

आयकर अपीलीय अधिकरण
कोलकाता 'ए' पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'A' BENCH, KOLKATA

श्री राजपाल यादव, उपाध्यक्ष (कोलकाता क्षेत्र)

एवं

श्री संजय अवस्थी, लेखा सदस्य

के समक्ष

Before

SRI RAJPAL YADAV, VICE-PRESIDENT
&
SRI SANJAY AWASTHI, ACCOUNTANT MEMBER

I.T.A. Nos.: 701 & 702/KOL/2023
Assessment Years: 2015-16 & 2016-17

Eximcorp India Private Limited.....Appellant
[PAN: AAACE 7115 P]

Vs.

ACIT, Cir-5(2), Kolkata.....Respondent

Appearances:

Assessee represented by: *Arnab Chakraborty, AR.*

Department represented by: *B.K. Singh, Addl. CIT.*

Date of concluding the hearing : July 10th, 2024

Date of pronouncing the order : August 5th, 2024

ORDER

Per Sanjay Awasthi, Accountant Member:

This is a batch of two appeals for AY 2015-16 & AY 2016-17 respectively. Since the issue in both the years pertains to disallowance u/s 40(a)(ia) of the Income Tax Act, 1961 (in short the 'Act') for not deducting tax at source u/s 195 of the Act, these two appeals are being disposed off through a single order. To begin with, we may briefly refer to the facts of the two cases—

ITA No. 701/KOL/2015

1.1. The assessee filed its return of income on 24.09.2015 declaring total income of Rs. 4,82,87,750/- and book profit of Rs. 4,46,81,226/- u/s 115JB of the Act. The assessee is engaged in the business of importing and selling of wood products. It was noticed that the assessee had debited usance interest and L.C. charges amounting to Rs. 12,72,292/-. Admittedly no tax had been deducted u/s 195 of the Act and hence the Assessing Officer (hereinafter referred to as ld. 'AO') proceeded to enquire on the issue and after relying on a number of authorities, came to the conclusion that in the instant case the import purchase is made on irrevocable 180 days L.C. terms, whereby the payment of the purchase price is an obligation of the importer and the L.C. itself creates a liability of debt. It is recorded that since that debt is incurred in India then the interest on the same, as defined in Section 2(28A) of the Act, would be liable to deduction of tax at source. He thereafter proceeded to make an addition of Rs. 12,72,292/- (being the impugned amount) u/s 40(a)(ia) of the Act. The Commissioner of Income Tax (Appeals) [hereinafter referred to as ld. 'CIT(A)'] is seen to have confirmed the action of the AO.

ITA No. 702/KOL/2015

1.2. In this case the assessee filed its return of income on 26.09.2016 declaring total income of Rs. 4,65,57,310/- and book profit of Rs. 4,42,73,900/- u/s 115JB of the Act. In this year also the assessee was engaged in the business of importing and selling of wood panel products etc. Even in this year, it was noticed that the assessee had debited on account of usance interest and L.C. confirmation charges amounting to Rs. 14,56,914/- and Rs. 2,11,332/-. After confronting the assessee with these facts and after relying on a number of authorities the AO proceeded to add Rs. 14,56,914/- and Rs. 2,11,332/- (totaling to Rs. 16,68,246, being the impugned amount) u/s 40(a)(ia) of the Act. Ld. CIT(A) is seen to have confirmed this action of the AO.

1.3. Aggrieved, the assessee has approached the ITAT with several grounds of appeal which essentially challenge the additions u/s 40(a)(ia) of the Act,

being Rs.12,72,292 for ITA 701 and Rs. 16,68,246 for ITA 702. The grounds are as under:

Assessment Year-2015-16:

“1. FOR THAT, the CIT(A) has in passing the impugned order dated 15.5.2023, erroneously added back the amount of usance interest of Rs. 12,72,292/- debited in the P/L account of the appellant, by wrongfully invoking Section 40(a)(i) of the Income Tax Act, 1961 ("the Act").

2. FOR THAT, the CIT(A) failed to appreciate that there is no obligation upon the appellant to deduct tax at source (TDS) under Section 195(1) of the Act against the amount paid to the local bank, equivalent to the usance interest purportedly paid by the local bank of the appellant to the foreign bank. There is no lis between the appellant and the foreign bank.

3. FOR THAT, the CIT(A) has erred in holding that the local bank in India in negotiating the loan from the foreign bank and obtaining Letter of Credit (L/C), acts on the instructions of the appellant herein (i.e buyer) or as an agent thereof. There is no such instruction by the appellant to the local bank to negotiate loans or source funds from foreign entities for meeting any obligations created against the L/C. The local bank providing the import finance to the appellant sourced its funds at its own discretion and in its independent capacity from foreign entities.

4. FOR THAT, the CIT(A) has erroneously distinguished relevant judicial and quasi-judicial precedents and/or failed to apply and/or misapplied the precedents relied upon by the appellant to the facts of the present case. The CIT(A) has also placed reliance upon precedents which have no relevance to the facts of the present case.

5. FOR THAT, the CIT(A) failed to appreciate further, that the local bank has only recovered from the appellant an amount equivalent to the usance interest paid by it to the foreign bank. The appellant has thus, not paid any usance interest, but an amount equivalent to the same as part of the cost of the loan/import finance obtained from the local bank. Such facts were not correctly appreciated by the CIT(A) in passing the impugned order dated 15.5.2023.

6. FOR THAT, the CIT(A) has also failed to appreciate that there is no evidence/record to indicate that any payment of usance interest was made by the appellant or by any person under the Act, to any foreign entity. The invocation of Section 195 of the Act in the present case, is without any legal or evidentiary basis.

7. FOR THAT, the local bank (i.e. borrowing bank) meets the loan availed by it to the foreign bank together with interest and other charges from its own

funds kept in Nostro Accounts abroad in foreign currency. There is nothing to indicate therefore, that usance interest was paid out of income accruing in India by any person under the Act, and no inquiry in that regard appears to have been made by the CIT(A).

8. FOR THAT, the CIT(A) has proceeded on erroneous premises of fact and law.”

Assessment Year-2016-17:

“1. FOR THAT, the CIT(A) has in passing the impugned order dated 15.5.2023, erroneously added back the amount of usance interest of Rs.16,68,246/-debited in the P/L account of the appellant, by wrongfully invoking Section 40(a)(i) of the Income Tax Act, 1961 ("the Act").

2. FOR THAT, the CIT(A) failed to appreciate that there is no obligation upon the appellant to deduct tax at source (TDS) under Section 195(1) of the Act against the amount paid to the local bank, equivalent to the usance interest purportedly paid by the local bank of the appellant to the foreign bank. There is no lis between the appellant and the foreign bank.

3. FOR THAT, the CIT(A) has erred in holding that the local bank in India in negotiating the loan from the foreign bank and obtaining Letter of Credit (L/C), acts on the instructions of the appellant herein (i.e. buyer) or as an agent thereof. There is no such instruction by the appellant to the local bank to negotiate loans or source funds from foreign entities for meeting any obligations created against the L/C. The local bank providing the import finance to the appellant sourced its funds at its own discretion and in its independent capacity from foreign entities.

4. FOR THAT, the CIT(A) has erroneously distinguished relevant judicial and quasi-judicial precedents and/or failed to apply and/or misapplied the precedents relied upon by the appellant to the facts of the present case. The CIT(A) has also placed reliance upon precedents which have no relevance to the facts of the present case.

5. FOR THAT, the CIT(A) failed to appreciate further, that the local bank has only recovered from the appellant an amount equivalent to the usance interest paid by it to the foreign bank. The appellant has thus, not paid any usance interest, but an amount equivalent to the same as part of the cost of the loan/import finance obtained from the local bank. Such facts were not correctly appreciated by the CIT(A) in passing the impugned order dated 15.5.2023.

6. FOR THAT, the CIT(A) has also failed to appreciate that there is no evidence/record to indicate that any payment of usance interest was made by the appellant or by any person under the Act, to any foreign entity. The

invocation of Section 195 of the Act in the present case, is without any legal or evidentiary basis.

7. FOR THAT, the local bank (i.e. borrowing bank) meets the loan availed by it to the foreign bank together with interest and other charges from its own funds kept in Nostro Accounts abroad in foreign currency. There is nothing to indicate therefore, that usance interest was paid out of income accruing in India by any person under the Act, and no inquiry in that regard appears to have been made by the CIT(A).

8. FOR THAT, the CIT(A) has proceeded on erroneous premises of fact and law.”

2. The Id. Counsel for the assessee filed a number of documents through paper books and a compilation of statutes and precedence in support of his contention that the appellant was not required to deduct any tax at source u/s 195 of the Act. At this stage, it is necessary to recapitulate the facts as visible from a combined reading of the AO and Id. CIT(A)'s orders. The appellant is seen to have obtained import finance from Bank of Baroda, Kolkata branch for importing goods from 2014 to 2016. The said bank used its foreign currency reserves in its foreign branches located outside India in several countries like Singapore, UK, Australia, Belgium, Hong Kong etc. to raise funds for financing the imports on behalf of the appellant. The foreign branches of Bank of Baroda have charged usance interest to the Kolkata branch of Bank of Baroda and the local branch has billed the appellant for such usance interest. Admittedly, such interest has been paid to the foreign branches by the Kolkata branch and the Kolkata branch has recouped such payment from the appellant in Indian rupees. It has been the contention of the authorities below that the remittances to the foreign branches are classifiable as “interest” within the meaning of Section 2(28A) of the Act. It has been contended that the appellant should have deducted TDS from the recouped usance interest paid to the local branch of Bank of Baroda, u/s 195 of the Act since the foreign branches were the ultimate beneficiary of such interest.

2.1. Before us, the Id. A/R meticulously took us through the documents in the paper book and the case laws relied upon by him to canvas the point that

the appellant was under no legal obligation to deduct tax at source u/s 195 of the Act. The arguments of the ld. A/R may be summarised for getting a picture of his overall contention. It has been stated that the Bank of Baroda Kolkata branch has independently negotiated terms with its external branches outside India, accordingly, there is no contractual obligation between the appellant and the external branches of Bank of Baroda. It has been averred that the interest has been paid by the local branch to the external branch and thereafter the cost of the same has merely been recouped in Indian currency from the appellant through a local transaction to which Section 195 of the Act should not apply. In support of this contention, the ld. A/R pointed out copies of credit sanction letters issued by the Bank of Baroda, Kolkata branch and import financing records made available in the paper book. It has been further argued that Section 195(1) of the Act applies to any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest. In the instant case it is Bank of Baroda, Kolkata branch which is making the interest payment to the foreign branch. The appellant is being charged for such interest in Indian rupees by the local branch, which is not a non-resident or a foreign company. For this purpose, the ld. A/R read out para 8 of the case of *Sriram Refrigeration Industries vs. ITO* reported in [2014] 49 taxmann.com 131 (Andhra Pradesh), wherein it has been said that if interest is debited to the account of an Indian company by a bank to recoup the interest charged to it by the discounting bank, then the provisions of Section 195 of the Act will not apply. It has been further averred that the appellant is not the person responsible for paying sums of monies within the meaning of Section 195 of the Act. The ld. A/R further argued that following the case of *GE India Technology Cen. (P.) Ltd. vs. CIT* reported in [2010] 193 Taxman 234 (SC) there can be obligation to deduct tax at source only when the remittance is a sum chargeable to tax under the Act. If the income has not accrued in India, there can be no TDS u/s 195 of the Act. Thereafter, ld. A/R argued at length following the case of *Vijay Ship Breaking Corporation* [86 ITD 497 (Rajkot)] which has an interesting and a very

significant judicial chronology, which is relevant for deciding the matter at hand.

2.2. The Id. A/R vehemently distinguished the Hon'ble Gujarat High Court judgment in the case of *CIT vs. Vijay Ship Breaking Corporation* reported in [2003] 129 Taxman 120 (Gujarat), which had reversed the finding in the Hon'ble ITAT's order in this case (supra), and concluded that since this case itself has been reversed by the Hon'ble Supreme Court in the case of *Vijay Ship Breaking Corporation vs. CIT* reported in [2009] 314 ITR 309 (SC), therefore, the original order of the Hon'ble ITAT would hold the ground. Id. A/R also pointed out that Hon'ble Gujarat High Court's decision in *Vijay Ship Breaking Corporation (supra)* is also contradicted by the findings of the Hon'ble Supreme Court in the case of *M/s. Bawa Paulins Pvt. Ltd. vs. UPS Freight Services (India) Pvt. Ltd. and Another* reported in 2023 SCC 330. Id. A/R concluded that since the payments were made to an Indian entity, which in turn made consequential payments to foreign entities, therefore the liability, if any, would be squarely on the Indian entity, i.e. the Bank of Baroda, Kolkata branch, and not on the appellant.

2.3. The Id. D/R relied on the orders of the authorities below and stated that since local bank was merely acting on behalf of the assessee to source goods from foreign countries therefore, the liability for TDS also rested with the assessee and not with any other entity.

3. We have carefully perused the documents placed before us, the orders of the authorities below and also carefully gone through the copies of various judgements supplied by the Id. A/R and also perused the authorities relied upon by both the AO and the Id. CIT(A). To begin with, it is understood that most of the importers in India import goods on the basis of Letter of Credit and pay usance charges to Banks for said credit facility. Now the question that arises for consideration is whether the importer is liable to deduct tax under section 195 of the Income Tax Act, 1961 on the usance charges paid to the Indian Bank which in turn pays to the foreign entity.

At this stage it would be relevant to discuss the meaning and import of "Usance". Usance means the allowable period of time permitted by customs between the date of bill and its payment. The usance of a bill varies between countries. The charges paid for usance period are called usance charges. Usance charges in import purchases are paid on letter of credit. Usance letter of credit is a letter of credit that requires a beneficiary to present it as a necessary document. The ultimate beneficiary of the usance charges is the supplier of goods/services.

As per section 2(28A) of the Income Tax Act, 1961 Interest is defined as under:

"interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised;

Now from the above definition, it is clear that the expression "Interest" for the purpose of Income Tax Act, 1961 includes any service fee or other charges in respect of any credit facility. Therefore, on a plain reading of the said clause, the charges paid by the assesses in respect of the credit facility amount to interest. Hence the usance charges paid by the importer comes under the definition of interest.

At this stage some parts of section 195 of the Act also deserves to be extracted for reference:

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

[Explanation 1]— For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest

payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.]

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

<i>(i)</i>	<i>a residence or place of business or business connection in India; or</i>
<i>(ii)</i>	<i>any other presence in any manner whatsoever in India.]</i>

3.1. It is seen that though Usance charges may be paid to the Indian bankers by way of LC Charges and commission, nevertheless, such a payment would be a part of the transaction involving purchase/import of raw material from non-residents. In this case admittedly, the payments have been made to the Indian entity which in turn has made payments to its foreign counterparts for effecting the imports. At this juncture it would be relevant to refer to certain extracts from the headnotes in the case of *Vijay Ship Breaking Corporation (86 ITD 497- Rajkot)* which has been relied upon by the Id. A/R in this case. In this case the assessee firm was engaged in the business of ship breaking. It had purchased two ships from non-residents and had made the interest payments to the non-resident parties on account of credit facility made available to it for the purchase of ships. In the course of assessment proceedings, the AO had held that the assessee was liable to deduct tax at source on the usance interest paid by it under the terms of L.C. through which the assessee had paid the purchase price of the ships. The Hon'ble ITAT held as under:

“Section 195, read with sections 2(28A) and 40(a)(i), of the Income-tax Act, 1961 and Double Taxation Avoidance Agreements with Singapore and United Kingdom - Deduction of tax at source - Payment to non-resident - Assessee-firm had purchased two ships for ship-breaking business, one from a UK based non-resident company and other from a Singapore based non-resident company - Purchase of ships was only transaction for which agreements were entered into between assessee and respective sellers - Agreements categorically provided that total purchase price shall be paid by means of 100 per cent confirmed irrevocable 100 days' usance letter of credit

- Payment of interest, though separately mentioned in agreement, was part of purchase price - In course of assessment proceedings, it was observed that as per Memorandum of Agreement entered into between assessee and sellers of ships, assessee was making interest payments to non-resident parties on account of credit facility availed by it for purchase of ships - Assessing Officer held that assessee was liable to deduct tax at source on 'usance interest' paid by it under terms of Letter of credit (LC) through which assessee had paid purchase price of ships as per terms of MOA -Assessee not having discharged that liability, Assessing Officer invoked provisions of section 40(a)(i) to disallow interest - Whether as definition of term 'interest' as given in DTAA is a narrower definition than given in section 2 (28A), provisions of DTAA will prevail upon provisions of Act, and as per definition of term 'interest' given in DTAA, interest amount specified in MOA partook of character of purchase price and it did not fall within definition of term 'interest' given in DTAA - Held, yes - Whether, therefore, assessee was not liable to deduct tax at source from said payment of interest and, hence, disallowance of interest made under section 40(a)(i) was not warranted - Held, yes”

3.2. Thereafter, this matter travelled to the Hon'ble Gujarat High Court and there after detailed analysis and citing of a number of judicial pronouncements on the subject the Hon'ble Court was pleased to set aside the order of this Tribunal. There the findings of Hon'ble ITAT were reversed. Some portions from the High Court judgement (261 ITR 113- Gujarat) deserve to be extracted:

“The provisions of section 9(1)(v)(b), read with section 5(2) and section 4(1)(2) leave no room for doubt that the income payable by way of interest by a resident to a non-resident which is not payable for the purpose of carrying on of the business of such resident outside India or for earning income from any source outside India would be deemed to have accrued or arisen to such non-resident in India, and will be part of his total income that would be chargeable to income-tax, which shall be deducted at source or paid in advance when it is so deductible at source or payable in advance under the provisions of the Act. If the controversy that the interest payable under the MOA to the non-resident by the assessee was not interest but a part of the price of the ship purchased by the resident, was kept apart for the time-being and the amount specified as interest in the MOA was treated as interest payable under the contract by the resident-assessee to the non-resident in respect of deferred payment of price, such interest payable to non-resident would be income deemed to have accrued or arisen to the non-resident in India under section 9(1)(v)(b) and would be chargeable to income-tax under section 4(1), read with section 5(2). If that be so, income-tax thereon would be deductible at source under section 195(1). [Para 9.2]

Under the MOA, the assessee was responsible for paying to the seller non-resident, the amounts specified therein for the purchase of the ship for demolition purposes. The assessee was responsible for paying both the amounts of the two separate invoices, one of the purchase price of the ship and the other of the interest amount. The amounts payable under the MOA were payable to the seller of the ship and not to the bank of the assessee that had issued the letter of credit, as per the mode of payment stipulated in the MOA by the seller and the buyer. The liability to deduct the tax at source in such case would be of the assessee by whom the interest was payable and not of the bank that issued the letter of credit. Such liability would arise when credit entry was made on accrual basis in favour of the non-resident in respect of such payable interest even before the actual payment which was yet to follow. The liability of the person responsible for the payment to deduct the tax at source arises when credit entry is made or when payment is made by cash or any other mode of payment, whichever is earlier. The liability of the assessee to deduct the tax from the interest so payable cannot, therefore, depend upon any particular mode that may be adopted by the buyer for making the payment. It would not, therefore, be correct to argue that the assessee had paid the amount to the issuing bank, which was not a non-resident, and, therefore, there was no obligation on the part of the assessee to deduct the tax at source. No such automatic shifting of responsibility in respect of interest payable to the non-resident under the MOA entailing duty to deduct tax at source and thereby shifting the obligation to deduct such tax to the bank which issued the letter of credit as a mode of payment of the amount by the assessee, is contemplated by section 195(1). The amount was payable by the assessee as per the MOA and, therefore, the liability to deduct the tax was that of the assessee while making payment through the letter of credit facility provided to the assessee by its bank..... [Para 9.3]

The effect of the deeming fiction that the income by way of interest payable by a person who is resident would be that the income deemed to accrue or arise in India, as envisaged by clause (v)(b) of section 9(1), will be treated to be arising in India irrespective of its being paid anywhere outside India. Simply by virtue of it becoming payable by the resident, the interest income of the type covered by clause (v)(b) of section 9(1) will be deemed to be accruing or arising in India even if it is actually received by the non-resident outside India. If it is permissible for a non-resident receiving such interest income from a resident of India to contend that he has actually disbursed the amount outside India and, therefore, such interest income not accrue or arise in India, the provisions of section 9(1)(v)(b) will become wholly redundant. Such income is deemed to accrue or arise in India whenever it is payable by a resident. This means that irrespective of its being paid to the non-resident in the country of his residence or elsewhere outside India, it is deemed to have accrued or arisen to him in India. Therefore, even if the sum which was payable to the non-resident by the resident assessee was paid

by the mode of releasing a letter of credit and received by the non-resident outside India from the negotiation/ intermediary bank, such sum would be nonetheless income deemed to be accruing or arising to the non-resident in India. [Para 9.4]

The letter of credit is a document issued by a bank as per instructions by a buyer of the goods authorizing the seller to draw a specified sum of money under specified terms, usually on receipt by the bank of certain documents, within a given time. In the instant case, the MOA between the buyer and the seller stipulated that the payment was to be made by irrevocable letter of credit. The letter of credit issued complied with the conditions laid down in the MOA. The MOA did not specifically provide that mere issue of credit would be absolute and final payment. Acceptance by the seller of a commercial credit constituting absolute payment which would debar him from his ordinary right to pursue the buyer if the seller did not receive payment under the credit has to be expressed in clear terms in absence of which the seller's rights against the buyer are not exhausted by the issue of credit. Thus, in absence of a specific 'absolute payment' clause when the letter of credit is issued and accepted by the seller, it operates as a conditional payment of the price. The buyer is not entitled to claim that he has performed his entire bargain by furnishing the required letter of credit and by remitting to the issuing banker the funds necessary for making payment. He is not discharged from his duty to pay the price to the seller, because the buyer promises to pay by letter of credit and not just to provide by a letter of credit merely a source of payment, which does not pay. [Para 10]

The buyer, therefore, does not get absolved from his contractual liabilities under the contract of sale or from his statutory liabilities, such as, of making deduction of tax at source under section 195(1) while making payment by the mode of a letter of credit. [Para 11.1]

The issuing bank acts at the request and on the instructions of the buyer and thereby acts on behalf of the buyer to pay the seller the amount on presentation of the documents as per the stipulations in the letter of credit. It is only a banking arrangement to effect payment and has nothing to do with the statutory obligations of the buyer which continue to bind the buyer in respect of the income by way of interest and other sums that are deemed to accrue or arise in India in favour of the non-resident seller. The contention that obligation of the buyer was taken over by the issuing banker when the letter of credit was delivered and, therefore, there was no duty on the part of the buyer to make deduction at source of the tax under section 195(1) was, therefore, misconceived and unwarranted. [Para 11.2]

The meaning of the word 'interest' is very wide and would include interest on unpaid purchase price payable in any manner which would include

payment by means of irrevocable letter of credit. The claim of the seller to the price of the goods sold normally arises when the property is transferred to the buyer. The seller gets a right to get the price of the goods and the buyer has a corresponding obligation to pay it, both as per the contract of sale and under the law. Therefore, debt is incurred by the buyer of the purchase-price which he is obliged to pay. The debt arises from the unwillingness or inability to pay cash down when the purchase price becomes payable against delivery, and the engagement to pay it at a later date or by instalments. [Para 14]

The article of the DTAA concerning the taxation of interest does not deal with the procedural aspects of tax collection. The mode of tax collection including by deduction at source as provided under section 195(1), read with section 4(2) which enjoin a duty on these assesseees who were responsible for paying to the non-residents usance interest, to deduct income-tax thereon at the time of credit to the payee's account or at the time of payment by means by irrevocable letter of credit, whichever was earlier could be validly enforced against them and having failed in making deduction of income-tax on the interest paid by them to the non-residents, they could not claim any deduction of the amount in respect to such interest which was payable outside India, in view of the provisions of section 40. The finding of the Tribunal that the assesseees were not liable to deduct tax at source from the said payment of interest and that disallowance of interest under section 40(a)(i) was not warranted, was, therefore, obviously erroneous. [Para 20]

For the foregoing reasons, following conclusions were arrived at:

A. The usance interest paid by the assessee was not any part of the purchase price of the ships and was interest within the meaning of the definition of the term 'interest' under section 2(28A).

B. The assessee who did not deduct tax at source under section 195(1) on the usance interest payable outside India, was not entitled to deduct the amounts of such usance interest in computing its income chargeable under the head 'Profits and gains of business or profession'. The Tribunal, in this Appellant's case (supra) was, therefore, wrong in deleting the disallowance under section 40(a)(i) for failure on the part of the assessee to deduct tax at source, from usance interest paid to the non-residents, under section 195(1).

C. The assessee being responsible for paying to the non-resident usance interest which was chargeable under the provisions of the Act was liable to deduct income-tax thereon under section 195(1) thereof.

3.3. Thereafter, this matter travelled up to the Hon'ble Supreme Court and through the judgement reported in [2009] 314 ITR 309 (SC) the following was pronounced while reversing the Hon'ble Gujarat High Court decision (*supra*)

"11. It may be mentioned that we are not required to examine this question in the light of the impugned judgment because after the impugned judgment which was delivered on 20-3-2003, the Income-tax Act was amended on 18-9-2003 with effect from 1-4-1983. By reason of said amendment, Explanation 2 was added to section 10(15)(iv)(c), which reads as under:

"Explanation 2—For the removal of doubts, it is hereby declared that the usance interest payable outside India by an undertaking engaged in the business of ship-breaking in respect of purchase of a ship from outside India shall be deemed to be the interest payable on a debt incurred in a foreign country in respect of the purchase outside India."

On reading that Explanation, it is clear that usance interest is exempt from payment of Income-tax if paid in respect of ship breaking activity. This amendment came into force only after the impugned judgment. It was not there when the impugned judgment was delivered.

12. For the aforesaid reasons, question No. 2 as to whether the assessee was bound to deduct TDS under section 195(1) is answered in favour of the assessee and against the Department. The assessee was not bound to deduct tax at source once Explanation 2 to section 10(15)(iv)(c) stood inserted as TDS arises only if the tax is assessable in India. Since tax was not assessable in India, there was no question of TDS being deducted by the assessee. Therefore, question No. 2 is answered in favour of the assessee and against the Department."

3.4. A combined reading of the three judgements reveals that though the order of the Hon'ble Gujarat High Court has been merged with the order of the Hon'ble Supreme Court but it is clear that due to a subsequent amendment to Section 10(15) of the Act (with retrospective effect) usance interest, if paid in respect of ship breaking activity, would be excluded from the provisions of Section 195 of the Act, the basic findings in the Hon'ble Gujarat High Court order will still stand firm because they would apply to the

broad principles governing payment of usance interest on account of L.Cs, for the purposes of imports. This is so because the verdict of the Supreme Court was delivered in favour of the assessee on a different reason. Besides the above, the Supreme Court has given a clear-cut finding that the issue on hand has not been adjudicated. It is an undisputed fact that the Gujarat High Court in the case of *Vijay Ship Breaking Corpn. (supra)* has decided the issue against the assessee by holding that the usance interest paid by the assesseees was not any part of the purchase price of the ships and was interest within the meaning of the definition of the term 'interest' under section 2(28A). The assesseees who did not deduct tax at source under section 195(1) on the usance interest payable outside India and on which tax had not been paid, are not entitled to deduct the amounts of such usance interest in computing their income chargeable under the head "Profits and gains of business or profession". The assesseees being responsible for paying to the non-residents usance interest, which was chargeable under the provisions of the Income-tax Act, were liable to deduct income-tax thereon under section 195(1) thereof. The finding of the Hon'ble Tribunal was, therefore, negated when it held that the usance interest partook the character of purchase price and was therefore, not liable to deduction at source under section 195(1).

3.5. It is seen that in the matter before the Hon'ble A.P. High Court in the case of *Sriram Refregeration Industries (supra)*, relied upon by the Ld. AR, the Hon'ble Gujarat High Court case (*supra*) and the Hon'ble Supreme Court's judgement were not considered and hence, respectfully that case would have limited value in terms of deciding the matter at hand. In fact, in several other judgements, this principle of the responsibility of the importer for deducting tax at source has been upheld. Such cases may be briefly discussed to illustrate the point that even in this case, the assessee's responsibility for deducting tax at source was always there.

3.6. The following court judgements are relevant on this topic:

(i) The Hon'ble Bombay High Court in the case of *India Furniture Products Ltd. vs. CIT* [2020] 122 taxmann.com 285/[2021] 276 Taxman 427 held that where assessee imported raw material for its consumption based on a letter of credit from non-resident sellers and paid usance charges to Indian bankers for said credit facility to secure payments to purchasers abroad, foreign seller being ultimate beneficiary, usance charges constituted income of non-resident as envisaged in provisions of section 9(1)(v)(b) read with section 5(2), hence, assessee was obliged to deduct tax at source in terms of section 195(1) before making such payment. Some extracts from this judgement would shed light on this issue even further:

“13. In this case, there is no dispute that the assesses were importing raw material from the sellers in Japan, Belgium, Germany, U.S.A., etc. Towards such purchase/import transactions, the assesses were required to provide Letters of Credit. Accordingly, the assesses, would provide Letters of Credit from the Indian bankers in order to secure the payments to the purchasers abroad. In order to provide such Letters of Credit the assesses, had to pay service fees and other charges to the Indian bankers. For this purpose, the assesses, during the relevant assessment year, incurred expenditure of Rs. 17,14,806/-. This includes LC Charges and commissions paid to the Indian banks. These expenses are referred to as Usance charges in trade parlance.

14. Mr. Gouda contends that the aforesaid expenses do not constitute "interest" and consequently, the provisions of section 195 of the IT Act were not at all attracted to the present case. In the alternate he submits that even if the aforesaid Usance charges are to be held as "interest", section 195 of the IT Act is not attracted if such Usance charges were paid to the Indian bankers and not to the purchasers abroad.

15. Now Section 2(28A) of the IT Act defines "interest" in the following terms:

"2(28A) - "interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised."

16. Perusal of the aforesaid definition makes it clear that the expression "interest" for the purpose of the IT Act includes any service fee or other charge in respect of any credit facility which is not been utilized. Therefore, on a plain reading of the said clause, the charges paid by the assesses in

respect of the credit facility amount to, interest. Therefore, it is not possible to accept Mr. Gouda's first contention in these appeals.

18. Now in this case, though Usance charges may have been paid to the Indian bankers by way of LC Charges and commission, nevertheless, such payment, is a part of the transaction involving purchase/import of raw material from non-residents. (emphasis added).

19. According to us, issuing bank of the assesses, merely acts as an agent of the assesses. The Usance charges is the income of the non-resident as envisaged in the provisions of section 9(1)(v)(b) read with section 5(2) of the IT Act. Therefore, the provisions of section 195(1) were attracted and the assesseees were obliged to deduct tax at source before making such payment.

20. In similar circumstances, the Gujarat High Court, in the case of Vijay Shipbreaking Corpn. (supra), has held that the assesses was duty bound to deduct tax at source even in respect of bank charges incurred for providing Letters of Credit to foreign sellers.

21. No doubt, the decision of the Gujarat High Court was reversed by the Hon'ble Supreme Court in Vijay Ship Breaking Corpn. v. CIT [2008] 179 Taxman 77/[2009] 314 ITR 309 . However, the Hon'ble Supreme Court, made it clear that such reversal was only because of the amendment which entered force on September 18, 2003, but w.e.f. 1-4-1983. By reason of the said amendment, an explanation was added to Section 10(15)(iv)(c) of the IT Act which provided that Usance interest payable outside India by an undertaking engaged in business of ship- breaking in respect of purchase of a ship from outside India shall be deemed to be the interest payable on a debt incurred in a foreign country in respect of the purchase outside India.

23. This means that the decision of the Gujarat High Court was not really interfered on its intrinsic merit. The interference was only on account of the subsequent amendment which entered force with the retrospective effect. The Gujarat High Court, had taken the view that Usance interest is payable in terms of section 2(28A) of the IT Act and therefore, the provisions of section 195 were clearly applicable to such assesses. If the assesses, failed to deduct tax at source, then, the expenditure so incurred was not entitled to be exempted from the total income of such assesses.

24. In this case, the assessment officer, has quite correctly held that Usance means the allowable period of time permitted by the customs between the date of bill and its payment. The Usance of a bill varies between countries. The charges paid for Usance period are called Usance charges. Usance

charges in import purchases are paid on a letter of credit. Usance letter of credit is a letter of credit that requires beneficiary to present as a necessary document. Therefore, the ultimate beneficiary of the Usance charges is the supplier of goods/ services.

25. Since in the present case, the assessee imported the raw material for its consumption based on a letter of credit and paid the Usance charges, the beneficiary of such charges is the foreign seller. The issuing bank of the assessee has merely acted as an agent of the assessee. The Usance charges therefore constitute income of a non-resident as envisaged in the provisions of section 9(1)(v)(b) read with section 5(2) of the IT Act. Therefore, the provisions of section 195(1) of the IT Act were attracted and the assessee were obliged to deduct tax at source failing which, such expenditure, could not be exempted under section 40(a)(i) of the IT Act.”

(ii) Similarly, the Hon'ble ITAT Panaji Bench in the case of *Asstt. CIT vs. Indian Furniture products Ltd. [2015] 53 taxmann.com 440 (Panaji - Trib.)* held that usance charges paid to non-resident on import purchase by the assessee would be considered as interest and liable to TDS. In this case, the assessee was engaged in manufacturing of wooden doors, frames, furniture etc. and trading in timber. It paid usance charges on import purchases. It was held by the Hon'ble ITAT that usance charges are interest within the provisions of section 2(28A) and income had accrued in India. Therefore, section 195 was clearly applicable and the assessee had committed default by not deducting TDS.

(iii) Moreover, the Hon'ble ITAT Panaji Bench in the case of *Asstt. CIT vs. Bhawani Enterprises [2014] 52 Taxmann.com 489/[2015] 152 ITD 339 (Panaji - Trib.)* held that usance charges paid to non-resident on import purchase by assessee would be considered as "Interest" Income.

(iv) The Hon'ble ITAT Mumbai Bench also in the case of *Uniflex Cables Ltd. v. Dy. CIT [2012] 19 taxmann.com 315/136 ITD 374* held that "Usance interest" paid to non-residents by Indian company for availing credit under irrevocable letter of credit for delayed payments for purchase of raw materials is interest under section 2(28A), being an income deemed to have accrued or arisen in India under section 9(1)(v)(b).

3.7. Since the ld. A/R had also mentioned the case of *M/s. Bawa Paulins Pvt. Ltd. (supra)* in support of his contention that the verdict in the Hon'ble Gujarat High Court case (*supra*) was no longer good law, it is necessary to briefly mention that the *M/s. Bawa Paulins Pvt. Ltd. (supra)* case is on entirely different issues and thus, has drawn a conclusion which is not relevant for deciding the issue at hand. The head notes in the said case may be extracted for reference:

“Consumer Protection - Sale of Goods through ‘Free on Board’ Basis — Quantum of compensation — Appellant during the course of its business entered into a contract with respondent no. 5 for export of goods for a total invoice value of US\$ 31,920 (Rs.13,79,901/-approx.) - Mode of payment was agreed to be through Letter of Credit (LC) against the Forwarder Cargo Receipt (FCR) - The sale of goods was through a ‘Free on Board’ (FOB) contract -Respondent Nos. 1-3 were appointed as forwarding agents to collect goods and forwarding the same — Respondent no. 1 mentioned the port of loading to be Jawaharlal Nehru Post Trust, Bombay instead of FOB, New Delhi on the FCR, which was rectified later on - After shipping goods, the Letter of Credit presented by the appellant could not be honoured on account of discrepancies in the FCR - The appellant neither got the goods back nor did they get any payment in respect of the said goods and therefore the appellant approached the concerned State Consumer Commission — State Commission allowed the complaint and awarded a sum of 13,79,901/- towards loss suffered, 50,000/- for mental agony and 10,000 towards the cost of litigation - National Commission set aside the judgment passed by the State Commission — The National Commission, reduced the compensation to Rs.10,000/- only along with an interest at the rate of 9% p.a. - On appeal, held: It is only after the appellant approached respondent no.1 to issue a certificate/ letter rectifying the error regarding the wrong point of loading, the respondent issued such a certificate/letter mentioning that the shipment was loaded from FOB New Delhi and effected from JNPT Bombay - The State Commission has based its decision that a mistake was committed by the respondent no.1 while issuing the FCR to the appellant - The National Commission has categorically held that there was deficiency in rendering services by the respondent no.1, therefore, the it ought not have reduced the compensation payable to the appellant - National Commission was not right in setting aside the judgment and order passed by the State Commission - Respondents to make the payment as assessed by the State Commission.”

A plain reading of the head notes as well as the judgement itself reveals that there is little, if any, similarity between the facts of the present case and the facts of the case in *M/s. Bawa Paulins Pvt. Ltd. (supra)*.

4. Considering the totality of facts and circumstances and the numerous judicial pronouncements referred to in this order there is no hesitation in holding that the appellant had the responsibility to deduct tax at source u/s 195 of the Act and therefore, the application of Section 40(a)(ia) of the Act has been rightly done by the AO, whose action is upheld. The findings in the impugned order are approved.

5. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open Court on 5th August, 2024.

Sd/-

[Rajpal Yadav]
Vice President

Dated: 05.08.2024

Bidhan (P.S.)

Copy of the order forwarded to:

1. **Eximcorp India Private Limited, 25, R.N. Mukherjee Road, 4th Floor, Suit-C, Kolkata, West Bengal, 700001.**
2. **ACIT, Cir-5(2), Kolkata.**
3. CIT(A)-NFAC, Delhi.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

Sd/-

[Sanjay Awasthi]
Accountant Member

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata