

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'F' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRABHASH SHANKAR, ACCOUNTANT MEMBER**

**ITA No.4511/Mum/2025
(Assessment Year :2017-18)**

Foods and Inns Limited 3 rd Floor, Hamilton House J.N. Heradia Marg Ballard Estate Mumbai- 400 038	Vs.	DCIT, Circle 2(1)(1), Mumbai
PAN/GIR No.AAACF0521C		
(Appellant)	..	(Respondent)

Assessee by	Shri Nitin Kulkarni
Revenue by	Ms. Kavitha Kaushik, Sr.DR
Date of Hearing	25/08/2025
Date of Pronouncement	30/09/2025

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

This appeal has been preferred by the assessee, Foods and Inns Limited, against the order dated 16th June 2025 passed by the National Faceless Appeal Centre (NFAC), Delhi, arising from the assessment framed under Section 143(3) of the Income-tax Act, 1961, for the assessment year 2017-18.

2. The assessee is aggrieved by the disallowance made under Section 40(a)(ia) of the Act in respect of commission paid to overseas agents for procuring export sales and

warehousing charges incurred abroad for storage of goods prior to delivery to overseas customers.

3. The facts in brief are that the assessee is engaged in the manufacture and export of fruit pulps, concentrates and processed vegetables to various international markets. During the year, it paid ₹25,84,396/- as commission to non-resident agents located in the UK, Australia, Netherlands, France, UAE, Hong Kong and Germany. These agents neither had any business operations in India nor any permanent establishment here. Their role was confined to canvassing orders and facilitating export transactions abroad, and payments were made in foreign currency outside India.

4. The assessee further incurred warehousing charges of ₹3,19,64,028/- in Europe for storing its finished goods before distribution to foreign buyers. These warehouses only provided storage facilities outside India. There was no evidence to suggest that they rendered any technical, consultancy or managerial services either in India or abroad.

5. The Assessing Officer, however, held that although the services were rendered outside India, they were “utilised” in India, and hence the sums were deemed to accrue or arise in India under Section 9(1). Referring to Section 195 and relying on an AAR ruling, he concluded that the assessee was under an obligation to deduct tax at source. For failure to do so, he invoked Section 40(a)(ia) and disallowed a sum of ₹4,52,69,641/-.

6. The learned CIT(A), while affirming the disallowance, reasoned that the payments to non-residents were covered by the deeming provisions of Section 9(1). According to him, once commission and warehousing charges partook the character of consultancy, technical or managerial services, they fell within the ambit of “fees for technical services” and were deemed to accrue in India. He thus concluded that the assessee was a defaulter for not deducting tax under Section 195, though he directed the AO to verify the actual figures of commission and warehousing charges claimed.

7. The learned CIT(A) observed as under:

“I have considered the above submission of the appellant with respect to grounds of appeal and related facts and gone through the AO's observation & decision in assessment order. Considering the entire conspectus of the case I fully agree with the observation and decision of the AO in as much as the amount paid to the non-resident are deemed to arise in India u/s 9(1) and therefore, chargeable to tax in India. Moreover as per assessment order the AO has established that the provisions of Section 9(1) of the Income Tax Act, 1961 would squarely come into place, as soon as commission and warehousing Charges is having an element of Consultancy Technical and Managerial services for which said commission on export sale and Overseas warehousing Charges is paid in as much as Section 9(1) would classify and cover all incomes as accruing and arising in India which partake the character of payment on account of Fee for Technical Services', which in turn, has been defined to include any payment for rendering of any managerial consultancy services rendered, by the non-resident agent.

In view of above, I do not find any infirmity in the order of the AO and resultantly, I have no hesitation in holding that the appellant as defaulter in making TDS on commission on export sale and Overseas warehousing Charges which is required to be deducted u/s 195 r.w.s 9(1)(i) r.w.s 5(2)(b) of the Income Tax

Act 1961 Accordingly I have no hesitation in holding that the impugned additions/disallowances of the AO are based on apropos consideration of facts and law and hence the same does not warrant interference. However the AO is directed to verify the actual payment, as claimed by the appellant regarding export commission paid of Rs. 25,84,396/- in lieu of Rs. 29,76,591/- and actual overseas warehousing charges paid of Rs. 3,19,64,028/- in lieu of Rs. 4,22,93,051/-. Therefore I am of opinion that AO's decision of addition of Rs. 29,76,591/- (25,84,396/- claim of "A") and Rs. 4,22,93,051/- (Rs. 3,19,64,028/-, claim of "A") invoking section 40(a)(ia) of the Act in respect to the appellant, is justified and in accordance with law. Accordingly impugned additions stand confirmed. The ground in this regard is dismissed.”

8. Before us, the learned counsel for the assessee submitted that in earlier years, from assessment years 2013-14 to 2015-16, the Tribunal has already decided this very issue in assessee's favour. It was contended that the income in the hands of the foreign agents is purely business income accruing outside India, taxable here only if they had a business connection or permanent establishment in India, which has not been demonstrated. He further argued that warehousing charges are simple commercial payments for storage abroad and cannot be regarded as fees for technical services.

9. The learned Departmental Representative, on the other hand, placed heavy reliance on the order of the CIT(A). She submitted that the payments made, though remitted abroad, were intrinsically connected with the business carried on in India. By applying the deeming provisions of Section 9(1), the CIT(A) had rightly held that the services partook the character of consultancy and managerial services, thereby falling within

the scope of fees for technical services. According to her, the assessee had failed in its statutory obligation to deduct tax at source, and hence the disallowance under Section 40(a)(ia) was fully justified.

10. We have carefully considered the rival submissions and examined the record. The foundation of Section 195 is that the obligation to deduct tax at source arises only if the payment to the non-resident is chargeable to tax in India. The Hon'ble Supreme Court in GE India Technology Centre (P.) Ltd. has unequivocally held that unless the remittance carries an element of income chargeable under the Act, the payer cannot be saddled with the obligation of deduction. The law thus draws its strength not from the mere fact of remittance, but from the inherent character of the income itself.

11. The commission paid to foreign agents in this case is clearly business income. Business income of a non-resident becomes taxable in India only if it is linked to a business connection or a permanent establishment within India. Neither the Assessing Officer nor the learned CIT(A) have shown any such presence. The foreign agents carried out their business entirely overseas, their efforts culminated abroad and their remuneration was received abroad. Business income follows the situs of the business activity, not the location of the payer. It is the soil in which the enterprise operates that gives rise to the income, not the country from which payment is remitted. To treat such receipts as taxable in India, without territorial nexus, is to stretch the charging provision beyond its legitimate reach.

12. Equally, the attempt to describe such commission as fees for technical services is misconceived. The statutory definition of FTS contemplates the rendering of managerial, consultancy or technical services. These terms presuppose the imparting of specialised knowledge or the provision of considered advice. A foreign agent who merely canvasses orders abroad does not advise on management strategy, impart technical know-how, or provide consultancy. He performs a commercial function of his own, engaging with prospective buyers and securing business for the assessee. To regard such activity as FTS is to confuse what is essentially the fruit of enterprise with what the law contemplates as the imparting of expertise. Business income and FTS are two distinct statutory categories, and their boundaries cannot be blurred by interpretative elasticity.

13. The warehousing charges, too, must be seen in their proper light. The assessee engaged warehouses in Europe to store its exported goods before delivery to customers. Warehousing is an arrangement for safekeeping of goods. It involves providing space, not providing skill. It is the renting of facilities, not the rendering of advice. No consultancy, technical expertise, or managerial oversight is involved in this process. The warehouse operator earns business income in the country where it operates. Absent a permanent establishment in India, there is no jurisdictional basis to tax such income here. To elevate mere storage into a technical service is to inflate a simple commercial transaction into something it is not, and never was intended to be.

14. Both categories of payments, namely commission to foreign agents and warehousing charges abroad, are therefore in the nature of business income accruing outside India. They are not fees for technical services, nor are they income deemed to accrue in India. Once the payments are not chargeable to tax in India, the obligation under Section 195 does not arise, and the disallowance under Section 40(a)(ia) cannot be sustained.

15. This issue has already been considered and decided by the Tribunal in assessee's own case for assessment years 2013-14 to 2015-16. Vide order dated 21st February 2022, the co-ordinate bench held that such payments were not taxable in India in absence of a permanent establishment and that the disallowance made under Section 40(a)(ia) was liable to be deleted. For ready reference, the relevant findings are as under:

"12. With regard to Ground No. 4 which is in respect of s 40(a)(i) of the Act relating to payments of export commission to foreign agents and overseas warehousing charges to warehousing agents, the relevant facts are, during the assessment proceedings, the Assessing Officer observed that assessee paid on ₹.2,38,82,578/- towards overseas agent's commission to foreign agents and paid ₹.6,11,24,190/- towards overseas warehousing charges. According to Assessing Officer, payments were made out of India, the provision of [section 195](#) of the Act are attracted. Assessee was liable to deduct tax on the payments, accordingly, disallowed the expenses claimed [u/s.40\(a\)\(i\)](#) of the Act. Aggrieved assessee preferred an appeal before the Ld.CIT(A). Ld.CIT(A) after considering the submissions of the assessee observed that in earlier assessment years i.e. A.Y. 2004-05, 2006-07 Assessing Officer disallowed similar disallowances and the then CIT(A) allowed the issue in favour of the assessee and the

department has not filed any appeal against those orders. Ld.CIT(A) by relying in the case of Hon'ble Jurisdictional High Court order in the case of Sesa Resources Ltd., allowed the grounds raised by the assessee. Aggrieved revenue is in appeal before us.

13. Considered the rival submissions and material placed on record, we observe from the record that assessee has paid foreign agent commission and warehousing charges to the parties in Holland. Since the payments were relating to services rendered outside India and service providers are non-residents, who do not have any permanent establishment in India. The various courts have held that before effecting TDS one of the aspects to be examined is whether such income is taxable in India in terms of [Income-tax Act](#). The issue in this case is very clear that none of the payments remitted outside India are taxable in India. Therefore, we conclude the decision in favour of the assessee and against the revenue. Accordingly, ground raised by revenue is dismissed.”

16. In view of the foregoing discussion, and respectfully following the co-ordinate bench decision in assessee's own case, we hold that the disallowance sustained by the learned CIT(A) cannot be upheld.

17. In the result, the appeal of the assessee is allowed.

Order pronounced on 30th September, 2025.

Sd/-

**(PRABHASH SHANKAR)
ACCOUNTANT MEMBER**

Mumbai; Dated 30/09/2025
KARUNA, sr.ps

Sd/-

**(AMIT SHUKLA)
JUDICIAL MEMBER**

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai