IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'A' Bench, Hyderabad

Before Shri R.K. Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member

ITA No.433/Hyd/2022		
Assessment Year: 2017-18		
Asst. Commissioner of Income Tax, Central Circle – 2(1), Hyderabad.	Vs.	M/s. Trident Chemphar Ltd. Hyderabad. PAN : AAEFT8416H.
(Appellant)		(Respondent)
Assessee by:	Shri B.G. Reddy	
Revenue by:	Shri Rajendra Kumar – CIT-DR	
Date of hearing:	09.01.2023	
Date of pronouncement:	09.01.2023	

O R D E R

PER LALIET KUMAR, J.M.

The appeal of the Revenue for A.Y. 2017-18 arises from the order of Commissioner of Income Tax (Appeals) – 12, Hyderabad dt.10.06.2022 invoking proceedings under section 143(3) of the Income Tax Act, 1961 (in short, "the Act").

2. The grounds raised by the Revenue read as under :

"1. The Ld. CIT(Appeals) erred both in law and on facts of the case in granting relief to the assessee.

2 On the facts and in the circumstances of the case. and in law. the Ld. CIT(Appeals) erred in deleting the addition of Rs.45,43.61,857/- made towards disallowance of commission paid to foreign agents when assessee failed to produce any evidence during assessment proceedings establishing that the services were actually rendered by the foreign agents.

3. On the facts and in the circumstances of the case, and in law, the Ld. CIT(Appeals) erred in deleting the disallowance of commission made u/s. 40(a)(i) of the Act even though the assessee failed to deduct tax u/s. 195 of the Act from the commission payment.

5. On the facts and in the circumstances of the case, and in law, the Id. CIT(Appeals) erred in not following the due procedure prescribed under Rule 46A and also erred in not calling for remand report from the AO on the additional evidence filed during the course of appellant proceedings.

6. On the facts and in the circumstances of the case, and in law, the Ld. CIT(Appeals) erred in not providing opportunity to the AO when fresh and additional information were submitted before the Id. CIT(Appeals).

7. On the facts and in the circumstances of the case, and in law, the Id. CIT(Appeals) ought to have appreciated that Mr. Bhupesh of M/s. Nayship Marine Services, Visakhapatnam through whom the foreign agents rendered services constituted "Permanent Establishment" within the meaning of clause 2(i) of Article 5 of "Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion" between India and UAE.

8. On the facts and in the circumstances of the case, and in law, the Ld. CIT(Appeals) erred in holding that the provisions of Section 195 are not applicable to the commission payments made to foreign agents, when the services were provided through the PE, Mr. Bhupesh of M/s. Nayship Marine Services and are taxable in India by virtue of Article 7 of "Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion" between India and UAE."

3. Facts of the case, in brief, are that assessee company is engaged in sourcing assistance, buying and selling, import and export of pharmaceutical raw materials, solvents, API, bulk drugs etc. The assessee filed the original return of income for the A.Y.2017-18 on 29-11-2017 admitting income of Rs. 17,12,78,580/-. A search and seizure operation u/s. 132 was conducted in the case of M/s.Divis Laboratories Limited and others on 14-02-2019, including the assessee. As part of the search operations, the case of the assessee was covered u/s.132 of the Act. Subsequently, the case of the assessee was notified to Central Circle-2(1), Hyderabad and a notice under section 153A of the Act dated 04-11-2019 was issued to the assessee. In response to the notice, the assessee filed the return of income on 0312-2019 admitting total income of Rs.17,12,78,580/-. Notice u/s.143(2) dated 28-09-2020 was issued to the assessee. Subsequently, notices were issued u/s.142(1) calling for information. In response to the notice u/s.143(2) and subsequent statutory notices, the assessee uploaded the information on various dates. After verifying the details filed and material available on recorded, the Assessing Officer had completed the assessment and passed order on 28.09.2021 u/s 143(3) r.w.s. 153A r.w.s. 92CA(4) of the Act, interalia making addition of Rs.6,58,462/- towards excess depreciation and Rs.45,43,61,857/- towards commission payment.

4. Feeling aggrieved with the order of Assessing Officer, assessee carried the matter before ld.CIT(A), who allowed the appeal of assessee. The relevant observation of Ld.CIT(A) are mentioned in Para 5.42, 5.43, 5.44 and also in 5.45 to the following effect.

> *"5.4.2 I have considered the submissions of the AO and AR. It is not in dispute that the appellant company has entered into an agreement for purchase of coal with PT Kideco Jaya Agung, an Indonesian company for import of coal to be supplied to Indian companies. During the year, the appellant has imported and supplied coal worth Rs. 372 crores (out of a turnover of Rs. 678 crores) to M/s.Coastal Energen Pvt. Ltd and M/s.My Home Power Ltd. In this business of coal trading, appellant has entered into commission agreement with three Dubai based entities, viz., M/s. Smitheco Trading Ltd., M/s. Resource Chain LLC and M/s. Ultimate Resource General Trading LLC. On perusal of the commission agreement it is seen that the commission agents are entitled for USD 7.20 per MT on successful shipment of coal from Indonesia. The services that the commission agent is required to render as per the agreement are as follows :*
>
> *(I) Identification of coal mines and suppliers in Indonesia and finalization of terms and conditions with the miner for supply of coal to the suppliers identified by the appellant company from time to time.*
>
> *(ii) Facilitation of negotiations, execution and finalization of supplier agreement between the supplier and the company.*
>
> *(i) Assistance in the process of shipment of coal which includes engagement of shippers, finalization of laycon and other stevedoring activities.*
>
> *(ii) Obtaining quality certificates for shipment.*
>
> *(iii) Assistance in identification and appointment of independent quality analyst.*
>
> *(iv) Any other related services in connection with import of coal by the Company.*
>
> *It is also mentioned in para 3.1 of the commission agreement that only after the successful shipment and receipt of full purchase price from the*

customer to the appellant company, commission would be paid to the agent. To put it differently, commission payment is linked to the realision of full purchase price of coal from the domestic customer and is based on the metric tonnes of coal that were imported. The AR has filed the copies of agreements, ledger account copies, copies of invoices raised by the agents, payment advices, bank payment advices and other regulatory compliance documents to substantiate appellant's claim of genuine commission payments. It is seen from the debit advice of the commission agents that the bills were raised based on the metric tonnes of coal that were successfully shipped. Also the payments were made through regular banking channels and Form 15CA & Form 15CB were filed. There is merit in the argument of the AR that the appellant being an importer and trader in coal requires specialized services for procurement of coal such as shipping, quality control, cargo loading witnessing, stock pile quality and jetty operations at load port, delivery at discharge port, finalization of laycan and other stevedoring activities. The commission agents are required to provide these services. Besides, the commission payments are paid only after successful shipment and on realization of sale price from domestic customers. There is no dispute that appellant has imported coal worth Rs. 372 crores and sold it in the domestic market during the year. From this discussion, it is clear that commission agents have rendered their services as per the agreement to facilitate the import of coal.

5.4.3 As regards the admission of income by the director of the company, it is settled law that admission is an important piece of evidence but the same is not conclusive as held by the Supreme Court in Pullagonde Rubber Produce Company Limited vs State of Kerala (1973) (91 ITR 18) (SC). However, the burden to prove that the statement was not correct is on the assessee. In CIT vs Shri Ramdas Motor Transport (1990) [102 taxmann 300 (AP)] the Hon'ble High Court of Andhra Pradesh held that retraction of initial admission at the time of filing of return after due verification of books and details was acceptable. In other words, admission u/s.132(4) has evidentiary value and casts a presumption on the assessee unless rebutted with evidence. In the present case, AR has filed evidences in support of the transaction to prove that it was genuine commercial transaction. The AR also pointed out that both the director & executive have stated in their statement that the transaction in question is genuine and the services were received. The only bone of contention was the non 'availability of material evidence to show that services were rendered. As held above, the appellant has furnished necessary documentary evidences and ledger accounts to support its argument that services were rendered

and payments were made. Therefore, the statement per-se cannot alone be relied upon disregarding the other compelling evidences.

5.4.4 With regard to non deduction of TDS u/s.195 and consequential disallowance u/s.40(a)(i) of the Act, it is seen that Section 195 comes into play only when payment of any sum chargeable under the Income Tax Act is made to a non¬resident. In such case, TDS needs to be deducted at the time of payment of the sum to the non-resident. For ready reference Section 195 is reproduced below:

"195(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC)91[or section 194LD] or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

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

Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-0.

Explanation 1.—For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation 2.—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

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

(ii) any other presence in any manner whatsoever in India". (emphasis added)

The operative portion of Section 195 is "any other sum chargeable under the provisions of this Act". In other words, if the sum is not chargeable to tax in India then there is no need for deducting TDS u/s. 195 of the Act. Under Section 5 of the Act, non-residents are taxable in India only on incomes which are received/deemed to be received or accrued/deemed to be accrued in India. The residency and incorporation certificates of all the three entities stating that they are incorporated in Dubai are on record. The commission agents are non-residents incorporated in Dubai and have performed their services outside India. Commission income was also received by them in their bank account outside India. Except for the commission, foreign entities did not have any interest in profits earned by the company or the management of the appellant company. It is an arms length business transaction with third parties incorporated abroad. AO has not brought anything on record to suggest otherwise. Therefore, it cannot be said that the commission amounts were accrued in India let alone being received in India. The commission agents do not have a fixed place of business or permanent establishment in India. Section 9(1) of the Act provides that income arising whether directly or indirectly, through or from any business connection in India or income by way of fees for technical services shall be deemed to accrue or arise in India and thus chargeable to tax in India. There is no business connection between the foreign entities and the operations carried out by the company in India. The commission agents have rendered their services outside India and their commissions are not dependent on the profits earned by the appellant company. The nature of services rendered by the foreign agents as per their agreement (listed at para 5.4.4 above) show that they essentially provide administration and coordination services that are needed for import of coal. They are not rendering any technical services while performing their duties. They obtain quality certificate for shipments from accredited agencies. There is no specialized technical service provided by the agents as per the agreement. The AO has also not brought anything on record to say that the foreign agents have been paid fees for technical services.

5.4.5 The ITAT, Delhi in the Digi Drives (P) Ltd vs ACIT (2021) (186 ITD 459) held that mere rendering of service of procurement of export orders by a non-resident company for Indian Company does not fall in the category for 'Fees for Technical Services' as defined in Explanation 2 to Section 9(1)(vii) of the Act. The jurisdictional ITAT, Hyderabad in M/s.Vimta Labs Ltd, Hyderabad vs DCIT, Circle-7(2), Hyderabad (ITA Nos.11, 12 & 1273/2017) dated 24/04/2019 has discussed this issue elaborately and held that the business receipts of foreign residents are not taxable in India since the agents have no PE in India and therefore are not required to deduct TDS

u/s.195 of the Act. The relevant extract of the decision is reproduced below:

On merits of the issue also, we find that the foreign agents have rendered the services outside India and have also received the payments outside India. The contention of the assessee that they are the business receipts of the foreign residents and the foreign agent do not have any PE in India and hence the income is not taxable in India has not been controverted by the AO. The AO has not disputed the contention of the assessee that the payments made by the assessee are the business receipts of the foreign agents. The only reason for the disallowance was that the income has accrued or arisen to the foreign agent in India and for coming to this conclusion the AO had relied upon the direction of AAR in the case of SKF Boilers & Driers Ltd. The Id Counsel for the assessee had placed reliance upon the decision of the Coordinate Bench of the Tribunal in the case of M/s. Anand Technologies Ltd in ITA No. 1246/Hyd/2017 dated 20.07.2018 wherein the Tribunal has considered similar circumstances and also the above decision of the AAR and after considering the decisions of the jurisdictional High Court and also the Hon'ble Supreme Court, at Para 7 of its order, has held as under:

"7. We have considered the rival contentions and perused the documents placed on record along with the case law relied upon. There is no dispute that assessee has entered into an agreement for following up with the customers in USA and has agreed to pay commission to the non-resident agent for the services rendered there only. There is no dispute that the said company has not rendered any services in India. It is also not disputed that the said company has no permanent establishment in India. The only issue raised by AO is that since the commission has been paid from the bank account in India and has been accounted in the books of account of assessee that has to be considered as deemed to arise or accrue in India. Similar issue has been considered by the Co-ordinate Bench in the case of CIT Vs. Sri Aurobindo Impex Company, (supra), the Hon'ble Jurisdictional High Court has rendered the judgment following the principles laid down by the Hon'ble AP High Court in the case of Sri Ram Refrigeration Industries Vs. ITO [361 ITR 119] (AP). Further, the Hon'ble the High Court also held that following the principles laid down by the Hon'ble Supreme Court in the case of CIT Vs.Toshoku Ltd., [125 ITR 525] (SC) that making up of the entries in the books of account of assessee cannot be taken into be receipt actual or constructive by the non-resident sales agents. In view of that, prima-facie, the amounts paid from India does not establish that income has accrued or arisen in India as the services are not rendered in India at all and assessee has no business connection. This issue was considered by

the Co¬ordinate Bench in the case of DCIT Vs. Divi's Laboratories Ltd.. [131 ITD 271], wherein it was held as under:

"The main thrust in such a situation is whether the commission made to overseas agents, who are non-resident entities, and who render services only at such particular place, is assessable to tax. Sec. 195 very clearly speaks that unless the income is liable to be taxed in India, there is no obligation to deduct tax. Now, in order to determine whether the income could be deemed to be accrued or arisen In India, s. 9 is the basis. This section does not provide scope for taxing such payment because the basic criteria provided in the section is about genesis or accruing or arising in India, by virtue of connection with the property in India, control and management vested in India, which are not satisfied in the present cases. Under these circumstances, withdrawal of earlier circulars issued by the CBDT has no assistance to the Department, in any way, in disallowing such expenditure. It appears that an overseas agent of an Indian exporter operates in his own country and no part of his income arises in India and his commission is usually remitted directly to him by way of TT or posting of cheques/demand drafts in India and therefore the same is not received by him or on his behalf in India and such an overseas agent is not liable to income-tax in India on these commission payments. It is pertinent to note that 195 has to be read along with the charging ss. 4, 5 and 9. One should not read s. 195 to mean that the moment there is a remittance, the obligation to TDS automatically arises. If the contention of the Department is to be taken as correct, that any person making payment to a non-resident is necessarily required to deduct tax, then the consequence would be that the Department would be entitled to appropriate the monies deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the IT Act by which a payer can obtain refund. As per s. 237 r/w s. 199 only the recipient of the sum i. e., payee would seek a refund. In view of the above, hence, no tax is deductible under s. 195 on commission payments and consequently the expenditure on export commission payable to non-resident for services rendered outside India becomes allowable expenditure and the same is outside rigours of the s.40a(ia). The requirement of services of the non- resident being rendered in India and being utilized in India is still valid, despite withdrawal of earlier circulars issued on this subject by CBDT.-CIT vs. Toshoku Ltd. (1980) 19 CTR (SC) 192 • (1980) 125 1TR 525 (SC) and GE India Technology Centre (P) Ltd, vs. CIT & Anr. (2010) 234 CTR (SC) 153 : (2010) 44 DTR (SC) 201 : (2010) 3271TR 456 (SC) relied on".

7.1 Similarly in the case of Euroflex Transmissions (India) Pvt. Ltd., Vs. ACIT in 1TA No. 1773/Hyd/2014, dt. 01- 04-2015, on similar issue the Co-ordinate Bench has held as under:

"7. We have considered the submissions of the parties and perused the orders of the revenue authorities as well as other materials on record. We have also carefully applied our mind to the decisions cited at the bar. On a perusal of the assessment order, it is very much evident that AO has not disputed the fact that commission payments were made to non-resident agents who nor only were carrying on their business activities outside India, bur, the commission payments were also related to services provided by those agents outside India. It is also not disputed that none of the commission agents have any permanent establishment or permanent business place in India. AO has also not disputed the f act that commission amounts were remitted to non- residents directly outside India. However, AO has held that assessee is liable to deduct tax u/s 195(1) on the reasoning that as per the decisions of the AAR, referred to by him, income is deemed to accrue or arise in India when right to receive it comes into existence. Ld. CIT(A) has confirmed the view expressed by AO without assigning any reason of his own. It is to be noted that in case of Rajeev Malhotra(supra), AAR has come to its conclusion by referring to the provisions contained u/s 6 and 9 of the IT Act. However, a careful reading of section 9 of the Act would make it clear that under Explanation 1(a) to section 9(1). it has been provided that in case of a business of which all the operations are not carried out in India, the income of such business only relating to such parr of the income as is reasonably attributable to the operations carried out in India shall be deemed to accrue or arise in India. In the present case, AO has not brought any material on record to establish that non-resident agents have carried out any part of their business in India.

8. Moreover, section 195(1) envisages that tax is to be deducted at source on income which is chargeable under the provisions of IT Act. The Hon'ble Supreme Court while interpreting the expression 'chargeable under the provisions of this Act' as employed u/s 195(1) of the Act has held in case of GE India Technology Centre P. Ltd. (supra) that the said expression would mean that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. However, if the payments made to non-residents are not chargeable to tax under the provisions of IT Act, then, the provisions of section 195 would not apply. The Hon'ble Supreme Court further observed that if the scope of section 195 is enlarged to that extent, then, it would result in a situation where, even though, the income will have no territorial nexus with India or is nor chargeable in India, the

Govt, would nonetheless collect taxes. In the present case, on a perusal of the assessment order or the order of Id. CIT(A), we do not find any conclusive finding given by the authorities concerned that the payments made to non¬residents are chargeable to tax under the IT Act. Applying the principles laid down by the Hon'ble Supreme Court as aforesaid, it is to be held that the provisions of section 195 would not be applicable to payments made by assessee to non-resident agents. This view is also supported by the following decisions:

1. CIT Vs. Model Exims Kanpur, [2013] 358ITR 72 (All.)

2. CIT Vs. Faizan Shoes Pvt. Ltd., [2014] 367 ITR 155 (Mad.)

9. Further, the coordinate bench while examining identical nature of dispute in case of Arobindo Pharma Ltd. (supra) held in the following manner:

25. As far as the amount paid as sales commission is concerned, this issue has already been decided by the Coordinate Bench in assessee's own case for the A.Y. 2002-2003 and 2004-2005 in ITA.No.415 & 999/Hyd/2007 by order dated 25.06.2010.the Coordinate Bench has held as under :

"2 We find that as per Circular 786 dated 17.2.2000, commission paid by the assessee company directly to non-resident agents for rendering services abroad are not liable for deduction of TDS under section 195 of the Act. Accordingly, the provisions of section 40(a)(ia) of the Act are not applicable. The case law relied on by the learned Departmental Representative in the case of Transmission Corporation of A.P. Limited reported in 239 ITR 587 (SC) and the decision of this Tribunal in the case of Cheminor Drugs vs. ITO is not applicable to the facts of the case under consideration, as in this case, the assessee made the payment directly to the non-resident agents for rendering services abroad. In view of the above, we do not see any infirmity in the order of the CIT(A) on this issue and the same is upheld."

7.2 The ratio laid down by the Co-ordinate Benches squarely applies to the facts of the present case and respectfully following the principles laid down in the judicial proceedings referred to herein above, we therefore hold that the provisions of Section 195 would not be applicable to the commission payments made by assessee to non-resident agent who has not done any service in India and as such income is not chargeable to tax under the provisions of the Act as there is no requirement to do any TDS u/s. 195. the disallowance made u/s. 40(a)(i) of the Act is also not survive.

7.3 We are surprised to note that Ld.CIT(A) without understanding the international law has simply held that a foreign agent and the Indian company are sister concerns and accordingly the amounts are taxable. Even if one were to consider that other company is a sister concern of assessee. how the provisions of Section 195 or Section 5 and Section 9 are applicable has not been discussed by the Ld.CIT(A) at all.

Moreover, the provisions of DTAA between India and USA also gives the right to tax the amount in the hands of foreign assessee if the same is considered as business income when there is no permanent establishment in India. Since the non- resident has no permanent establishment in India, the question of taxing the amount does not arise as the provisions of DTAA which over rides the provisions of Income Tax Act. In view of that, the order of CIT(A) cannot be upheld. Similar view was also expressed by the Co-ordinate Bench in the case of Dy.CIT Vs. M/s. Linkwell Telesystems (P.) Ltd., wherein also commission was paid to non-residents for the services rendered abroad and was held not taxable. In view of that, we cannot uphold the orders of AO disallowing the amount u/s.40(a)(i). Grounds raised by assessee are allowed".

10. Respectfully following the same, we hold that the business receipts of the foreign residents are not taxable in India since the agents have no PE in India and therefore, the assessee was not required to make TDS u/s 195 of the Act. Therefore, the assessee's appeals for all the three AYs are ALLOWED".

In view of the above decision of the Hon'ble ITAT, Hyderabad, it is held that the commission payments made to foreign residents are not taxable in India since the foreign agents do not have PE in India and therefore the assessee was not required to deduct TDS u/s.195 of the Act. Therefore, the AO is directed to delete the addition on account of commission payments of Rs.45,43,61,857/-. The grounds of appeal related to this issue are ALLOWED."

5. Feeling aggrieved with the order of ld.CIT(A), Revenue is now in appeal before us.

6. Before us, ld. DR had drawn our attention to the order passed by the Assessing Officer wherein the Assessing Officer in Para 5.3 to 5.5, has held as under :

"5.3 During the course of assessment proceedings, the assessee was asked to explain about applicability of withholding tax provisions on these payments. In this regard, it is stated that the recipients of commission payments are all non¬resident entities for the purpose of Indian Income Tax Act. As per the provisions of Sec.195, any person responsible for paying to a non-resident, not being a company, or to a foreign company any other sum chargeable under the provisions of this Act shall, at the time of credit of such income to the account of the payee or at the time of payment thereof, whichever is earlier, deduct income tax thereon at the rates in force. Under Section 5 of the Income Tax Act, Non-residents are taxable in India only on incomes which are received or deemed to be received; accrues or arises or deemed to accrue or arises in India.

5.4 The contention of the assessee that the services rendered by the Dubai based entities to the assessee company not accrued in India and hence not required to deduct TDS, is not acceptable. Since the payments claimed to be made to these companies are made for the services rendered to the assessee company for its business in India, the same construed to be received or deemed to be received; accrued or arose or deemed to accrued or arose in India only. Furthermore, as per the provisions of Section 195, the assessee was required to deduct TDS on these payments. However, the assessee company failed to deduct TDS. On this ground, the payments made to foreign entities are to be disallowed as per the provisions of section 40(a)(i) of the I.T.Act, 1961.

5.5 In view of the above, in respect of payments made to these Non-Resident entities, as discussed above, in the absence of any documentary evidence for the services rendered and also for non-deduction of tax, the entire amount of Rs.45,43,61,857/- is disallowed and added to the income returned. Penalty proceedings u/s.270A of the I.T.Act are initiated separately for under-reporting of income."

7. Ld. D.R. had submitted that the Ld.CIT(A) had decided the issue without categorically dealing with the finding of Assessing Officer. He submitted that the Ld.CIT(A) in the order reproduced hereinabove has mentioned that various documents / invoices, bills were filed by the assessee during the appellate proceedings, which were considered by ld.CIT(A) while allowing the appeal of the assessee. ld. DR submitted that , the above said conduct of the Ld.CIT(A) was in violation of Rule 46A of the Income Tax Act, Rules 1963 .It was further submitted that the Ld.CIT(A) has not made any factual verification of the affairs of the assessee as required by law before granting the relief to the assessee for establishing that any services under the commission agreement were actually rendered by the said third parties namely, M/s. Smitheco LLC (STL), M/s. Resource Chain LLC (RCL) and M/s. Ultimate Resource General Trading LLC (URGTL) for which the huge commission of Rs.45,43,61,857/- was paid by the assessee, outside India. Further, the Ld. D.R. had submitted that in the statement recorded before the Investigation Officer, the Director of the company had stated in response to question no.15 as under :

> ***"With respect to the services provided by the Dubai firms, they were monitored by a third-party consultant, Shri Bupesh of M/s. Navship Marine Services with whom we had regular verbal interaction. However, there was no contact with the Dubai firms."***

8. It was the contention of the Ld. D.R. that neither the assessee was able to prove that any services under the agreement which are rendered outside India , which were relatable to the

business of the assessee nor the Ld.CIT(A) had given any reasoning to discard the admission of the assessee made during the search. On the basis of admissions of the assessee during the assessment, the Assessing Officer had concluded that the said third parties were PE of M/s. Smitheco LLC (STL), M/s. Resource Chain LLC (RCL) and M/s. Ultimate Resource General Trading LLC (URGTL) in India. It was the contention of the Ld. D.R. that more than 10% of the value of coal imported to the tune for Rs.45 crore approximately were paid to these three parties as commission by the assessee without bringing any record as to what kind of services were provided and such services were necessary for the business of the assessee . Further the ld.CIT(A) had not examine the record with respect to the prices charged by the assessee for the coal supplied by it from the buyers. Lastly, it was stated that the order passed by the Ld.CIT(A) was cryptic, non-speaking and perfunctory order and therefore, the same is required to be dismissed.

9. Per contra, the learned Authorised Representative for the assessee filed detailed submissions to the following effect :

> *"8.1 The first grievance of the Revenue is that Ld. CIT(Appeals) erred in not following the due procedure prescribed under Rule 46A and also erred in not calling for remand report from the AO on the additional evidence filed in the course of appellate proceedings. This grievance of the Revenue is not well founded on the facts of the case. We submit that in the present case, no new evidence was filed in the course of appellate proceedings before CIT(A). Sample copies of Form 15CA (Information to be furnished for payment to a foreign company), Form 15CB (certificate of Chartered*

Accountant), Transaction Advice Notes of the Bank concerned (RBL) which were filed before CIT(A) to prove the genuineness of the commission expenditure and payments are part of seized documents (Annexure: A/TCL/OFF/03, Pages 91 to 94), (A/TCL/OFF/03, Pages 98 to 101), which are very much available with the Assessing Officer. In fact, Assessee obtained copies of these documents, being seized documents from the Department only after seizure u/s 132 of the Act. Similarly, ledger accounts filed before CIT(A) are compiled from the audited financial statements for the subject year, which are incorporated in the return of income filed. In such circumstances, it is not correct to say that new evidences were filed for the first time before CIT(A) and the same were admitted by CIT(A) without following the due procedure prescribed under Rule 46A of IT Rules.

8.2 The next ground of the Revenue that the assessee failed to produce any evidence during assessment proceedings establishing that the services were actually rendered by the foreign agents to the assessee company. This ground of the Revenue is also lacking in merit. During the relevant year, the Assessee company has got a business opportunity for supply of coal in Indian market and to meet the requirement of local buyers, the Assessee had to import of coal from Indonesia. There were various issues and complexities involved in import of coal and the Assessee, being new entrant in this line of business, has to necessarily depend upon the third-party agencies, who can render the services besides other liaison work with overseas suppliers. The coal agreements, a sample of which is included in paper book compilation of the Assessee (APB pages 18 to 41) clearly indicate that there are several terms including shipping terms to be observed by the buyer and seller along with documentation for import of coal from overseas entities and therefore it is a business exigency to engage the commission agents for rendering specialized services by these entities as spelt out in the agreements.

8.2.1 As already submitted in Para 5.1 and 5.1.1. hereinabove and as mentioned in Para 5.4.3 of order of CIT(A), assessee has furnished necessary documentary evidence and ledger accounts to support the fact that services were rendered as indicated in the agreements and then payments were made to the agents. We therefore reiterate and submit that commission payments are based on prudent and genuine business considerations and the expenditure was incurred in the course of coal business of the assessee for the services rendered by the overseas parties and the same is allowable business expenditure. Considering the nature of services rendered abroad, it is practically difficult to maintain infallible evidence for the services rendered by the agents at every stage as required by the Assessing Officer and what is to be seen is commercial expediency

from the point of view of the assessee. We submit that the fact of the matter is that services were received by the Assessee and for which payments were made with due diligence through authorized channels and after duly complying with statutory requirements. As a result of such services, as mentioned above, Assessee imported coal of substantial value during the year. The coal business of the company requires deployment of huge funds for import of the material and the company was not in a financial position to make the payments soon after the services were rendered. Further, in the agreements also, it is clearly stated that the commission payments will be made after sale of coal in the domestic market and realization of the sale proceeds. Accordingly, Assessee has made certain payments out of the funds readily available on delivery of coal and balance payments were made after realization of sale proceeds from sale of coal in the local market.

8.3. The other contention of the Revenue is that Mr. Bhupesh of M/s. Nayship Marine Services, Visakhapatnam through whom the foreign agents are stated to have rendered services constituted "Permanent Establishment" within the meaning of clause2(i) of Article 5 of "Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion" between India and UAE and hence the commission payments are taxable in India by virtue of Article 7 of this Agreement. This argument of the Revenue is also not sustainable on the facts of the case and in law. First of all, there is no such observation or finding in the assessment order that Mr. Bhupesh of M/s. Nayship Marine Services constitutes PE of overseas entities as per Article 5 of India-UAE treaty. This is a new ground raised by the Revenue in the grounds of appeal for the first time in appeal before Hon'ble Bench. The new ground requires investigation and collection of fresh facts regarding the role of Mr. Bhupesh in the entire activity of rendering services by the foreign entities to the assessee and whether such services, if any, provided by Mr. Bhupesh to the assessee continue for the same project or connected project for a period or periods aggregating more than nine months within any twelve-month period as mandated in Article-5 of the Agreement between India and UAE. As the new ground does not arise from the facts available on record and it requires further inquiries and investigation, we urge the Hon'ble Bench not to entertain the ground of the Revenue at this stage.

8.3.1 Without prejudice to the above submission, if we have a look at the India-UAE Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion, clause 2(i) of Article-5 of the Agreement reads as under:

-2. The term "permanent establishment" includes especially:

i) the furnishing of services including consultancy services by an enterprise of a Contracting State through employees or other personnel in the other Contracting State. provided that such activities continue for the same project or connected project for a period or periods aggregating more than 9 months within any twelve-month period.-

8.3.2 Form the above extract, it is manifest that for application of said clause 2(i) of the Treaty, furnishing of services by Dubai based entities have to be through their employees or other personnel, for a period of nine months within any 12 months period. In the present case, except stating by the Revenue for the first time before the Hon'ble Bench that Mr Bhupesh is PE of overseas entities, no documentary evidence is brought on record by the Revenue to show that services were rendered by Dubai based entities through Bhupesh for a period of nine months within 12 months period. Further, nothing is brought on record by the Revenue to show that Mr. Bhupesh habitually exercises in India, an authority to conclude contracts on behalf of the Dubai based entities or habitually concludes contracts or habitually plays the principal role leading to conclusion of contracts by the non-residents or habitually secures orders in India, mainly or wholly for the non-resident entities. On the contrary, in the present case, it is amply demonstrated by the assessee with evidences such as Form 15CA, 15CB, Transaction Advice Notes of the Bank concerned that the overseas agents are situated abroad, dispensed services abroad for the assessee and the payments were made from India as foreign remittances and the said service providers do not have a fixed place of business or Permanent Establishment (PE) in India. Mr Bhupesh at best is only a consultant of the assessee for coordinating and facilitating the signing of the agreement with overseas entities and not for rendering any services either in India or abroad on behalf of overseas entities. In view of these facts, Article-5 of the Treaty has no application to the case of the present assessee and Mr. Bhupesh cannot be treated as PE of Dubai based Entities in India. In such circumstances, we submit that commission amounts are not chargeable to tax in India even under Article-7 of India-UAE Agreement and therefore the assessee was not required to deduct tax at source u/s 195 of the Act on the said commission payments. As a consequence, it is our humble submission that provisions of 40(a)(i) are not applicable to such payments."

10. It was also submitted by the learned Authorised Representative for the assessee that the assessee has provided all the documents / invoices to the Assessing Officer / Ld.CIT(A) and based on said documents only, the Ld.CIT(A) had decided the issue in favour of the assessee.

11. We have heard the rival submissions and perused the material on record. During the course of argument we had raised the following queries to the ld.AR and ld.DR :

i. To point out the documents, if any, filed before the lower authorities which shows the rendition of services made by the alleged three parties namely, M/s. Smitheco LLC (STL), M/s. Resource Chain LLC (RCL) and M/s. Ultimate Resource General Trading LLC (URGTL) to the assessee and further such services were rendered outside India.

ii. Whether these three parties were instrumental or part of negotiation with the ultimate coal suppliers from Indonesia India or not.

iii. Whether any agreement / agreements were entered or not delineating the role of these three parties in such concluded agreements or not ?

iv. Whether the Ld.CIT(A) had examined the corresponding documents, e-mails prior to entering into any such agreement for the purpose of deciding the issue in favour of the assessee.

12. In spite of our specific queries mentioned herein above, both the parties failed to point out any such document / paper to the above said aspects. In fact, the learned Authorised Representative for the assessee had sought time to search and file such documents, if any, on record. However, it is clear from the record that no such documents were filled before the ld.CIT(A). In our considered opinion, the examination of these documents, which were fundamental is essential for returning any finding for the purpose of coming to the conclusion whether any services were rendered by the said commission agent to the assessee or not. In the absence of the examination of these documents as mentioned hereinabove along with other documents, it was not apt on the part of Ld.CIT(A) to decide the issue in favour of the assessee merely on the Form of 15CA and Form of 15CB.

13. In our opinion, the Ld.CIT(A) was duty bound to examine the transactions and come to the conclusion whether there exists a commission agreement which was necessary for the purpose of importing the coal from Indonesia or not. The Ld.CIT(A) was also required to examine all the agreements which were entered by the assessee with the coal suppliers to find out whether these three

companies namely, M/s. Smitheco LLC (STL), M/s. Resource Chain LLC (RCL) and M/s. Ultimate Resource General Trading LLC (URGTL) were part of negotiation process and were instrumental in securing the ultimate suppliers of the coal or not. But nothing has been done by the ld.CIT(A) and the Ld.CIT(A) in a cryptic and non-speaking order has allowed the appeal of the assessee. In our opinion, the order of Ld.CIT(A) is not only cryptic, non-speaking but suffers from the violation of Rule 46A of I.T. Rules 1963. It is the duty of the Ld.CIT(A) to call for a remand report from the Assessing Officer as and when any document is filed for the first time before him or relied upon by the assessee. Admittedly, before the Assessing Officer, the assessee had failed to file any supporting documents which show the rendition of services etc. Further, we are of the opinion that once the alleged commission agents were operating through their agents in India as admitted by the Director of the assessee in reply to question no.15, (supra) then the finding of the learned Assessing Officer that the assessee was required to withhold tax and deduct TDS in accordance with the provision of section 195 cannot be faulted with. Unfortunately the above said aspect had not been dealt by ld.CIT(A). Considering the matter from any angle, the order of Ld.CIT(A) cannot be sustained and therefore it is required to be quashed.

14. Since there is violation of principles of natural justice and violation of Rule 46A of I.T. Rules, 1963, we deem it appropriate to remand back the matter to the file of ld.CIT(A) with a direction to

decide the appeal afresh after affording due opportunity of hearing to the assessee and to the Assessing Officer. Needless to say that while doing so, the ld.CIT(A) shall keep in mind the statements recorded before the Investigation Officer during the course of search proceedings, recovery of documents, the admission of the assessee that the commission agency had its P.E. in India etc. Therefore, in the light of the above, the appeal of the Revenue is allowed for statistical purposes.

15. In the result, the appeal of the Revenue is allowed for statistical purposes.

Order pronounced in the Open Court at the time of hearing itself i.e., on 09.01.2023.

Sd/-	**Sd/-**
(RAMA KANTA PANDA) **ACCOUNTANT MEMBER**	**(LALIET KUMAR)** **JUDICIAL MEMBER**

Hyderabad, dated 9th January, 2023.
TYNM/SPS

Copy to:

S.No	Addresses
1	M/s. Trident Chemphar Limited, Sy.No.66 & 67, Tirumalagiri, Miyapur, Serilingampally, Hyderabad – 500004.
2	Asst. Commissioner of Income Tax, Central Circle – 2(1), Hyderabad.
3	Commissioner of Income Tax (Appeals) – 12, Hyderabad.
4	Pr.CIT, Central, Hyderabad.
5	DR, ITAT Hyderabad Benches
6	Guard File

By Order