IN THE INCOME TAX APPELLATE TRIBUNAL

(DELHI BENCH 'G' : NEW DELHI)

BEFORE SH. M. BALAGANESH, ACCOUNTANT MEMBER

AND

SH.ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 116 & 117/Del/2020, A.Y. 2014-15 & 2015-16

M/s. Sunbeam Lightweighting Solutions Pvt. Ltd. (Formerly : Sunbeam Auto pvt. Ltd.) 38/6 KM Stone, Delhi-Jaipur Highway, Narsingpur, Distt. Gurgaon PAN : AAFCN8583K	Vs.	ACIT, Circle-24(2), New Delhi-110002
Appellant		Respondent

Assessee by	Ms. Shashi Kapila, Adv., Sushil Kumar, Adv., R.R. Mourya, Adv.
Revenue by	Shri Anuj Garg, Sr. DR

Date of hearing:	09.10.2023
Date of Pronouncement:	11.10.2023

ORDER

Per Anubhav Sharma, JM :

These appeals are preferred by the Assessee against the order dated 27.11.2019 of Commissioner of Income Tax (Appeals)-8, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal no. 10147/16-17 & 10245/17-18, A.Y. 2014-15 & 2015-16 arising out of an appeal before it against the order dated 31.03.2016 & 28.12.2017

respectively passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the ACIT, New Delhi (hereinafter referred as the Ld. AO).

2. Facts in brief are that the assessee is engaged in the business of manufacturing of automotive die cast components, I.C. Engine parts and pistons for two wheelers and four wheelers since inception. During the relevant years the assessee had debited in P & L account certain amounts on account of foreign commission although the assessee has treated the aforesaid payments as foreign commission / export commission, however Ld. AO found that services rendered by these parties are not merely for the sale of products of the assessee company but for prospecting, marketing *&* providing comprehensive and integrated services. Thus, soliciting of business is only a part of it. As the aforesaid would fall within the purview of section 9(l)(vii). "fee for technical services which would be liable to be taxable in India as income deemed to have accrued/arisen in India. Accordingly Ld. AO had made the disallowance considering services to be a FTS and that assessee was liable to deduct tax u/s 195 which it has failed to do so therefore, disallowance u/s 40(a)(i) of the Act was made.

2.1 During A.Y. 2015-16, Ld. AO also made an addition of interest of section u/s 234A.

3. Ld. CIT(A) had sustained the additions for which the assessee is in appeal challenging the additions u/s 40(a)(i)(B) of the Act in both the AYs and the levy of interest u/s 234 A in A.Y. 2014-15.

4. Heard and perused the record.

5. Ld. AR relying the order in favour of the assessee in ITA no. 4378/Del/2016 order dated 06.04.2023 submitted that the issue of disallowance u/s 40(a)(i) of the Act is covered in favour of assessee.

5.1 Ld. DR however could not bring out anything contrary on facts.

6. It comes up that in para 10 to 17 the issue has been discussed in ITA no. 4378/Del/2016 and for convenience the same is reproduced below :

"10. Ground No. 3 relates to disallowance of Rs. 2,31,97,600/- under section 40(a)(i) of the Act. The Ld. AO discussed this issue in para 9 of his order. He found from the P & L Account that the assessee has debited the aforesaid sum as 'foreign commission'. On being asked the assessee submitted two agreements with two parties, namely M/s. Asian Manufacturing LLC and M/s. ETCSLLC both of USA which were valid till 31.03.2012. The Ld. AO noted the salient point of these two agreements and rejecting the explanation of the assessee held that the services provided by the said parties fall within the purview of Fees for Technical Services ("FTS") as per section 9(1)(vii) of the Act and Fees for Included Services ("FIS") as per Article 12(4) of India-USA Double Taxation Avoidance Agreement ("India-USA DTAA"). Further, Explanation to section 9(2) clarified that the above shall be deemed to accrue or arise in India irrespective of where the services have been rendered. Accordingly, the assessee was liable to deduct tax under section 195 which it has failed to do. As such the claim of expenses of Rs. 2,31,97,600/- is disallowed under section 40(a)(i) of the Act.

10.1 The assessee challenged the impugned disallowance of commission paid to the parties resident of USA for sale of its products by treating the payment of export commission as a payment for technical services and applying the provisions of section 195 thereto before the Ld. CIT(A). He discussed the issue in para 9 at pages 20-24 of his appellate order and confirmed the order of the Ld. AO by recording the following finding:-

"9.5 However, from examination of the agreement of the assessee with M/s. Asian LLC and with M/s. ETCS LLC it emerges that the two foreign parties were not merely providing services for soliciting of business but were also providing services of prospecting, marketing, promotion and development of business which would give enduring benefit to the assessee. The aforesaid is discernible from the following points of the agreement:

Salient point of agreement with M/s. Asian Manufacturing LLC

- *As per the agreement, Asian Manufacturing LLC (AM) has knowledge and understanding of the automotive component manufacturing industry and marketing for such industry in the United States and North America.*

- *As per para 1.6 of this agreement, AM agrees to use its best efforts to promote and market the products and solicit purchase orders from customers located in the territory for delivery of products in the Territory.*

- *Further as per para 3 - AM shall be responsible to do the following with respect to the customers listed*
  (a) Study the market for the Products in the Territory.
  (b) Appraise the potential of the market for the Product;
  (c) Procure RFQ's from the prospective customers; and
  (d) assist SBA in
  i) making presentations to the potential customers;
  ii) establishing pricing and other commercial negotiations for finalization of the order;

iii) providing sales and after sales service to the customer on behalf of SBA; and
iv) any other commercial or non commercial communication, negotiation or any such matter to be dealt with the customer.

- *As per para 10- Confidentiality and Secrecy*

AM and Solanki acknowledge and agree that all tangible and intangible information including all documents, data, papaers, statements, business/customer information, trade secrets and processes of SBA relating to its business provided to, obtained by or developed by AM for purposes of or pursuant to the performance of services under this Agreement or otherwise constitutes confidential and proprietary information of SBA ("Confidential Information") AM and Solanki shall maintain due confidentiality at all times and shall not disclose any confidential Information to any person or entity or earlier discharge or termination thereof except that AM may disclose such information as it is required to disclose by law or judicial process or as may be required for enforcement of this agreement.

9.6 Thus from the above points its amply clear that the agent M/s. Asian Manufacturing LLC (AM) has specialized knowledge and understanding of automotive component, manufacturing industries and marketing of these products in USA and North America. It has to study the market for the product in the territory and appraise the potential for the product market. It has also to assist the assessee in; (a) making presentation to the potential customer (b) Establish pricing and other commercial negotiations; (c) In other commercial or' non-commercial communications with the customers /assessee.

The above shows that the services of 'business development and marketing are' being offered by M/s. AM to M/s. Sunbeam Auto Pvt. Ltd. and as per the agreement there are comprehensive and integrated services. These services provide for creations of tangible and intangible information and also for enduring benefits to assessee's business. Thus soliciting of business orders is only a small part of it.

As per section 9(1)(vii) 'Fee for Technical Services' (FTS) means any consideration received for rendering of any technical, managerial or consultancy services. As per the agreement, it is an undisputed fact that M/s. AM is providing to M/s. Sunbeam Auto Pvt. Ltd. business consultancy services and for which consideration is received by it from M/s. Sunbeam Auto Pvt. Ltd.

3. As per Article 12(4) of the India USA DTAA, the term FIS (Fee for Included Services) means payments of any kind to any person in consideration for the rendering of any technical or consultancy services. It is apparent that M/s. Asian Manufacturing LLC (AM) is providing the assessee comprehensive consultancy services related to business development and marketing and not merely soliciting of sales orders. The only objection of the assessee is, therefore, that the technical or consultancy service provided by M/s. Asian Manufacturing LLC (AM) does

not satisfy the "Make Available" Clause of Article 12(4) of the DTAA between India and USA.

It may be seen that as per the agreement M/s. AM is assisting and advising on commercial sales and contract development as well as in preparation of business proposals and bid documents to be submitted to the customers. Therefore, it is but natural that while receiving the above stated well paid for business services, the recipient of such service which is the assessee is automatically put on a learning curve. As can be seen that as per the agreement, M/s. AM is mandated to assist and advise on commercial sales and contract development, make presentations for key, preparation of business proposals and documents to be submitted to the customers. The imparting of such important business services by a business consultancy provider and its assimilation by the recipient of such services is bound to equip the recipient with such knowledge which may enable it to use on its own. Also, there is no bar in the agreement which prohibits the recipient (assessee) to use on its own such knowledge as it has acquired through its close business association with M/s. AM. Therefore, the importance of learning and absorbing for its own future use and benefit by the recipient cannot be over emphasized.

4. As regard the Make available' clause, it is further stated as under;-

Generally speaking, technology will be considered "made available" when the person acquiring the service is enabled to apply the technology. It has been shown in detail above that business development and marketing services are being provided by M/s. AM to the assessee in a coordinated fashion and M/s. AM is assisting and advising the assessee in an array of business related services in a way which encourages learning, absorption and assimilation of such services and therefore, enables the recipient for its own future use and benefit.

Therefore, it is beyond doubt that working in close association with M/s. AM, the assessee is bound to get work experience and domain knowledge. This in turn creates human resources intangibles.

Rendering of services involving advice, guidance, etc. would certainly lead to transfer of knowledge and expertise, which enables the recipient (i.e. the assessee) to utilize the knowledge so acquired in similar situations. This certainly is a situation in which knowledge is 'made available'.

In the present case it is the human skill and experience which is being provided and made available to the assessee in a coordinated way and through assisting and advising in the nomenclature of marketing consultancy. Therefore, it is very clear that the 'Make available' clause is satisfied.

5. Salient points of agreement with M/s ETCS

- *The agreements with M/s ETCS is designated as 'Professional Marketing Service Representative Agreement' which clearly show the wide nature of the services and not merely acting as a sales agent.*

- *The paragraph on 'appointment and acceptance' specifies that M/s ETCS agrees to sell and promote the sale of the products of the principle.*

- *The paragraph on agreement, describing the relationship of the party specifies the following.*

It is intended that the Marketing Representative shall be an impendent contractor and not exclusively devoted to the sales of Principal's product (s) or an agent or employment of this Principal. The Marketing Representative would not be representing any other company manufacturing Aluminum Die Casted Components to the company's listed in schedule a without taking the consent of the principal. Marketing Representative shall have no authority to act by or on behalf of the Principal nor shall the Marketing Representative be authorized to bind the Principal in any manner whatsoever. All knowledge and information that the Marketing Representative may acquire during the manufacturing and sales practices of the Principal, its operation and procedures shall be deemed to be proprietary and confidence to the Principle and Marketing Representative agrees to retain in confidence unless otherwise publicly available.

The aforesaid points clearly show that the ambit of agreement is wider than mere soliciting of business. The objective of the work assigned to M/s ETCS is that of providing the services of marketing as well as development of business of the assessee concerned in USA. The assessee is also liable to get enduring benefit for the technical knowledge and experience of M/s ETCS. The domain work of M/s ETCS would include not only securing order of the assessee but in its larger ambit it would have to identify markets, make introductory contacts, assist in preparation of presentations, targets clients etc. These all would require vast technical knowledge and experience of the product as well as the market. Further this would also entail transfer of technical information and knowledge between M./s ETCS and the assessee providing enduring benefits to the assessee.

6. It is vital to mention that in the case of Intertek Testing Services, in (2008) 307 ITR 418, the AAR held that the expression 'Technical Services' cannot be construed in a narrow sense. It has been observed that the terms 'technical' ought not to be confined in India only to technology relating to engineering, manufacturing or other applied sciences.

In this regard, it is important to cite an important ruling by the AAR dated 17.01.2012 in the case of M/s Shell India Markets Pvt. Ltd. (AAR No. 833 of 2009). In the said ruling, business support services were held to be of consultancy nature and tantamount to be taxed as FTS under the India-UK DTAA.

In its landmark order dated 09.12.2011 in the case of Perfetti Van Melle Holding BV (AAR No. 869 of 2011) the AAR, held that support services provided to the subsidiary by the group company are assessable as fee for technical services. This ruling has impacted the scope and interpretation of the 'Make available' clause. In the cited case, support service include technical, operational and management support.

7.Attention is also drawn to latest decision dated 29.11.2013 of the Cochin Bench of ITAT in the case of ITO Vs Device Driven India Pvt. Ltd. wherein it was held that commission agent for securing export orders constitutes technical service because such services require the agents vast technical knowledge and experience. In its ruling Hon'ble ITAT held that the work of the taxpayer does not end upon developing and installing the software at the client's site. It requires on-site monitoring, especially when the customized software is developed. Hence, it cannot be equated with the commodities, where the role of a commission agent normally ends after supply of goods and receipts of money.

In the present case, the commission agent has vast technical knowledge and experience. Further, he is also one of the directors of the taxpayer. He is able to secure orders only because of his vast technical knowledge and experience.

As per the clause of the agreement, the commission agent is responsible in securing orders and for that purpose he has to assist the taxpayer in all respects including identifying markets, making introductory contacts, arranging meeting with prospective clients, assisting in preparation of presentations for target clients.

The commission agent's duty does not end on securing the orders, but he has to monitor the status and progress of the project, meaning thereby, the commission agent is responsible for ensuring supply of the software and also for receiving the payments. All these activities could be carried on only by a person who has vast technical knowledge and experience. Accordingly, the payment made to a commission agent constitutes towards technical services."

10.2 Aggrieved the assessee is in appeal before the Tribunal.

11. At the very outset, it is submitted by the Ld. AR that the assessee has been paying commission to these two agents under the same agreement since AY 2004-05 which has been allowed in assessments framed under section 143(3) of the Act for AY 2005-06 to AY 2010-11. No new facts or law has been brought out by the Ld. AO/CIT(A) in AY 2011-12 under consideration. They have merely taken a different stand on the same facts which violates the principle of rule of consistency as held by the Hon'ble Supreme Court in Excel Industries 358 ITR 295 (SC).

11.1 On merits, the Ld. AR submitted that commission to foreign sales agents is paid for procuring successful orders only after the agreed price is released by the foreign purchaser. The agent carries out market study etc. for boosting his commission income. The agents act at the dictates of the assessee. They were not

authorized to make any binding representation without written authorization duly signed by the assessee. The foreign agents rendered such services which are typical of any commission agency business. Such services are not 'technical services' and therefore, tax at source need not be deducted as held by the Hon'ble Delhi High Court in DIT vs. Panalfa Autoelektrik Ltd. (2014) 49 taxmann. Com 412 (Del).

11.2 As to the reliance by the Ld. AO on the decision of Cochin Bench of ITAT in ITO vs. Device Driven India Pvt. Ltd. in ITA No. 282/2013 dated 29.11.2013, the Ld. AR pointed out that appeal of the assessee against the order (supra) of the ITAT has since been decided by the Hon'ble Kerala High Court in ITA No. 257 of 2014 dated 13.10.2020 in favour of the assessee.

11.3 The Ld. AR submitted that the assessee had no Permanent Establishment ("PE") in USA. Both the parties to whom the assessee paid commission are tax residents of USA and had no business connection in India nor they have any PE in India. None of the agents is related to any of the Director of the company directly or indirectly.

11.4 Regarding taxability under the India-USA DTAA, the Ld. AR submitted that it is settled law that if the provisions of DTAA are more beneficial, the assessee can invoke it in preference to the Act. He then referred to Article 12(4) of the India-US DTAA and relied upon the decision of Mumbai Bench of the Tribunal in Mckinsay and Co. Vs. ADIT 284 ITR (AT) 227.

11.5 The Ld. AR further submitted that the Hon'ble Delhi High Court has also considered the scope of the expression 'make available' in Article 13(4)(c) of the DTAA with UK in DIT v. Guy Carpenter & Co. Ltd. (2012) 346 ITR 504 (Delhi). The Ld. AR also placed reliance on the decision of Hon'ble Madras High Court in CIT vs. Orient Express (2015) 56 Taxmann. Com 331(Mad) and DCIT vs. McFills Enterprise (P) Ltd. (2019) 101 taxmann.Com 212 (Ahmedabad-Trib)

11.6 According to the Ld. AR services rendered outside India are not taxable under the India-USA DTAA. He pointed out that there is no dispute that the non-resident sales agents rendered service outside India. He submitted that in Ishikawajma-Harima Heavy Industries Ltd. vs. DIT (2007) 288 ITR 408 (SC), the Hon'ble Supreme Court held that whatever was payable by a resident to a non-resident by way of technical fees would not always come within the purview of section 9(1)(vii). It must have sufficient territorial nexus with India so as to furnish a basis for imposition of tax as envisaged in Article 12 of DTAA with Japan. In order to overcome the judgment (supra) an explanation below section 9(2) was introduced by the Finance Act, 2010 retrospectively. Referring to the decision of Hon'ble Delhi High Court in DIT vs. Nokia Networks OY (2013) 358 ITR 259 (Del), the Ld. AR submitted that the amendment cannot be read into the DTAA. He also referred to the decision of Mumbai Bench of the Tribunal in IHI Corporation vs. Addl. DIT (Int. taxation) (2013) 32 taxmann.Com 132 (Mumbai Trib.) wherein the Tribunal held that in view of the amendment to the relevant provisions by means of the substitution of Explanation to section 9(2) governing the year made under consideration also, the income from offshore services rendered outside India would fall within the domain of section 9(1)(vii) of the Act. The Tribunal also observed that in assessee's own case for earlier years income on account of offshore services is not chargeable to tax as per Article 7 of the DTAA. The Tribunal held that the

crux of the matter is that the provision of the Act or of the DTAA whichever is more beneficial shall apply and therefore, the income from offshore services though chargeable under section 9(1)(vii) but exempt under the DTAA cannot be charged to tax in the light of section 90(2) of the Act.

11.7 The Ld. AR concluded that since the sales agents rendered services outside India and that they had no 'business connection' or PE and that they are tax residents of USA, the payments made and remitted directly to them in foreign exchange are not taxable under the provisions of India-USA DTAA. Therefore, there was no requirement of deduction of tax on such remittances under section 195 of the Act. Hence, the disallowance made by the Ld. AO under section 40(a)(i) of the Act is not tenable in law.

11.8 The Ld. DR on the other hand supported the orders of the Ld. AO/CIT(A).

12. We have carefully considered the rival submissions and perused the material on record. The undisputed facts are that in AY 2011-12 the assessee paid commission aggregating to Rs. 23197600/- to ETCS LLC USA and Asian Manufacturing LLC USA both non-resident agents. The assessee submitted before the Ld. AO/CIT(A) that similar commission was paid since AY 2004-05 and has been allowed in assessments made under section 143(3) of the Act in all the preceding AYs. The modus operandi was also explained. The assessee receives the orders from parties through agents electronically and the goods are dispatched directly to the party with a copy invoice to agents. The role of the agent is for procuring orders/RFQ and getting the payment released from party. When the goods are exported and the payments are released by the party, the agents raise invoice in respect of commission giving complete details of sale invoice, the amount received and its commission.

12.1 It was also submitted before the Ld. AO/CIT(A) that no information in the nature of technical, management or consultancy services had been provided by any of the agent. The assessee had no PE in USA. Both the agents are tax residents of USA and had no business connection in India nor they have any PE in India. None of the agents is related to any of the Director of the company directly or indirectly. All the payments have been made in US$ through proper banking channels.

12.2 We have perused the agreement dated 31.08.2004 between the assessee (SBA) and Asian Manufacturing LLC USA (AM) at page 152-162 of Paper Book as also the agreement dated 01.06.2004 between the assessee (Principals) and FTCS LLC (Marketing Representative) at pages 163-166 of Paper Book. The relevant portion of the agreement between SBA and AM is extracted below:

"1. Appointment

1.1 SBA hereby appoints AM, and AM hereby accepts such appointment, as SBA's non-exclusive sales representative for the sale of Products to customers located in the Territory. However, AM will set as SBA's exclusive agent with respect to the customers set forth in Annexure "C".

2. Products and Territory

1.2 The product covered by this agreement consist of the products manufactured or outsourced as outlined in Annexure-A and modified from time to time as agreed mutually by parties (the "Product(s)").

1.3 SBA shall have the sole right to determine its Product prices and terms of sale. All orders are subject to acceptance by SBA.

1.4 The appointment is for the region of North America (the ''Territory").

1.5 AM shall communicate to SBA in the first instance any business relationship for a potential sale of the Products it wants to establish/follow/open with any prospective customer ("Lead"). Upon receiving consent from SBA with respect to a Lead, AM shall start the process of establishing the same Lead. In case AM receives no response from SBA with a request for consent to develop a Lead, AM shall send a reminder after 2 weeks ("Reminder"). If AM does not receive any response from SBA within one week after the Reminder, AM can choose, by written notice to SBA, to add the prospective customer corresponding to the same Lead to Annexure C. If no RFQ is generated within 3 months of it's addition the customer will automatically fall off of Annexure C. If no business has matured after RFQ generation and there is no further RFQ for a period of 1 year the customer will automatically fall off Annexure C.

1.6 AM agrees to use its best efforts to promote and market the Products and solicit Purchase Orders from Customers located in the Territory for delivery of Products in the Territory. AM will conduct all of its business in its own name and pay all its own expenses, other than any travel outside of the USA, for which it will be compensated provided that it receives prior written approval from SBA for reasonable travel and related expenses.

1.7 AM shall have no authority to make any representations or warranties to any customer on behalf of SBA or to enter into any agreement of any kind on behalf of SBA.

2. ***Independent Contractor Status***

2.1 SBA shall exercise no control over the activities and operations of AM, each being recognized hereunder as an independent contractor and free agent.

2.2 As AM is an independent contractor, it is not liable in any form or relations to any claim the customer may have towards SBA, including claims that may result from non-performance of timely delivery and quality problems.

3.0 AM shall be responsible to do the following with respect to the customers listed in Annexure C:

a) study the market for the Products in the Territory;
b) appraise the potential of the market for the Product,
c) procure RFQ's from the prospective customers; and
d) assist SBA in:
i) making presentations to the potential customers;
ii) establishing pricing and other commercial negotiations for finalization of the orders:

iii) providing sales and after sales service to the customer on behalf of SBA; and
iv) any other commercial or non commercial negotiation or any such matter to be dealt with the customers

*4. **Commission***

4.1 AM shall be paid a commission of two percent (2%) on the orders which have been procured through AM's efforts for the Products in the Territory. In certain circumstances as listed in Annexure C, this rate may differ for specific customers^ or purchase orders as appropriate and mutually agreed upon.

4.2 SBA shall pay commission on the existing purchase orders of SBA as listed in Annexure B. Further, SBA may, at its option, pass to AM any purchase orders for which commission of 1% shall be payable by SBA to AM by mutual consent of AM, in which case such commission shall be payable to AM provided that AM agrees to and does, in fact, assist SBA in all facets of the business relationship with the customer, including the providing of those services as described in Section.3(d)(iii) and 3(d)(iv).

4.3 The Commission shall be paid to AM on the gross invoice price charged to customer. The invoice price used in this Agreement means purchase prices paid to SBA by the customer.

4.4 Commission shall be considered due within five days after receipt of payment from the customer. All payments due will be paid once a month.. SBA shall provide to AM Purchase Orders and Invoice/Payment receipt summaries that apply to all orders that are commissionable.

4.5 SBA shall pay to AM commission of 5% of the gross invoice price on all tooling. The invoice price used in this agreement means purchase prices received by SBA from the prospective buyers when it is charged to the customer.

4.5.1 Any increase in prices that is negotiated with customers over the SBA prices submitted to AM will be shared between AM and SBA on a 50/50 basis. This includes both Piece price and Tooling prices. Raw material price increases are excluded from this revenue share."

*10. **Confidentiality and Secrecy***

10.1 AM and Solanki acknowledge arid agree that all tangible and intangible information including all documents, data, papers, statements, business/customer information, trade secrets and processes of SBA relating to its business provided to, obtained by or developed by AM for purposes of or pursuant to the performance of services under this Agreement or otherwise constitutes confidential and proprietary information of SBA (''Confidential Information"). AM and Solanki shall maintain due confidentiality at all times and shall not disclose any Confidential Information to any person or entity or earlier discharge or termination thereof except that AM may disclose such information as it is required to disclose by law or judicial process or, as may be required for enforcement of this agreement. Similarly, SBA shall also observe the same level of prudence and care in exercising and

maintaining secrecy of the confidential information/trade secrets of AM. SBA also agrees to observe the same level of prudence and care in exercising and maintaining secrecy of the confidential information/trade secrets of AM. This clause shall survive the termination of this Agreement.

10.2 AM, Solanki and SBA shall each undertake all necessary action to protect the Confidential Information against misuse, loss, destruction, alteration or deletion from their respective premises. This clause shall survive the termination of this Agreement"

12.3 The relevant portion of agreement between SBA (Principals) and ETCS LLC (Marketing Representative) are hereunder:

"Appointment and Acceptance

Principals hereby appoint and authorize Marketing Representative the right to sell the principal's products to customers as outlined in Schedule A. Representative hereby agrees to sell and promote the sale of the Principal's products and accepts such appointment The principal may from time to time, include such other customer as it mutually decides with Marketing Representative and include it in Schedule A.

Compensation

A commission rate of five percent will be paid by tire Principle to the Representative on the sale of products, to the customers as appearing in Schedule A, excluding height, credits and returns.

Commission structure is outlined as follows.

Retainer Fee $ 2500/- 6 Months w.e.f. 01.06.04

Commission Fee 5.0% - Paid Monthly (based on sales)

(Retainer fee will accrue on signing the agreement but will not be payable to Manufacturer's Rep till first business is won for the Principle as a result of this relationship).

Relationship of Parties

It is intended that the Marketing Representative shall be an impendent contractor and not exclusively devoted to the sales of Principal's product (s) or an agent or employment of this Principal. The Marketing Representative would not be representing any other company manufacturing Aluminum Die Casted Components to the company's listed in schedule A without taking the consent of the principal. Marketing Representative shall 2iave no authority to act by or on behalf of the Principal nor shall the Marketing Representative be authorized to bind the Principal in any manner whatsoever. All knowledge and information that the Marketing Representative may acquire during the relationship between the Marketing Representative and the Principal concerning , manufacturing and sales practices of the Principal, its operation and procedures shall be deemed to be proprietary and confidence to the Principle and Marketing Representative agrees to retain in confidence unless otherwise publicly available."

12.4 Quoting para 1.6, para 3 and para 10 of the agreement with AM and para on appointment and acceptance and para on relationship of parties of the agreement with ETCS, the Ld. AO/CIT(A) formed the opinion that services rendered by AM and ETCS fall within the purview of FTS as per section 9(1)(vii) of the Act and FIS as per article 12(4) of India-USA DTAA Explanation to section 9(2) has also been referred to.

13. After going through the agreement entered into by the assesee with AM and ETCS we are not inclined to agree with the view of the Ld. AO/CIT(A). As per the Explanation 2 to section 9(1)(vii) 'fees for technical services' means any consideration for the rendering of any managerial, technical or consultancy services. Article 12(4) of DTAA between India and USA also defines 'fees for included services' to mean payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services: (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or (b) make available technical knowledge/experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design. None of the ingredient contained in the definition of "Fees for technical services" as per Explanation 2 to section 9(1)(vii) and/or in Article 12(4) of the IndiaUSA DTAA is found in the impugned payment of commission by the assessee to AM and ETCS. It has been submitted by the assessee before Ld. AO/CIT(A) that both the parties, namely AM and ETCS provide leads for prospective buyers of the assessee's products in USA. These are not in the nature of any consultancy or managerial services. No managerial services or technical services are involved since the non-resident parties (AM and ETCS) were merely commission agents appointed to procure purchase orders for assessee's products. Further, the impugned payment is not in relation to any services which make available any technical skill or know-how. Nothing of the sort was involved in the assessee's case. In Outotec India P Ltd. Vs CIT (2015) 41 ITR (Trib) 449 (Delhi), Delhi Bench of the Tribunal pointed out that the expression "make available" in the context of 'fees for technical services' contemplates that the technical services should be of such a nature, that the payer comes to possess the technical knowledge so provided which enables it to utilize the same thenceforward. If the services are consumed without leaving anything tangible with the payer for use in future, it will not be 'make available' of the technical services notwithstanding the fact that its benefit flowed directly to the payer. In Mahindra and Mahindra Ltd. vs. Dy CIT (2009) 313 ITR (AT) 263 (Mumbai) (SB) it has been held that where the payer only obtained the benefit from the services, but did not get any technical knowledge experience or skill in its possession for future use, it cannot be said that technical know-how was made available.

13.1 Before the Ld. AO/CIT(A) the assessee submitted that no information in the nature of technical, managerial or consultancy services had been provided by any of the two agents to the assessee. No such information has been brought on record by the Revenue. The assessee has been asserting that these foreign agents were appointed for arranging of export sales and recovery of payments on commission basis.

13.2 The agreements only stipulate that the foreign agents who have the knowledge about the market will assist the assessee for making presentation to potential customer, fixing the rates and attending the complaints and any communication with the customers. No element of decision making was involved in the services rendered by the foreign agents. All decision making process in respect of sales rested with the assessee.

14. In Panolfa Autoelektrik Ltd. (supra) the AY 2010-11 was involved. The Ld. AO held that the commission payment to the non-resident company on procuring orders was taxable as 'fees for technical service' under sub-clause (b) to section 9(1)(vii), and thus assessee was liable to deduct tax at source while making said payments. On appeal, the Ld. CIT(A) reversed the aforesaid finding holding that the commission payment was not in the nature of 'fees for technical service' ITAT confirmed the order of the Ld. CIT(A). On appeal by the Revenue the Hon'ble High Court of Delhi held that commission paid by the assessee to its foreign agent for arranging of export sales and recovery of payment could not regarded as fees for technical services under section 9(1)(vii) of the Act. The decision (supra) squarely applies to the facts of the assessee's case.

15. As to the reference by the Ld. AO to the Explanation to section 9(2) as substituted by the Finance Act, 2010 w.r.e from 01.06.1976, the Hon'ble Delhi High Court in Nokia Network OY (supra) has held that unilateral amendment of the domestic statute cannot be read into the Treaty with another sovereign state. Moreover it is now well settled that the provision of the Act or of the DTAA, whichever is more beneficial to the assessee shall apply. In this view of the matter, the amended law also cannot have adverse impact on the allowability of the claim of commission payment to the foreign agents.

16. Record shows that the assessee has been paying commission to these two agents under the same agreement since AY 2004-05 and the Ld. AO has consistently been allowing the payment of foreign commission in assessments framed under section 143(3) of the Act for AY 2005-06 to 2010- 11. It is only in the AY 2011-12 that a different stand on the same facts have been taken. We are conscious that the principle of estoppel and resjudicata do not have any application in income tax proceedings, since each assessment year is a separate unit. However, it is necessary that consistency should be maintained when the facts are not different.

7. We, therefore, hold that on the facts and in the circumstances of the assessee's case the impugned disallowance under section 40(a)(i) of the Act made by the Ld. AO and confirmed by the Ld. CIT(A) is not sustainable. Accordingly, the orders of the Ld. AO/CIT(A) are set aside. The ground No. 3 of the assessee is decided in favour of the assessee."

7. Therefore, following the findings of the Co-ordinate Bench in favour of the assessee, the issue with regard to disallowance u/s 40(a)(i) stands decided in favour of the assessee.

8. As with regard to ground no. 2 in A.Y. 2014-15, we are of the considered opinion that Ld. CIT(A) has duly appreciated the fact that the extended date for filing return expressly excluded any benefit of not paying interest u/s 234A. Accordingly, this ground has no substance.

9. Consequently, **ITA no. 116/Del/2020 is allowed partly and the ITA no. 117/Del/2020 stands allowed .**

Order pronounced in the open court on 11th October, 2023.

Sd/-	**Sd/-**
(M. BALAGANESH)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:-11 .10.2023
Binita, SR.P.S
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI