IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "G", NEW DELHI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER,

AND

SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

	ITA NO. 115/Del/2020	
	A.YR. : 2012-13	
SUNBEAM LIGHTWEIGHTING SOLUTIONS PVT. LTD. (FORMERLY: SUNBEAM AUTO PVT. LTD), 38/6, K.M. STONE, DELHI-JAIPUR HIGHWAY, NARSINGPUR, GURGAON-122001 (PAN: AAFCN8583K)	VS.	DCIT, CIRCLE 24(2), NEW DELHI – 110002
(APPELLANT)		**(RESPONDENT)**

AND

	ITA NO. 673/DEL/2020	
	AY 2012-13	
DCIT, CIRCLE 24(2), Room no. 328, CR Building, IP Estate, New Delhi – 2	VS.	SUNBEAM AUTO PVT. LTD, S-323, Panchsheel Park, New Delhi – 110 017 (PAN: AAABCS2948F)
(RESPONDENT)		**(APPELLANT)**

Assessee by	:	Ms. Sashi Kapila, Adv., Sh. Sushil Kumar, Adv. & Sh. Parvesh Kumar, Adv.
Department by	:	Sh. Anuj Garg, Sr. DR.
Date of hearing	:	20.12.2023
Date of pronouncement	:	27.12.2023

ORDER

PER SHAMIM YAHYA, AM :

The Assessee as well as Revenue has filed the cross appeals against the order of the Ld. CIT(A)-8, New Delhi relating to assessment year 2012-13 on the following grounds:-

2. The grounds raised in Assessee's appeal No. 115/Del/2020 (AY 2012-13) are reproduced as under:-

1. That the order passed by the Ld. CIT(A) is bad in law and against the facts of the case.
2. That on the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in holding that the capital subsidy received from the Government of Haryana should be deducted from the cost of assets under Explanation – 10 to section 43(1) of the Act.
3. That on the facts and circumstances of the case in law, the Ld. CIT(A) erred in sustaining the disallowance of Rs. 2,01,09,091/- u/s. 40(a)((i)(B) of the aggregate amount of commission paid to independent U.S. resident agents for promoting sale of assessee's product in U.S.
4. That the appellant craves leave to add, delete or amend any of the grounds of appeal on or before the disposal of the present appeal.

3. The grounds raised in Revenue's appeal No. 673/Del/2020 (AY 2012-13) are reproduced as under:-

1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the assessee's in allowing the assessee's claim of subsidy received by assessee of Rs. 3,05,82,000/- from the Govt. of Haryana in the form of sales tax concession by treating it as capital receipt.
2. The appellant craves, leave or reserving the right to amend, modify, add, or forego any ground(s) or appeal at any time before or during the hearing of this appeal.

4. Briefly stated facts are that assessee filed return of income on 28.9.2012 declaring income of Rs. 82,58,07,040/- and further filed revised return on 19.8.2013 declaring income of Rs. 79,52,25,040/-. The assessee-company is engaged in manufacturing of automotive die cast component, IC engine parts and pistons for two and four wheelers. The case of the assessee was selected for scrutiny and assessment u/s. 143(3) of the Act was completed by the Assessing Officer on 28.02.2015, determining the assessed income at

Rs. 82,58,07,040/- by making additions of Rs. 2,01,09,091/- u/s. 40(a)(i) and Rs. 1,42,031/- u/s. 14A read with rule 8D.

5. Against the above order, Assessee as well as Revenue are in cross appeals before us. We have heard both the parties and perused the records.

6. First we take up the Revenue's Appeal. Apropos Ground No. 1, we find that pursuant to the AO's decision on disallowing the claim of the assessee of capital subsidy, we find that Ld. CIT(A) has relied upon the decision of the Ld. CIT(A)-28, New Delhi taken in assessment year 2011-12 and allowed the subsidy as capital receipt.

6.1 Ld. Counsel contended that the issue involved in Ground No. 1 in Revenue's appeal is squarely covered by the decision of the ITAT 'G' bench decision in assessee's own case decided in ITA No. 4378/Del/2016 & Ors. (AYrs 2011-12 & 2013-14) vide order dated 06.04.2023. Per contra, Ld. DR did not dispute this proposition.

6.2 Upon careful consideration, we find that similar issue as that issue in dispute was adjudicated by the Tribunal vide order dated 06.04.2023 (supra) vide para no. 5.1 to 6.3 which are reproduced as under:-

> *"5.1 We have heard the Ld. Representative of the parties and perused the material on the records. It has been submitted by the Ld. AR that the assessee offered the amount of subsidy received by it in AY 2007-08, 2008-09, 2009-10 and 2010-11 as income which had been taxed under section 143(3) of the Act by the Ld. AO. Subsequently, the assessee filed an application under section 264 of the Act before the Principal Commissioner of Income Tax* ***("Pr. CIT")*** *pleading that the assessee had erroneously treated the subsidy received from Haryana Govt. as its income. The Ld. AO may, therefore, be directed to treat it as capital receipt not subject to tax. It is pointed out by the Ld. AR that the Ld. Pr. CIT vide order dated 30.03.2015 rejected the assessee's application, holding that the subsidy was revenue receipt. Alternatively, the Ld.*

Pr. CIT also held that the Explanation 10 to section 43(6) was applicable.

5.2 The Ld. AR further submitted that the assessee filed writ petition before the Hon'ble Delhi High Court and the Hon'ble Delhi High Court set aside the order dated 30.03.2015 of the Ld. Pr. CIT passed under section 264 of the Act and resultantly the order(s) of the Ld. AO . The Hon'ble Delhi High Court held that the sales tax subsidy received by the assessee be treated as capital receipt and not be added to the income of the asseseee. The Hon'ble Delhi High Court went on to observe further that the consequential orders will now be passed by the Ld. AO.

5.3 The Ld. DR did not controvert the above submissions of the Ld. AR.

6. In the light of the factual matrix as submitted by the Ld. AR of the assesee we have no hesitation in holding that the issue that the sales tax subsidy received by the assesee from Haryana Govt. is capital receipt is covered in favour of the assesee and against the Revenue by the decision of Hon'ble Delhi High Court in the assessee's own case in WP(C)8941/2015 dated 07.12.2017 (copy at pages 145-148 of Paper Book)

6.1 As regards, the objection of the Revenue that the assessee declared the impugned subsidy as its income in its original return for AY 2011-12 presently under consideration, it is an admitted fact that the assessee filed revised return under section 139(5) treating the same as capital receipt and that the Ld. CIT(A) has held the revised return as valid return in the eye of law. The Revenue has accepted this decision of the Ld. CIT(A) and is not in appeal before the Tribunal on the validity or otherwise of the revised return. Assessments of the past year(s) stand set aside by the decision (supra) of the Hon'ble Delhi High Court on this issue.

6.2 Accordingly, we hold that the Ld. CIT(A) has rightly treated the impugned sales tax subsidy as capital receipt and reject the appeal of the Revenue.

6.3 In the result, appeal of the Revenue in ITA No. 5127/Del/2016 for AY 2011-12 is dismissed."

6.3 Following the aforesaid precedent, we uphold the order of the CIT(A) and dismiss the Ground No. 1 raised by the Revenue. Accordingly, the Revenue's appeal is dismissed.

Assessee's Appeal

7. Ld. Counsel contended that the issue involved in Ground No. 2 in Assessee's appeal is squarely covered by the decision of the ITAT 'G' bench decision in assessee's own case decided in ITA No. 4378/Del/2016 & Ors. (AYrs 2011-12 & 2013-14) vide order dated 06.04.2023. Per contra, Ld. DR did not dispute this proposition.

7.1 Upon careful consideration, we find that similar issue as that of issue in dispute was adjudicated by the Tribunal vide order dated 06.04.2023 (supra) vide para no. 7.2 to 9 which are reproduced as under:-

> *"7.2 Ground No. 2 relates to deduction of capital subsidy received by the assessee from Haryana Govt. from the cost of assets under Explanation 10 to section 43(1) of the Act. On query raised by the Ld. AO, the assessee explained that even though the amount of subsidy is linked to the fixed capital investment made by the assessee, the aim is not to subsidize the cost of the assets. It is not a case that the subsidy is being provided to the assessee to meet the cost of asset. Referring to the Explanation 10 to Section 43(1), the assesee submitted that the subsidy provided is not for acquiring the assets but for encouraging setting up of a new unit. Even though, the subsidy is quantified on the basis of the fixed capital investment but that does not mean that the subsidy is given to purchase the assets. Placing reliance on several decisions including the decision of Hon'ble Supreme Court in CIT vs. P.J. Chemicals Ltd. 210 ITR 830 (SC) it was submitted that the subsidy received by the assessee from Haryana Govt. cannot be reduced from the actual cost of the assets for the purpose of computing the depreciation. The explanation was not acceptable to the Ld. AO who held that*

the capital subsidy was liable to be reduced from the cost of the assets in terms of Explanation 10 to section 43(1) of the Act.

7.3 On appeal, the Ld. CIT(A) confirmed the view of the Ld. AO and observed in para 5.4 at page 10 of the appellate order as under:-

"5.4 From the above silent features it is apparent that not only the quantification subsidy was calculated on the percentage of investment made in plant and machinery but the benefit of the sales tax exemption was only allowable on the investment made in plant and machinery. Hence the subsidy received in question was both directly and indirectly linked to the investment in the plant and machinery made by the assessee company. Moreover in the Scheme of Incentive it has been specially clarified under a separate sub head "Sales Tax concession on expansion/ Diversification" that for the industrial unit undergoing expansion/diversification will get benefit of subsidy only on the investment made by the unit in plant and machinery. Since the subsidy in question is linked with the investment made in plant and machinery, hence, the said subsidy amount has to be adjusted against the cost of assets and the depreciation is to be allowed on the re-worked cost of assets . The decisions relied by the assessee is distinguishable and not applicable to the facts of the present case . Considering above, I am of the view that the incentive in the form of subsidy should be considered as reimbursement of amount directly or indirectly to meet any portion of the actual cost and thus it falls outside the ken of Expln. 10 to s.43(1) of the Act. Hence for the purpose of computing depreciation allowable to the assessee, the subsidy amount cannot be reduced from the cost of the capital asset. In result ground no 3(c) taken by the appellant is dismissed."

7.4 This has brought the assessee before the Tribunal.

7.5 The Ld. AR submitted that neither the Ld. AO nor the Ld. CIT(A) have identified any asset, the cost of which was met directly or indirectly by the sales tax subsidy. As a matter of fact, the cost of assets acquired by the assessee for

getting up new unit was incurred from the assessee's own resources years before the subsidy was even sanctioned by the Govt. of Haryana. The subsidy was neither 'used nor 'utilised' for acquiring assets and hence actual cost was not directly or indirectly met by the grant of subsidy.

7.5.1 The Ld. AR relied on the decision of Pune Bench of the Tribunal in Alkoplus Producers (P) Ltd. v. Dy. CIT reported in (2019) 106 taxmann.com 115 (Pune-Trib) wherein the Tribunal held that if the object of the scheme is to accelerate the industrial development of the State, then the case is not caught within the mandate of the Explanation 10. In this decision the Tribunal considered the amendment introduced by the Finance Act, 2015 w.e.f. 01.04.2016 whereby the definition of income under section 2(24)(xviii) has been enlarged and held that since the amendment is effective from AY 2016-17, it will not apply to a case prior thereto. The Ld. AR relied on many other decisions including the decision of Hon'ble Delhi High Court in its own case.

7.6 The Ld. DR supported the orders of the Ld. AO/CIT(A).

7.7 We have given our careful thought to the rival submissions and perused the material in the records. Perusal of the judgment of the Hon'ble Supreme Court in P.J. Chemicals Ltd. (supra) will reveal that the Hon'ble Supreme Court has laid down the guidelines /yardstick to find the answer to the vexed question of whether the subsidy received by an assessee is to be reduced from the actual cost of assets or not for the purpose of allowing depreciation. To quote: [From para 13 of the judgment]

> *"...The real question is as to the character and nature of a subsidy whether it was really intended to subsidize the cost of the capital or was intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost which is the basis for determining the subsidy being only a measure adopted under the scheme to quantify the financial aid."*

7.7.1 Let us apply the above yardstick to the facts of the assessee's case. Before the Ld. AO/CIT(A) the assessee submitted that the purpose/aim of the impugned subsidy was to promote industrial growth in the state. The main idea behind the subsidy scheme is overall economic development which directly or indirectly increase the employment opportunities. The basic objective of the scheme is to encourage establishment/expansion of new/existing undertaking by attracting new investment. It was thus explained that the object of grant of the impugned subsidy by way of sales tax concession under Rule 28C of the Haryana Sales Tax Rules was to promote industrial development in the State by promoting establishment of a new industrial unit or substantial expansion of an existing industrial unit.

7.8 On consideration of the above facts and the identical facts in DCIT vs. Maruti Suzuki India Ltd. in ITA No. 2188/Del/2010 decided by the Delhi Bench of the Tribunal, the Ld. CIT(A) held that the impugned subsidy is capital receipt after extracting inter alia the following observations of the Tribunal:

"the subsidy in question viewed from the angle of the provisions of Section 25A of The Haryana General Sales Tax Act, 1973 read with Industrial Policy 1999 of the Government of Haryana, the subsidy receipt in question are part of capital receipt given by the State Government for the purpose of meeting the objectives of Industrial Policy 1999, viz. to attract new investment and to ensure growth of existing industries so that they can generate employment in industrial and allied sector by 20%. The entire package of incentives should be read as focusing on providing 44 ITA No.1927 & 2188/Del/2010 incentives for investment of industrial sector to achieve effective, meaningful and speedy development of the state."

7.9 In the backdrop of the above factual matrix, there is no doubt that the impugned subsidy was granted to the assessee to provide assistance to the assessee for substantial expansion of an existing industrial unit undertaken by the assessee under Rule 28C of the General Sales Tax Rules , thereby contributing towards the industrial development in the State of Haryana. This is, then obvious that the impugned

subsidy was not given to the assessee to subsidize the cost of assets. Nonetheless the amount of subsidy granted to the assessee is linked with the fixed capital investment by the assessee. This, however, is not detrimental to the claim of the assessee which is supported by the judgment of the Hon'ble Supreme Court in P.J. Chemicals case (supra) wherein the Hon'ble Supreme Court held that Govt. subsidy, it is not unreasonable to say, is an incentive not for the specific purpose of meeting a portion of the cost of the assets, though quantified as or geared to a percentage of such cost. If that be so, it does not partake of the character of a payment intended either directly or indirectly to meet the actual cost.

8. The contention of the assessee before the Ld. AO/CIT(A) has been that the impugned subsidy granted to the assessee does not represent payment directly or indirectly to meet any portion of the 'actual cost' but it was intended as an incentive. However, the quantification of the amount of subsidy was determined at a percentage of the fixed capital cost. This is amply supported by the letter dated 29.11.2006 of the Director of Industries & Commerce Haryana to the assessee which is reproduced below:-

"Registered
From
The Director of industries & Commerce, Haryana.
To
. M/s. Sunbeam Auto Ltd.,
38/06 KM Stone, Deihi-Jaipur Highway,
Viii. Narsinghpur, Gurgaon.

Memo. No. FA/NSTE/ CCN/S-16/17817-A
Dated, Chandigarh the : 29.11.06

Subject: Sales Tax Concession - Case of M/s. Sunbeam Auto Ltd.,
38/06 KM Stone, Delhi-Jaipur Highway, Vill. Narsinghpur, Gurgaon.

Your case was placed before High Powered Committee in its meeting held on 9.11.2006 under the Chairmanship of Hon'ble Chief Minister, Haryana. The

decision of the High Powered Committee is reproduced below:-

"Director of industries & Commerce Haryana, explained to the committee that M/s. Sunbeam Auto Casting have invested Rs.43.47 crores on their 4tn expansion. The investment made by the unit is more than Rs.30,00 crores as this is a case to be decided by the High Powered Committee under Rule 28-C. The case fails under the unit in Pipeline under Sub Rule 3(1). The unit fulfills all the four conditions of the unit in Pipeline and High Powered Committee may declare it a "Unit in Pipeline".

Financial Commissioner Excise & Taxation Department informed the committee that total investment verified by DETC is Rs. 29.64 crore. The Company has made investment in die and moulds to the extent of Rs.9.19 crore which has been included under plant & machinery. The dies and moulds though includable to compute fixed capita! within the meaning of definition of FCI 3(g) these can not be taken into account for quantification of tax benefit by virtue of provision made in the table-11 of sub rule 5(a).

Director of Industries & Commerce Haryana informed to the committee that die and moulds are integral part of fixed capital investment and the investment made by the company on Die and Moulds should be allowed.

Excise and Taxation Commissioner, Haryana informed the committee that under Rule 28-C, the High Powered Committee can take decision for the grant of tax concession on the basis of facts like employment generation, likely revenue, and impact on overall growth. The High Powered Committee shall have the powers to relax any of the conditions stipulated in the rules. No anneal shall be against the decision of High Powered Committee.

After due deliberations the High Powered Committee declared it a Pipeline case which fulfills all the four conditions and considered the investment of Rs.9.19 crores on Die and Moulds as a part of fixed capita! investment and decided to grant sales tax concession of Rs.29.64 crore which is 100% of Fixed Capital Investment on Plant and

Machinery for a period of 5 years under rule 28- C from the date of issue of Entitlement Certificate".

Sd/-
Joint Director (FA)
For Director of Industries & Commerce, Haryana Endst.No. FA/NSTE/
Dated:

A copy of the above is forwarded to the following for information and necessary action:-

1. Deputy Excise & Taxation Commissioner, Gurgaon.
2. General Manager, District Industries Centre, Gurgaon.

sd /
Joint Director (FA)
For Director of industries & Commerce, Haryana"

8.1 Hence, we do not agree with the view of the Ld. CIT(A) that since the subsidy is linked with the investment made in plant and machinery, it has to be adjusted against the cost of assets for the purpose of allowing depreciation. The Ld. AR has submitted that neither the CIT(A) nor the Ld. AO have identified any asset the cost of which was met directly or indirectly by the impugned subsidy. This is evident from the appeal effect order dated 06.09.2016 passed by the Ld. AO under section 250 of the Act brought on record by the Ld. AR.

8.2 Perusal of the Explanation 10 along with its proviso to section 43(1) would reveal that the provision requires that the subsidy will go to reduce the actual cost to the extent to which the cost is met directly or indirectly by the subsidy. The proviso enables pro rata allocation, where the subsidy does not directly relate to any particular asset.

8.3 The assessee's case is that the impugned assets were acquired by the assesee during the period from 01.12.1999 to 27.04.2002 and the cost was met from assessee's own funds whereas subsidy was sanctioned on 29.11.2006 and

entitlement certificate under Rule 28C of the Haryana Sales Tax Rules Granting tax subsidy of Rs. 29.14 crores was issued on 01.02.2007 and the first tranche of subsidy was received in Financial Year 2006-07 relevant to AY 2007-08. These facts were on the records and very much verifiable. Thus, it is evident that the cost of assets acquired by the assesee to set up new unit was met by it out of its own resources years before the subsidy was even sanctioned by the Govt. of Haryana on 29.11.2006. The subsidy was, therefore, neither used nor utilized for acquiring the assets. If that be so it cannot be said that the actual cost was directly or indirectly met by the grant of subsidy as alleged by the Ld. AO/CIT(A). The factual position is that the total amount of investment in plant and machinery made by the assessee for setting up new unit was only a measure for determining the amount of subsidy. It was in such a scenario that the assesee had cited before the Ld. CIT(A) the decision of VisakhaPatnam Bench of the Tribunal in Sasisri Extractions Ltd. vs. ACIT (2008) 307 ITR (AT) 127 (Viskha) wherein the ITAT in para 12 held as under:-

"In our opinion, even after insertion of Explanation 10 to section 43(1) of the Act, the basic principle underlying in the decision of the Apex Court in the case of P J Chemicals Ltd. (1994) 210 ITR 830, still holds the field. Their Lordships analysed the expression "met directly or indirectly" to come to the conclusion that only in a case where a subsidy or other grant was given to offset the cost of an asset, such payment/grant would fall within the expression "met" whereas the subsidy received merely to accelerate the industrial development of the State cannot be considered as payments made specifically to meet a portion of the cost of the assets."

8.4 In Alkoplus Producers P. Ltd. (supra) the Pune Bench of the Tribunal analysed the provisions of Explanation 10 to section 43(1) of the Act and observed that this explanation gets activated where the subsidy is specifically relatable to cost of a particular asset; that proviso also refers to 'such subsidy' only. If the object of the scheme is to accelerate the industrial development of the State, then the case is not caught within the mandate of Explanation 10. Taking note of the amendment in Section 2(24) by insertion of clause (Xviii)

w.e.f. 01.04.2016 by the Finance Act, 2015 the Tribunal held that the amendment is effective from AY 2016-17 and hence will not apply to a case prior thereto. Since the case at hand pertains to AY 2011-12, the above amended law will not apply to it.

8.5 We observe that the Pr. CIT's order dated 30.03.2015 under section 264 of the Act in the case of the assessee pertaining to AY 2007-08 to 2010-11 wherein he held that the subsidy was liable to be reduced from the cost of the assets in terms of Explanation to section 43 stands set aside by the decision of Hon'ble Delhi High Court rendered on 07.12.2017 (copy at page 145-148 of Paper Book)

9. For the reasons recorded above, we decide ground No. 2 in favour of the assessee and hold that the impugned capital subsidy cannot be deducted from the cost of assets under Explanation 10 to section 43(1) of the Act.

7.2 Following the aforesaid precedent, we set aside the order of the Ld. CIT(A) on the issue in dispute and decided the same in favour of the assessee.

8. Ld. Counsel contended that the issue involved in Ground No. 3 in Assessee's appeal is squarely covered by the decision of the ITAT 'G' bench decision in assessee's own case decided in ITA No. 4378/Del/2016 & Ors. (AY 2011-12 & 2013-14) vide order dated 06.04.2023. Per contra, Ld. DR did not dispute this proposition.

8.1 Upon careful consideration, we find that the similar issue as that of issue in dispute was adjudicated by the Tribunal vide order dated 06.04.2023 (supra) vide para no. 10 to 18 which are reproduced as under:-

"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 f****ee 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 India-USA 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.

17. 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.

18. In the result, the appeal of the assessee in ITA No. 4378/Del/2016 for AY 2011-12 is allowed."

8.1 Following the aforesaid precedent, we set aside the order of the Ld. CIT(A) on the issue in dispute and decided the same in favour of the assessee

9. In the result, the Revenue's appeal is dismissed and Assessee's appeal is allowed.

Order pronounced on 27/12/2023.

Sd/-	Sd/-
(CHALLA NAGENDRA PRASAD) **JUDICIAL MEMBER**	**(SHAMIM YAHYA)** **ACCOUNTANT MEMBER**

SRBHATNAGAR

Copy forwarded to:-

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar