessee has to obtain certificate for no deduction or lower deduction of tax on the payments as

required u/s 195(2) of act. The foreign agents can also obtain certificates for no deduction or lower deduction of tax on amount receivable / received as prescribed u/s 195(3) of act. Since, these conditions have not been certified payments have been made to non residents without deduction of tax as required u/s 195 of the act. Consequently, the expenditure on export commission and other related charges payable to a non resident for services rendered outside India is not allowable expenditure and these are rightly disallowed u/s 40(a)(ia) of the Act. She accordingly supported the lower of the lower authorities.

16. We have heard the rival contentions and perused the material available on record. The Coordinate Bench in case of **JLC Electromet P Ltd vs ACIT** (supra) has dealt with an identical issue of disallowance of commission payment to non-residents u/s 40(a)(i) due to non-deduction of TDS and where (speaking through one of us), it was held as under:

> *"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."

17. In the present case, the facts are *pari-materia* where 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 by these entities 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 commission paid to non-

resident outside India for the services rendered outside India will not fall in the category of the income received or deemed to be received in India as well as accrues or arises or is deemed to accrue or arise in India. Such commission payment or part thereof cannot therefore be held chargeable to tax in India and in absence of any income chargeable to tax, there was no liability to deduct tax at source u/s 195(1) and the provisions of section 40(a)(i) therefore cannot be invoked in the instant case. Further, out of total commission payment of Rs 99,84,436, an amount of Rs 1,55,867/- has been paid to a resident entity on which TDS has already been done which is again out of the ambit of provisions of section 40(a)(i) of the Act. In light of above discussions and considering the entirety of facts and circumstances of the case, the disallowance made by the Assessing officer by invoking provisions of section 40(a)(i) is hereby directed to be deleted.

18. Now, coming to ITA No. 199/JP/19 for AY 2015-16, both the parties fairly submitted that the facts and circumstances of the case are exactly identical to facts and circumstances of the case in ITA No. 1494/JP/2018, therefore, 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 15/02/2021.

Sd/-	Sd/-
(संदीप गोसाई)	(विक्रम सिंह यादव)
(Sandeep Gosain)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 15/02/2021
*Ganesh Kr.

आदेश की प्रतिलिपि अग्रेशित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- Modern Threads India Limited, Jaipur
2. प्रत्यर्थी/ The Respondent- ACIT, Circle-06, Jaipur
   DCIT, Circle-06, 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 Nos. 198 & 199/JP/2019}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar