

**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW 'A' BENCH, LUCKNOW
BEFORE SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER**

ITA Nos. 356 & 357/LKW/2024

A.Ys. 2014-15 & A.Ys. 2015-16

Superhouse Limited, 150 Feet Road, Jajmau, Kanpur-208010	vs.	The Commissioner of Income Tax International Taxation-3, Delhi
PAN: AABCS9328K		
(Appellant)		(Respondent)

Assessee by:	Sh. G.C. Srivastava, Adv & Sh. Kalrav Mehrotra, Adv
Revenue by:	Sh. R.K. Agarwal, CIT DR
Date of hearing:	03.12.2025
Date of pronouncement:	25.02.2026

ORDER

PER NIKHIL CHOUDHARY, A.M.:

These two appeals have been filed by the assessee against the orders of the CIT, (International Taxation)-3, Delhi passed under section 263 of the Act for the A.Ys. 2014-15 and 2015-16, both dated 29.03.2024, wherein the Id. CIT has set aside the earlier orders of the Assessing Officer for making of fresh orders in accordance with the directions issued by her. The grounds of appeal are as under:-

ITA No. 356/LKW/2024

"1. BECAUSE, on the facts and circumstances of the case and in law, the Ld. CIT has erred in assuming jurisdiction under Section 263 of the Act and in doing so, has sought to substitute his opinion with the order under Section 201(1)/201(1a) passed after undertaking extensive and detailed consideration of the issue by the ITO (TDS).

2. BECAUSE, on the facts and circumstances of the case and in law, the Ld. CIT has erred in assuming the jurisdiction under Section 263 of the Act without appreciating that the order under Section 201(1)/201(1a) passed by the ITO (TDS) was unerring and in consonance with the settled principles of law.

3. BECAUSE, on the facts and circumstances of the case and in law, the Impugned Order while premised on an illegal assumption of jurisdiction, further suffers from non-application of mind since the submissions of the Assessee have not been considered [as illustrated infra].

4. BECAUSE, on the facts and circumstances of the case and in law, the Ld. CIT has failed to examine the agreements entered into by the Assessee with various subsidiaries which make it unequivocally clear that the commission paid on the sales to foreign subsidiaries, could not be said to accrue or arise in India.

5. BECAUSE, on the facts and circumstances of the case and in law, the Ld. CIT has erred in arriving at the finding that the commission on sales paid to foreign subsidiaries constituted Fee for Technical Services ("FTS") on which tax was liable to be deducted at source.

6. BECAUSE, without prejudice to what has been stated above, the Ld. CIT has failed to even consider much less examine the relevant clauses of the various Double Taxation Avoidance Agreements ("DTAA") entered into with the countries of which the subsidiaries were resident, which either restricted the scope of FTS or did not provide for taxation of FTS (including managerial services).

7. BECAUSE, on the facts and circumstances of the case and in law, the order dated 29.03.2024 ("Impugned Order") passed by the Ld. Commissioner of Income Tax ("CIT") under Section 263 of the Income Tax Act, 1961 ("Act") is illegal and bad in law.

8. BECAUSE, without prejudice to what has been stated above, the failure of the Ld. CIT to examine the relevant treaty provisions has resulted in rendering the beneficial provisions under Section 90(2A) of the Act, redundant and nugatory.

9. The Appellant reserves the right to add, amend, alter, all or any grounds of Appeal.

ITA No. 357/LKW/2024

"1. BECAUSE, on the facts and circumstances of the case and in law, the order dated 29.03.2024 ("Impugned Order") passed by the Ld. Commissioner of Income Tax ("CIT") under Section 263 of the Income Tax Act, 1961 ("Act") is illegal and bad in law.

2) BECAUSE, on the facts and circumstances of the case and in law, the Ld. CIT has erred in assuming jurisdiction under Section 263 of the Act and in doing so, has sought to substitute his opinion with the order under Section 201(1)/201(1a) passed after undertaking extensive and detailed consideration of the issue by the ITO (TDS).

3) BECAUSE, on the facts and circumstances of the case and in law, the Ld. CIT has erred in assuming the jurisdiction under Section 263 of the Act without appreciating that the order under Section 201(1)/201(1a) passed by the ITO (TDS) was unerring and in consonance with the settled principles of law.

4) BECAUSE, on the facts and circumstances of the case and in law, the Impugned Order while premised on an illegal assumption of jurisdiction, further suffers from non-application of mind since the submissions of the Assessee have not been considered [as illustrated infra]

5) *BECAUSE, on the facts and circumstances of the case and in law, the Ld. CIT has failed to examine the agreements entered into by the Assessee with various subsidiaries which make it unequivocally clear that the commission paid on the sales to foreign subsidiaries, could not be said to accrue or arise In India.*

6) *BECAUSE, on the facts and circumstances of the case and in law, the Ld. CIT has erred in arriving at the finding that the commission on sales paid to foreign subsidiaries constituted Fee for Technical Services ("FTS") on which tax was liable to be deducted at source.*

7) *BECAUSE, without prejudice to what has been stated above, the Ld. CIT has failed to even consider much less examine the relevant clauses of the various Double Taxation Avoidance Agreements ("DTAA") entered into with the countries of which the subsidiaries were resident, which either restricted the scope of FTS or did not provide for taxation of FTS (including managerial services).*

8) *BECAUSE, without prejudice to what has been stated above, the failure of the Ld. CIT to examine the relevant treaty provisions has resulted in rendering the beneficial provisions under Section 90(2A) of the Act, redundant and nugatory.*

9) *The Appellant reserves the right to add, amend, alter, all or any grounds of Appeal."*

2. The facts of the case are that the ld. Assessing Officer passed orders under section 201(1)/201(1A) in respect of the assessee for both assessment years on 29.09.2021. He noted that the assessee was engaged in the manufacturing and export of finished leather from Raw Skin Hides, leather products from finished leather, Textile Garments and animal feed. It was noticed that the assessee had paid commission on export sales during the F.Y. 2013-14 amounting to Rs. 28,21,14,677/- and during the F.Y. 2014-15 amounting to Rs. 23,72,46,226/- without deducting any tax at source. The ld. AO records that during proceedings initiated under section 201(1)/201(1A), the assessee was asked to file complete details of tax of tax deducted on commission alongwith documentary evidence and copy of TDS statement uploaded on the system. The assessee furnished relevant details alongwith documentary evidences in respect of the TDS deducted under the various heads and after going through the replies and details filed by the assessee, the ld. AO concluded the proceedings under section 201(1)/201(1A) of the I.T. Act, 1961 without any change or addition in the matter.

3. Thereafter, the files were perused by the Id. CIT, (International Taxation) and the Id. CIT observed that there was no doubt that the commission paid to various commission agents and foreign wholly owned subsidiaries had accrued / arisen in India as per the provisions of section 9(1) of the Act as the same was in connection with services rendered to the assessee company for procuring the orders of foreign customers. Accordingly, the CIT, (International Taxation) issued a notice under section 263 of the Act, asking the assessee to show cause as to why the orders should not be presumed to be erroneous and prejudicial to the interest of Revenue, on account of the fact that the assessee had not deducted the tax at source on the commission paid to its subsidiaries incorporated abroad for the different services rendered for the procurement of orders of different types of items, which were manufactured or to be manufactured by the assessee company in India, on the basis of specific orders procured by the subsidiaries and others. The Id. CIT, (International Taxation) pointed out, that the commission had not only been paid for introducing a foreign buyer, but had also been paid for marketing, market survey, study, identifying the item required in the local market, research for the design of the item required in the area and collection of the entire bill amount from the purchaser. Thus, the Id. CIT, (International Taxation) opined that the receipts of the foreign agent that were sourced in India were taxable in India as, "fees for technical services" as per domestic law as well as in accordance with the DTAA with the different countries. In response to this notice, the assessee submitted that the issue of commission payments to agents and overseas subsidiaries had been subject matter of consideration for more than 10 years preceding this assessment year and there had been adjudication of commission paid to subsidiaries in transfer pricing orders also, which had been regular feature from A.Y. 2005-06 onwards. The query raised by the AO during the scrutiny proceedings had been answered to the satisfaction of the AO. Simply because the same was not reflected in the assessment order, a conclusion could not be drawn by the Commissioner that no proper inquiry with respect to the issue had been made by the Assessing Officer so as to enable her to assume jurisdiction under

section 263 of the Act. It was further submitted that orders where two views were permissible in law, could not be treated as erroneous and prejudicial to Revenue, unless the view taken was completely unsustainable in law. Furthermore, an audit objection could not be the sole basis for initiating a proceeding under section 263. On the merits of the case, it was submitted for a particular transaction of commission to fall under the scope of section 195 of the Income Tax Act, 1961 r.w.s. 9(1)(vii) of the Income Tax Act, 1961, it had to be adjudicated on the facts of the case and not on a general principle. Fees for technical services included managerial services, if managerial services were being offered. Another aspect to be considered was that there were Double Taxation Avoidance Agreement with countries which laid down that in case of bilateral agreements, the treaties would override the provisions of the I.T. Act, 1961. As per the said treaties with various countries in which the assessee had commission transactions, it was required that the other state would only have a right of taxing the transaction, if the technical service entailed technology transfer. It was further submitted that the conclusion drawn by the Id. CIT, (International Taxation) that commission had been paid not only for introducing the foreign buyer but for marketing, market survey, study, identifying the item required in the local market, research or design of the item required in the area, was without any proof or evidence. The assessee also filed copies of the transfer pricing orders passed by the Transfer Pricing Officers and the subsequent appeal orders in respect of those transfer pricing orders in support of its claim and accordingly requested that the proceedings initiated under section 263 of the I.T. Act, 1961 for A.Ys. 2014-15 and 2015-16 may be dropped.

4. However, the Id. CIT, (International Taxation) was not in agreement with the submissions of the assessee. She held that as per Explanation 2(a) and 2(b) of section 263 orders that had been passed without making enquiries or verification which ought to have been made or which had been passed by allowing relief without inquiring into the claim were deemed to be erroneous in view of the provisions of the said explanation. In the present case, as the order had been passed without conducting inquiries relevant to ascertain the facts and the

taxability of the income, therefore, the said order was erroneous and prejudicial to the interest of Revenue as per such provision. She further held that the argument regarding change of opinion or replacement of view did not stand to reason in the present case, because for that there should be an opinion or the forming of a view by the AO, and in the instant case, there was none. In the instant case, the AO had completely overlooked the legal provisions dealing with taxation of income in the hands of non-resident assessee under the provisions of the Income Tax Act and the relevant DTAAs. Any order that was passed without gathering relevant facts, including necessary inquiries / investigation was erroneous. Even where facts had been disclosed by the assessee, the order of assessment could be revised if the correct provisions of law had not been examined. The Id. CIT, (International Taxation) cited several case laws in support of these contentions. Therefore, she held that the proceeding under section 263 had been correctly initiated.

5. On the merits of the case, the Id. CIT, (International Taxation) held that commission payment made to the assessee's foreign subsidiaries, accrued or arose in India hence there was liability to deduct tax at source in India. It was pointed out that the income was said to accrue or arise, when the right to receive the income came into existence. No doubt the agents had rendered the services abroad and solicited orders, but the right to receive the commission arose in India, when the order was executed by the assessee in India. Thus, the fact that the agents had rendered services abroad were wholly irrelevant for the purposes of determining the situs of their income. Furthermore, she held that it was quite evident that the services rendered by the assessee company were in the nature of fee for technical services (FTS) covered within the provisions of section 9(1)(vii)(b) of the Act. She held that as commission payments had been made for promotion of sales, which includes a variety of activities such as market prospecting, market research, marketing, researching the requirements of the market regarding modalities of item in demand and inputs were required from the assessee company regarding the manufacturing of goods and products of a certain design and modalities which

were in demand in the foreign markets, that constituted utilization of the services of the subsidiaries in India. Furthermore, the Indian Entity had supplied, “finished leather and leather goods”, which demonstrated that the technical and consultancy inputs given by the subsidiaries were utilized in India by the parent entity to manufacture the goods which were completed and finalized in India. The Id. CIT, (International Taxation) placed reliance on the decision of the ITAT Delhi in the case of Maruti Udyog Limited vs. ADIT (Circle)(2), International Taxation, New Delhi, wherein the ITAT had held that payments made to a company of France for conducting impact test on cases sent by it to the company in France, the reports of which were utilized in India, amounted to rendering of technical services/information by the French company to the assessee and therefore, the services rendered by the French company would be in the nature of technical services and payments made were taxable in India. She further pointed out that the Courts had held that even if services were, “rendered” outside India, they could be, “utilized” in India. For this proposition, she placed reliance on the decision of the Hon’ble Andhra Pradesh High Court in the case of Elkem Technology vs. Deputy Commissioner of Income Tax (DCIT) 250 ITR 164 and the Hon’ble Madras High Court in the case of Regen Powertech (P.) Limited v. DCIT-IT-2(1) 2019 110 taxman.com 55 (Madras) and the decision of the AAR, New Delhi in the case of Steffen Robertson and Kirsten Consulting Engineers & Scientist vs. CIT. The Id. CIT held that since the Indian parent company i.e. M/s Superhouse Limited was making payments in connection with services utilized by it, the source of the income was in India. She placed reliance on the decision of the Hon’ble High Court in the case of CIT vs. Havells India Limited (2012) 21 taxman.com 476 (Delhi) wherein the Hon’ble Delhi High Court had held that in order to fall within the second exception provided in section 9(1)(vii)(b) of the Act, it was the source of the income and not the source of the receipt that should be situated outside India. In that case, since the export activity had taken place or fulfilled in India, the source of the Income was located in India and not outside and the mere fact that export proceeds emanated from persons situated outside India, did not constitute source

of income outside India. The Hon'ble Court had held that the fee for technical services was taxable in the hands of the US Company in India and the assessee was liable to deduct tax at source. The ld. CIT(IT) also held that another aspect was the accrual of income. She held that since the export contracts were concluded in India, the manufacturing activity was located in India, the source of income was created at the moment when the export contracts were concluded. Thus, the receipt of sale proceeds emanating from outside India were only the source of the monies received. The income component of the monies or export received was located or in India. She pointed out that the Court had held that to get the benefit of the second exception in section 9(1)(vii)(b), the assessee had to show that the technical services were not utilized for its business activities of production in India but utilized in a business carried on out outside India. In the present case, since the source of income of the assessee was located in India, hence the impugned income of the agents and subsidiaries was within the provisions of section 9(1)(vii)(b) and were deemed to arise and accrue in India as per section 5(2) r.w.s. 9(1)(vii) of the Act. Therefore, she held that the assessee was liable to deduct the tax at source on the commission paid as per the provisions of section 195 of the Act.

6. The ld. CIT, (International Taxation) rejected reliance upon the transfer pricing orders on the grounds that the issue before her was not, "adjustment of pricing" but on characterization of income and subsequent TDS liability. Furthermore, she noted that as per, "Agency Contract" the subsidiaries companies worked for the assessee and therefore, because the control and management of the subsidiary company was situated wholly in India, the income of the subsidiary was covered under section 5(1) r.w.s. 66 of the Act. Furthermore, the perusal of the agency agreement indicated that substantial functions, assets and risks were being performed by the Indian parent entity on behalf of the subsidiary, indicating that the control and management of the subsidiary was situated wholly in India. Thus, the nature of the services were in the nature of FTS and ld. CIT, (International Taxation) held that the assessee should be treated in default for the commission

paid to the foreign subsidiaries and also directed the AO to examine the terms and contracts with the other foreign commission agents and if their contracts were found to be on the same footing as the contracts of the assessee with subsidiaries to treat them in the same manner. Accordingly, holding both the orders to be erroneous and prejudicial to Revenue, she set them aside and directed the AO to frame fresh orders considering her observations.

7. The assessee is aggrieved by these orders passed by the Id. CIT, (International Taxation), Delhi-3 and has accordingly come in appeal before us. Sh. G.C. Srivastava, Advocate and Sh. Kalrav Mehrotra, Advocate appeared on behalf of the assessee and argued the matter. It was submitted that the case of the assessee was identical to the case of Model Exims, where the Hon'ble Allahabad High Court in the case of CIT, Central vs. Model Exims (2014) 42 taxman.com 446 (Allahabad) had held that where the assessee appointed foreign agents for securing export orders, the explanation added to section 9(vii) by the Finance Act, 2010 w.e.f. 1.06.1976 was not applicable, in view of the fact that the agents had their offices situated in foreign countries and did not provide any managerial services to the assessee. The Id. AR pointed out that in the said case, the Hon'ble High Court had held that the agreement of procuring orders would not involve any managerial services. The agreements did not show the applicability or requirement of any technical expertise as functioning as a selling agent, designer or any other technical services. The Hon'ble High Court had reproduced the observations of the Id. CIT, (International Taxation), wherein the CIT, (International Taxation) had held that the AO had not brought on record any material which could demonstrate that these agents had been appointed as selling agents, designers and technical advisors and in the absence of any such evidence, this observation of the AO was mere conjecture and therefore, no cognizance of the same could be taken. Accordingly, the Id. AR submitted that the facts of the assessee's case being exactly similar in the absence of any evidence to show that the foreign subsidiaries were doing anything more than simply procuring, there was no liability fastened upon the assessee to deduct tax at source holding their services to be technical services.

The Id. AR also invited our attention to the decision of the ITAT Delhi 'I' in the case of M/s Giesecke & Devrient India Pvt. Ltd., vs. DCIT in ITA No. 3865/DEL/2015 for the A.Y. 2010-11, wherein the Hon'ble ITAT had placed reliance on the earlier decision in the case of ACIT vs. Evergreen International Limited (2018) 91 taxman.com 111 (Delhi-Trib), wherein it had been held that commission paid by a nonresident from outside India had been held that to not be in the nature of fee for technical services. The Hon'ble Tribunal had held that as per ordinary business practices, managerial services, covered services rendered in performing in management functions which related to running a business or handling of manpower or related affairs but could not cover the services of foreign agents of procuring export orders. Thus, the process of procuring orders by non-residents could not be termed as managerial services which could fall under fee for technical services as defined by Explanation-2 below section 9(1)(vii) of the Act and furthermore, after considering the explanation inserted below section 9(2), the Tribunal had held in the case of M/s Giesecke & Devrient India Pvt. Ltd., vs. DCIT (supra), that the payment for procuring of export sale order for Indian taxpayer by any foreign entity from outside India could not be held to be a fee for technical services.

8. The Id. AR, thereafter drew our attention to page 199 of his paper book which contained a summary submission, that for the A.Ys. 2006-07, 2007-08, 2008-09, 2011-12 and 2012-13, the case of the assessee company had been assessed under section 92CA(3) of the Income Tax Act, 1961 by the Transfer Pricing Officer (TPO) in which the TPO had examined the payment to foreign wholly owned subsidiaries and accepted that the nature of the transactions with the foreign wholly owned subsidiaries was "Commission" and not fees for technical services. The Id. AR submitted that the income of the foreign subsidiary accrues and arose abroad. He referred to the decisions of the Hon'ble Gujarat High Court in the case of PCIT vs. Komal Amin Exports (P.) Ltd. (TA No.1397 & 1398 of 2018 wherein it had been held that when commission paid to non-resident agents was neither received or deemed to be received in India nor accrued or deemed to be accrued

in India, then there was no obligation on the assessee to deduct TDS under section 195(1) of the I.T. Act and consequently the provisions of section 40(a)(i) would not apply. The Id. AR also referred to the decision of the Hon'ble ITAT Jaipur in *Modern Threads India Limited vs. ACIT* (ITA No. 198/JP/2019 and 119/JP/2019 wherein it had been held that payment of sales commission by the assessee to the non-resident agents for services rendered outside India will not fall in the category of income received or deemed to be received in India or accrue or arisen or deemed to accrue or arise in India. Hence, there would be no liability to deduct tax at source under section 195(1) of the Income Tax Act and provisions of section 40(a)(i) of the I.T. Act could not be invoked.

9. The Id. AR thereafter invited our attention to pages 62 and 63 of his paper books which revealed the nature of the agreement signed between the assessee and a foreign commission agent. Taking us through the said agency agreement, the Id. AR submitted that clause 5 of the said agency agreement only referred to handling of issues relating to the orders procured. The foreign commission agents were not managing the business of the principal in the foreign country and to bring their income to tax within India, either they needed to have a permanent establishment or the nature of the service had to be one of handling the business of the principle in the foreign country. The Id. AR submitted that the perusal of the agency agreement between the assessee its wholly owned subsidiaries were also on similar lines. The wholly owned subsidiaries were only to promote sales of finished leather and leather goods as advised by the assessee and to obtain orders for the assessee from customers. They were responsible for realizing the full value of the bill raised on customers within the due date and to ensure that the consignment were as per the terms and conditions of the contract / order. Any complaints were to be settled by them after approval from the assessee. Thus, these services which were in the nature of procurement and supply of export orders, could not be held to be managerial services that would render the payments to them as fees for technical services and accordingly could not be any liability upon the assessee to deduct tax at source. Accordingly, the Id. AR

submitted that before a payment could be classified as fee for technical services, one had to look at the explanation and examine whether the service rendered fell in the category of managerial, technical or consultancy services.

10. The ld. AR further submitted that it was incorrect to hold that the AO had not made any inquiry. The detailed submission made by the assessee before the AO was available from pages 196 to 200 which had been submitted alongwith annexures and the AO had examined all these materials before coming to a conclusion. The ld. AR finally argued that in the show cause notice issued by the ld. CIT, (International Taxation), the ld. CIT, (International Taxation) had mentioned the nature of the service as comprising various market surveys, technical inputs etc., but these were not coming out from the language of the agreement. Thus, these assumptions had been made without any basis and could not be the yardstick to judge the nature of the services rendered by the wholly owned subsidiaries or the foreign commission agents. Accordingly, the ld. AR submitted that the orders of the ld. CIT, (International Taxation) may kindly be set aside as the assessee was not liable to deduct tax at source on commission payments made to owned subsidiaries or the foreign commission agents for procurement of work orders.

11. On the other hand, Sh. R.K. Agarwal, ld. CIT DR pointed out that the issue at stake in the present appeal was whether the order under section 263 was right or whether it was wrong. He pointed out that the AOs order was reflective of the fact that no enquiries had been done as required. The question of forming views only arose once the views had been formed and therefore, it could not be said that the CIT was substituting her view for the view of the AO because in the instant case, there was no view formed by the AO. The ld. DR read out from para 4 of the order of the ld. CIT, (International Taxation) wherein the CIT, (International Taxation) had recorded a clear finding that the AO had erred in accepting the claim of the assessee. He further referred us to para 8.2.4 of the ld. CIT's, order which discussed the nature of service rendered by the wholly owned subsidiaries and

pointed out that the same could be regarded in the nature of managerial services. The Id. CIT DR thereafter took us through the order of the Id. CIT, (International Taxation) and specifically invited our attention to clause 1(i) to section 9 of the Income Tax Act which held that all income accruing or arisen whether directly or through or from any business connection in India would be income that was deemed to be accrue or rise in India and because the wholly owned subsidiaries had a “business connection” with the assessee company, therefore, the commission received by them from services rendered outside India would be deemed to be income that accrued and arose in India, since the source of the income was India, billing was in India, manufacturing was in India and export was from India. Hence, the activity was clearly covered under the provisions of section 9(1)(vii)(b) and the Id. CIT, (International Taxation) was justified in revising the assessment under section 263 and ordering that the earlier order under section 201/201(1A) be done afresh, after withholding the due tax under section 195.

12. We have duly considered the facts and circumstances of the case. The first issue which we must address is whether the Id. CIT, (International Taxation) was justified in assuming jurisdiction under section 263 by invoking the provisions of Explanation 2(a) and Explanation 2(b). We noticed from the paper book that has been submitted by the assessee that on 3.03.2021, the AO issued notices in connection with the proceedings under section 201(1)/201(1A) of the Income Tax Act for both assessment years 2014-15 and 2015-16. In the said notices, the AO clearly mentioned that the assessee had made payments of, “commission on sales” to foreign parties during the relevant assessment year and not deducted tax at source. The assessee was therefore, required to show cause as to why it should not be treated as an assessee in default and in view of the above, it was required to submit;

a. Copy of the relevant agreements / invoices which were the basis of remitting the money.

- b. Copy of Form No. 15CA / CB or order under section 195(2)/195(3) or certificates under section 197(1) of the Income Tax Act, 1961.
- c. Copies of profit/loss account and balance-sheet.
- d. Copies of ledgers of all foreign parties to whom payment of commission on sales were made during the year under consideration.
- e. A note on its business activities with specific focus to such transactions.

We further notice that on 16.03.2021, the assessee submitted a detailed reply to the Assessing Officer explaining why it had not deducted TDS on commission payment made on export sales, under section 195 of the Income Tax Act, 1961. In course of the same, it quoted the legal provisions. Alongwith this reply, the assessee submitted copies of agreement with Foreign Commission Agents alongwith CDX forms and copies of export invoices on which commission had been remitted to agents, copies of balance-sheet and profit and loss account for the F.Ys. 2013-14 and 2014-15 and also copies of earlier orders passed under section 143(3) and also under section 201(1)/201(1A), where it pointed out that these issues had been examined.

13. It is seen that subsequent to the filing of this reply, the AO issued a further show cause notice on 24.08.2021 in which it was pointed out that the assessee had not submitted the entire details of commission paid to different entities date-wise and had also not submitted the amount of commission on which TDS had been deducted. In response to these notices, the assessee furnished another reply on 31.08.2021 in which the details were submitted and legal arguments on the necessity to deduct or otherwise were also furnished. Furthermore, copies of agency agreement and Declaration Form from commission agents that they were not having any permanent establishment in India were furnished. Various case laws were also furnished. It was further pointed out that the assessee had been assessed under section 143(3) of Income Tax Act for the A.Ys. 2010-11, 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16 in which the AO, after having examined

the books of the assessee company had accepted the nature of transactions with Foreign Commission Agents as commission. It was further pointed out that the assessee had also been assessed under section 92CA(3) in which the TPO had examined the payment to foreign WOS and accepted the nature of transactions with foreign wholly owned subsidiaries was, "commission". Copies of all these orders were enclosed. Thereafter, another reply was filed by the assessee on 8.09.2021. In response to the said show cause notice dated 24.08.2021 wherein the assessee submitted a response to the query of the AO that in the case of ITO vs. M/s Device Driven (India) Pvt. Ltd., the ITAT Cochin Bench had held that the assessee would be liable to deduct tax at source on sales commission made to its non-resident Director for rendering services outside India and in response to the same, the assessee furnished the order of the Hon'ble Kerala High Court in respect of that assessee in ITA No. 257 of 2014, which was to the contrary and reiterated the legal submissions. It also distinguished the case of Perfetti Van Melle Holding B.V., Netherlands in AAR No.869 of 2010, which had been confronted to it by the AO. It furnished the details of commission paid / payable to different entities and reiterated that since the commission on sale was not taxable in the hands of foreign WOS and Foreign Commission Agents in India, they were not liable to deduct tax at source. The assessee submitted a further reply on 17.09.2021 wherein it furnished a response to the order of the AAR in the case of Shell Technology India P. Ltd. in AAR No. 833 of 2009 and distinguished its case from the said order. It also pointed out to the AO, that there was an error in accounting for commission to Bricks Industrial Footwear as commission to other Foreign Commission Agents instead of commission on sales to foreign wholly owned subsidiaries.

14. Thus, it is very evident from a perusal of the questionnaires issued by the AO and the replies furnished by the assessee that the ld. AO examined the issue in great detail before deciding that the assessee was not required to be treated in default on account of the payment of commission made on sales to the wholly owned subsidiaries or the Foreign Commission Agents. The fact that the details of these enquiries were not mentioned in the assessment order in great detail, cannot

be a ground to assume that the said enquiries did not take place. Accordingly, the observation of the Id. CIT, (International Taxation) that the order was passed without conducting enquiry relevant to ascertain the facts of the case and the taxability of the income is clearly not in accordance with the facts of the case. Neither could it be said that the order had been passed without making enquiries or verification which ought to have been made, nor could it be said that the order had been passed to allow relief without enquiring into the claim. Accordingly, the assumption of jurisdiction by the Id. CIT, (International Taxation) by invoking the Explanation 2(a) and 2(b) is held to be without justification in view of the facts of the case, as narrated above.

15. The next issue which we must examine is whether the commission to Foreign Commission Agents (including wholly owned subsidiaries) was in the nature of fees for technical services on which tax was required to be deducted under section 195(1). We have perused the agency agreements concluded by the assessee with its wholly owned subsidiaries and also with some of the Foreign Commission Agents. Perusal of the agency agreement with the wholly owned subsidiaries show that the foreign owned subsidiary is required to promote sales of footwear and other products in the country in which it is based and to obtain orders for the assessee from its customers. The wholly owned subsidiary is responsible for ensuring delivery of consignment to the customers as per terms and conditions of the contract, resolving disputes relating to the same and realizing the full value of the bill raised on the customer within due time. For these services, the agency would receive a commission of 10% of the full value of the bill against the orders that had been booked by them. The Hon'ble Allahabad High Court considered a similar issue in the case of CIT, Central vs. Model Exims (2014) 42 taxman.com 446 (Allahabad). In that case, the assessee was engaged in the business of manufacture and export of finished leather, shoe uppers and leather products. Its main business being export, it had to take the service of foreign agents, whose secured export orders and helped in execution of such business. For the services rendered by the foreign agents, they were paid commission in foreign

exchange by remitting the amount through the bank. In that case the AO held that as a selling agent, the agent had to have managerial acumen and therefore was hit by the provisions of section 195 r.w.s. 9(1)(vii). The ld. CIT(A) (IT) held that the provision of section 9(1)(vii) deals with fee for technical services and has to be read in that context. As the income of the non-resident agent was not taxable in India since it was not received in India nor had it accrued or deem to accrue in India, the ld. CIT(A) held that the assessee was not required to deduct tax at source under section 195. The Hon'ble High Court rejected the plea of the Department that the CIT(A) and ITAT had not considered the explanation added to section 9(1)(vii) by the Finance Act, 2010 w.e.f. 1.06.1976 and held that the same did not apply to the present case as the agents appointed by the assessee had their offices situated in a foreign country and they did not provide any managerial services to the assessee. Section 9(1)(vii) dealt with technical services and had to be read in that context. The agreement of procuring orders would not involve any managerial services. The agreement did not show the applicability or requirement of any technical expertise as functioning as a selling agent, designer or any other technical services.

16. The question of whether the consideration received by the commission agent could be considered as consideration received for the rendering of managerial or technical services was considered by the ITAT Ahmedabad in the case of DCIT vs. Welspun Corporation Limited (2017) 77 taxman.com 165 wherein it was held that the agent received commission on securing order and not for the provision of services. The reasoning provided by the ITAT was that the amounts that were paid by the assessee to these agents, constituted consideration for the orders secured by the agents and not the services allegedly rendered by them. In a situation where the agent did not render services but still procured the orders, it would be entitled for commission, whereas in a situation where the agent rendered the services but did not procure orders, it would not be entitled for commission. Thus, the event triggering the earnings by the agent was securing the business and not rendition of service but procuring of business. The ITAT pointed

out that as contemporary business models required that the obtaining of orders was invariably preceded by and followed up by several preparatory and follow up activities, the description of the agent's obligations set out such common ancillary activities as well, but that did not override or relegate the core agency work. The consideration that was paid to the agent was based on the business procured as the agency agreements did not provide for any independent, stand alone or separate consideration for these services. It is observed that the agreements of the assessee with the wholly owned subsidiaries and other Foreign Commission Agents, similarly mandate payment obligations on the basis of the full bill value, and not on the basis of any ancillary services provided by the wholly owned subsidiaries or the Foreign Commission Agents.

17. The issue as to whether such services constituted, "managerial services" have also been analyzed by the Mumbai ITAT in the case of Linde A.G. vs. ITO (1997) 62 ITD 330 wherein the ITAT held that managerial services envisaged adoption and carrying out the policies of an organization as a whole and not just procurement of machinery. In the case of DIT (Intl) vs. Panalfa Autoelektrik Limited (2014) 272 CTR 117 (Del), the Hon'ble High Court held that services rendered in the procurement of export orders etc., cannot be treated as management services or consultancy services provided by the non-resident to the respondent of the services. The non-resident was not acting as a manager or dealing with administration. It was not controlling the policies or scrutinizing the effectiveness of the policies, it did not perform as a primary executor, any supervisory function whatsoever. The Mumbai ITAT explained the differentiation between management and execution in the case of UPS SCS (Asia) Ltd vs. ADIT (2012) 50 SOT 268 wherein it held that managerial services contemplated not only execution but also the planning part of the activity done. If the planning aspect was missing and one had to follow direction from the other for executing a particular job in a particular manner, it could not be said that managerial services were being rendered. In the case of Evolv Clothing Co. (Pvt) Ltd. vs. ACIT (2018) 407 ITR 72 (Mad), the Hon'ble Madras High Court held that payment for research with regard

to need for products was incidental to the job of procuring orders on commission basis and could not be considered as fees for technical service under section 9(1)(vii). Thus, the contention of the Id. CIT, (International Taxation) that the services being performed by the wholly owned subsidiaries and foreign commission agents were in the nature of technical services within the meaning of section 9(1)(vii)(b) is not borne out by the interpretation of the various Courts with regard to the nature of such services and hence could not form the basis for liability to deduct tax at source under section 195(1).

18. Another issue that has been raised by the Id. CIT, (International Taxation) is that the income of the wholly owned subsidiaries/foreign commission agents accrued and arose in India because the export orders were executed by a company in India and thus the services of the foreign subsidiary were being utilized in India. Circular No. 23 of 1969 pointed out that a foreign agent of an Indian exporter operates in his own country and no part of his income arises in India. That Circular has since been withdrawn but there are various judicial precedents which hold that income of such agent could not be considered as accruing or arising in India. The Hon'ble Gujarat High Court in the case of PCIT-2 vs. Komal Amin Export P. Ltd. in RTA No. 1397 and 1398 of 2018 referred to the judgment of the Hon'ble Supreme Court in the case of G.E. Technology Center (P.) Ltd. vs. CIT 193 taxman 234 and held that, where there was nothing on record to show that the overseas agent had any business connection as contemplated under Explanation 2 to section 9 of the Act and no income had accrued to the overseas agent from any property in India, nor had any income accrued from any asset in India or for the transfer of any capital asset situated in India, the income could not be said to accrue and arise in India because the overseas agent was paid by the assessee from India. The Hon'ble High Court held that in this case the source of income for the overseas agent were the services rendered abroad to the assessee by way of searching prospective foreign buyers/clients and the payment was received by them directly in their country. Thus, the services rendered by the non-resident overseas agents had been rendered abroad and only the payment was made by the

assessee from India. In so far as the non-resident overseas agents were concerned, the source of income was the transaction whereby services were offered by them to the assessee by procuring exports sale orders abroad. The overseas agents did not have any permanent establishment or any business connection in India nor was the source of income by means of or by reason of any source of income in India. The Revenue was trying to equate the source of payments with the source of income. The source of income was not the place from where the payment was made, but the place where the transaction which yielded such income had taken place. Since, the source of income were the services rendered by the overseas agent abroad and not the payment made by the assessee, it could not be said that any income accrues or arises to the overseas agent in India as contemplated in section 9 of the Act. In the case of *Wellspring Universal vs. JCIT* (2015) 56 taxman.com 174, the ITAT held that one had to keep in mind the distinction between the accrual of income of the exporter from exports and that of the foreign agent from commission. As a foreign agent of the Indian exporter operated outside India for procuring export orders and further the goods pursuant to such orders were also sold outside India, no part of his income can be said to accrue or arise in India. Therefore, the contention of the ld. CIT, (International Taxation) that the income of the wholly owned subsidiaries accrued or arose in India is not tenable in the light of the aforesaid judgments.

19. It is also been alleged that because the foreign commission agents in the instant case were, “wholly owned subsidiaries” whose management and control vested in India, therefore, they had a business connection with India and since the income to them accrued or arose directly or indirectly from any business connection in India, therefore, the income of those agents were deemed to accrue or arise in India. However, it is seen from Explanation 1(a) of section 9(1)(i) that in the case of a business (other than a business having business connection in India on account of significant economic presence) of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable

to the operations carried in India. Thus, except in the case of business connections on account of significant economic presence, only such part of the income as was reasonably attributable to operations carried out in India could be considered to be income deemed to accrue or arise in India. It is noticed from the agency agreements that no operations of the agent are actually undertaken in India and therefore, it could not result in any attribution of income of the agent as deemed to accrue or arise in India. Consequently, since the wholly owned subsidiary is incorporated in another country and taxable under the statute of that country, and since it has not carried out any operations within India, no liability for deducting TDS under section 195(1) would vest upon the assessee for the commission paid to the wholly owned subsidiary in terms of the agency agreement signed between it and the assessee. In the circumstances, it cannot be held that there was any infirmity in the view taken by the AO in refusing to hold the assessee in default for failure to deduct tax at source on payment of export commission to foreign commission agents. Accordingly, there does not appear to be any basis to revise the aforesaid orders under section 263 and the orders of the Id. CIT, (International Taxation) can therefore, not be upheld. Accordingly, they are quashed.

20. In the result, both appeals of the assessee are allowed.

Order pronounced on 25.02.2026 in the Open Court.

Sd/-
[SUDHANSHU SRIVASTAVA]
JUDICIAL MEMBER

DATED: 25/02/2026

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Copy forwarded to:

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

Sd/-
[NIKHIL CHOUDHARY]
ACCOUNTANT MEMBER

By order
Sr. P.S.