

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'D' BENCH, CHENNAI**

श्री चंद्र पूजारी, लेखा सदस्य एवं श्रीजी. पवन कुमार, न्यायिक सदस्यकेसमक्ष

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER  
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. Nos.2167, 2168 & 2169/Mds/2013  
निर्धारण वर्ष /Assessment years : 2004-05, 2005-06 & 2008-09

The Deputy Commissioner of  
Income Tax,  
Company Circle I(1)  
Chennai 600 034

**(अपीलार्थी/Appellant)**

**Vs.** M/s. AVT MC Cormick Ingredients  
Ltd,  
No. 64,Rukmani Lakshmipathy  
Salai, Egmore,  
Chennai 600 008.

**[PAN AAACA 3217E ]**

**(प्रत्यर्थी/Respondent)**

आयकर अपील सं./I.T.A. No.58/Mds/2015

निर्धारण वर्ष /Assessment year : 2010-2011

M/s. AVT MC Cormick Ingredients  
Ltd,  
No. 64,Rukmani Lakshmipathy  
Salai, Egmore,  
Chennai 600 008.

**[PAN AAACA 3217E ]**

**(अपीलार्थी/Appellant)**

**Vs** The Additional Commissioner of  
Income Tax,  
Company Range -I  
Chennai 600 034

**(प्रत्यर्थी/Respondent)**

Department by

: Shri. A.V.Sreekanth, IRS, JCIT.

Assessee by

: Shri. T. Banusekar, C.A

सुनवाई की तारीख/Date of Hearing

: 23.11.2015

घोषणा की तारीख /Date of Pronouncement

: 19.02.2016

**आदेश / ORDER****PER G. PAVAN KUMAR, JUDICIAL MEMBER:**

The Revenue filed three appeals against the common order of Commissioner of Income Tax (Appeals)-I, Chennai in ITA TR Nos.17 & 18/09-10/A-I and ITA No.713/11-12/A-I dated 24.09.2013 for the assessment years 2004-05, 2005-06 and 2008-2009 passed u/s.143(3) r.w.s 144C and 250 of the Income Tax Act and the assessee filed appeal against the order of Commissioner of Income Tax (Appeals)-I, Chennai in ITA No.52/2014-15/A-I, dated 24.09.2014 for the assessment year 2010-11 passed u/s.143(3) r.w.s. 92CA(3) and 250 of the Act. Since the issues in Department appeals are common in nature, hence these appeals are combined, heard together, and disposed off by this common order for the sake of convenience.

2. The Revenue has raised two substantive grounds on the issues pertaining to Transfer Pricing for the assessment years 2004-05 and 2005-06 and three grounds for assessment year 2008-09.

*"2.1 The CIT(A) erred in directing the assessing officer to treat the payment of royalty at Arm's Length (0.75%), rejecting the determination of Arm's Length at NIL.*

*2.2. The CIT(A) failed to appreciate that Reserve Bank of India approval has nothing to do with Income-tax provisions, with regard to determination of Arms Length Price (ALP).*

*2.3. Having regard to the following decisions, the learned CIT(A) ought to have upheld the action of the Assessing Officer.*

(a) *SKOL Breweries Ltd. v. ACIT (ITA No.6175/Mum /2011 dt.18.01.2013(Mum)*

(b) *CIT v. Nestle India Ltd. (337 ITR 103)(Del.)*

*3.1. The learned CIT(A) erred in disapproving the adjustment to Arms Length Price (ALP), in respect of royalty, made by the A.O. on the basis of negative variation.*

*3.2. The learned CIT(A) ought to have noted that the instant case deals with determination of ALP on spice transactions.*

*3.3. The learned CIT(A) failed to note that the international spice market is a highly volatile one and hence, even a small variation (positive or negative) in spice prices will have a significant bearing in determination of ALP .*

*3.4. The learned CIT(A) ought to have seen that owing to the spice trade, involved herein, the case laws relied upon by the CIT(A), will not apply to the facts of the instant case”.*

**3.** We take up Departmental appeal ITA No.2167/Mds/2013, assessment year 2004-05 for adjudication:- The Brief facts of the case that the assessee is engaged in the business of manufacture and sale of whole and ground spices and filed return of income on 29.10.2004 with total income of ₹4,50,28,570/- and was reduced to Nil after set off of brought forward unabsorbed depreciation but paid Minimum Alternative Tax (MAT) as per the provisions of u/s.115JB of the Act on a Book profits of ₹2,15,01,033/- and the return of income was processed u/s.143(1) and subsequently, notice u/s.143(2) was issued. In response to notice, the Id. Authorised Representative appeared and furnished details in assessment proceedings. The Assessing Officer alongwith other disallowances made addition in respect of international

transactions. During the year, the assessee company entered into international transactions with Associated Enterprise M/s. McCormick & Company Inc., USA where the transactions exceeded ₹5 crores and referred to the Transfer Pricing Officer (TPO) to consider the Arms Length Price. The Id. TPO vide order No. C.No.42/PO I/A.Y.2004-05, dated 7.12.2006 made an adjustment of ₹19,31,513/- on account of Arms Length Price of transaction between company for payment of royalty of ₹7,78,019/- as price variation in export sales. On receipt of order u/s.92CA(3) of the Act, the Assessing Officer provided opportunity for submitting reply to the assessee and Id. Authorised Representative made submissions on 15.12.2006 referred at page no.4. as under:-

*"1. Upward adjustment to the total Income on account at' determination or arm's length price re.latl1g to payment of royalty amounting to ₹19,31,513/-*

*As already submitted to the Transfer Pricing Officer, the payment of royalty has been approved by' the Government of India, Ministry of Finance in as early as 1994 much before the transfer pricing rules came into force, Moreover, as per the recent guidelines, the payment of royalty if it is within the limits qualifying for automatic route, government approval 1\$ not required either for extending the duration of the quantum or change in royalty rates if the rates are within the rates permitted which is at present 8% on the FOB value of exports. The quantum of royalty and the rate of royalty on the turnover was fixed in the year 1894 and It has not been changed upwards and the assessee company is paying only 0.75% on the GOB value or exports which is much below the rate permitted by the Government of India for automatic route. The Transfer Pricing Officer has disallowed the royalty payment as according to him, there is failure on the part of the assessee to furnish cost of development of technology and It is impossible for him to find out the correctness of figures as per A.LP regulations. Since because there is no comparable cases*

*and the cost cannot be ascertained, there is no justification for disallowing royalty payments in full.*

*The assessee further submitted that without prejudice to the above stand, the said amount at ₹19,31,513/- has already been disallowed by itself u/s.40(a) because the TDS has been remitted on 06.10.2004 and the assessee intends to claim the deduction in the assessment year 2005-06. Hence, no adjustment is called for while determining the Arm's Length Price on this account.*

*2. As far as adjustment on account or price variation amounting to Rs,7,78,019/- In export sales, we would like to submit that the assessee company supplied Rs.33.41 crores worth materials to Associated Enterprises during the relevant previous year. Based on the geographical location Wise determination of arm's length price, there are only two products where the negative variance IS more than 5%. In one product, the quantity sold to Associated Enterprises is just 500 kgs, resulting in a variation of ₹5,00,462/- The Transfer Pricing Officer has also not considered the fact that overall, there is a positive variation to the extent of Rs. 1.80 crores. Being a small lot, naturally the pricing of 500 kgs was higher. To compute arms length price adopting the rate for 500kgs for ₹4,31,150 kgs is highly illogical and against the principal of natural justice".*

The Id. Assessing Officer considered the submissions of the assessee on record and also findings of the TPO on determination of Arms Length Price. Since Royalty of ₹19,31,513/- was disallowed by the assessee u/s.40(a)(ia) of the Act for non deduction of TDS and no further adjustment was made and completed assessment with only adjustment on account of price variation ₹7,78,019/- and passed order u/s.143(3) dated 20.12.2006. Aggrieved by the order of the Assessing Officer, the assessee filed an appeal before the Commissioner of Income Tax (Appeals).

4. In the appellate proceedings, the Id. Authorised Representative submitted that the Assessing Officer considered the TPO order ignoring various relevant and important facts and the price variation in transaction with Associated Enterprise. The Government of India approved the payment of royalty at 0.75% on FOB and accepted by the Revenue in assessee's own case as reasonable payment from assessment year 1993-94 till latest. Further, the Assessing Officer without considering Arms Length Price made an adjustment in export sales overlooking the volume of Associated Enterprise. The Id. Commissioner of Income Tax (Appeals) found that the assessee company is in the business of spices and export to various countries and entered into joint venture with M/s. A.V. Thomas Group Companies and McCormick & Company Inc. USA. The assessee company exports spices to Associated Enterprise and non Associated Enterprise in different parts of the world. The Id. Authorised Representative submitted that McCormick & Company Inc. USA has setup a joint venture with M/s. A.V. Thomas Group Companies and has given their support and technology for setting up a state of the art steam sterilization facilities to cater the spices market of the world and McCormick & Company Inc. USA does not have a similar joint venture in any part of the world except India. The agreement for payment of royalty entered in the year 1994 very much before applicability of

Transfer Pricing Provisions. As per notification dated 24.06.2003, applicable to the assessee, the royalty was paid at 0.75% on FOB value of exports which is below 8% prescribed rate under the automatic route and supported the case with the decision of *ACIT vs. Dufon Laboratoies (2010) 39 SOT 59 (Mum)* and *EKL Appliances (24 Taxmann 199)*. The Commissioner of Income Tax (Appeals) observed at para No.4.3 at page no. 4 and directed the Assessing Officer to consider royalty at Arms Length Price.

*‘‘Coming to the determination of the ALP of the payment of royalty at Nil, the Id. AR has submitted that the royalty paid by the appellant company to McCormick is 0.75% of FOB value of exports and this has been approved by the RBI and Government of India in' 1994 itself. Further, the Id. AR submitted that the case of Mumbai Tribunal ThyssenKrupp vs. Addl. CIT -, ITA No.6460/ Mum/2012 has observed as under:-*

*‘‘When a payment is made after obtaining due approval from the RBI, how its ALP can be computed at 'Nil', is anybody's guess. The facts of approval of the payment by the Ral has been succinctly recorded by the TPO in his order as well. He still chose to propose adjustment in respect of full payments. In our considered opinion, when the rate of royalty payment and fee for drawings etc, has been approved or deemed to have approved by the RBI, then such payment has to be considered at ALP.*

*Thus, on the facts and on merits, the determination of Arms Length Price of the payment of royalty at Nil for A.Y. 2004-05, 05-06 and 08-09 is set aside and the Assessing Officer is directed to treat the payment of royalty at ARM's length for respective assessment years’’.*

On the next ground of price variance the Id. Commissioner of Income Tax (Appeals) considered the grounds of appeal, submissions, arguments and the material evidence filed in appellate proceedings and findings of price variance and perused the export price of Associated Enterprise and non Associated Enterprise for all the products in the relevant assessment year. On comparison of variance based on the comparative tables, the Id. Commissioner of Income Tax (Appeals) found negative variance is negligible compared to the positive variance in respect of the exports made to Associated Enterprise and held at page no.3, page no.4.2 of CIT order as under:-

*'It is also to be noted that the Associated Enterprise and non Associated Enterprise operate in different market. In view of the negative variation being negligible compared to substantial overall positive variation and also as per the ratio of decision of the Tribunal in the case of Dufon Laboratories, this addition on account of negative variation amounting to ₹7,78,019/- ₹10,17,289/- and ₹40,44,422/- for A.Y 2004-05, 05-06 and 08-09 is directed to be deleted.'*

The Id. Commissioner of Income Tax (Appeals) partly allowed the appeal. Aggrieved by the order, the Revenue has filed an appeal before Tribunal on two substantive grounds.

**5.** Before the Tribunal, the Id. Departmental Representative reiterated his submissions on the grounds that the royalty payment 0.75% cannot be accepted and the price variation on spices market is highly volatile and the agreement was entered in the year 1994. The

Id. Commissioner of Income Tax (Appeals) has considered percentage ignoring royalty paid to the US based company McCormick & Company Inc. being 0.75% of FOB value of exports was approved in the year 1994 by Reserve Bank of India and the decision relied by the assessee of Mumbai Tribunal *Thyssenkrupp vs. Addl. CIT in ITA 6460/Mum/2012* is distinguished and prayed for set aside of the Commissioner of Income Tax (Appeals) order and also supported the arguments with the judicial decisions.

**6.** The Id. Authorised Representative in reply to the submissions clarified that the company has entered into Joint Venture between M/s. A.V. Thomas Group Companies and McCormick Companies Inc. USA and export spices to Associated Enterprise. During the year the assessee company exported ₹12,28,18,436/- to the Associated Enterprise and as per agreement entered in the year 1994 much before applicability of TPO provisions were Royalty is paid at 0.75% of FOB value of exports and such rate is approved by Government of India and RBI and a on comparison to automatic route under exports 0.75% of FOB price is very much below 8%. The Id. Authorised Representative referred to page no. 87 and 88 of paper book containing the agreement with McCormick Technology Licence and Technical Assistance Agreement effective from 3.3.2004 as per the

clause (2) of agreement the assessee company shall pay royalty as per the terms observed at para 2 as under:-

*'2. During the period of ten (10) years commencing on March 3, 2004 AVT McC Shall pay McCormick royalties for the licenses as mentioned in Section 7 of the said McCormick Technology License Agreement dated March 3, 1994 and as amended by the agreement dated March 4, 1994, subject however that the total royalty including royalty already paid shall not exceed US \$400,000.'*

and further on approval of RBI, the Id. Authorised Representative referred to the letter dated 18.0.8.2004 at page no.110 of paper book.

*Government of India,  
Ministry of Commerce and Industry,  
(Dept. of Industrial Policy and  
Promotion )  
Udyog Bhawan, New Delhi 110 001.  
Dated 18.08.2004*

*M/s. AVT McCormick Ingrdients Pvt. Ltd  
Plot No.225/1. A5-7, Kaipoorikkara,  
Vazhakulam Marampilly P.O.  
Aluva 683 107,  
Dist Ernakulam, Kerala.*

*Subject: Application for extension /renewal of foreign technology & trademark licence agreements.*

*Sir,*

I am directed to refer to your letter dated 3<sup>rd</sup> August, 2004 on the subject mentioned above and to say that renewal of foreign technology & trade mark license agreements is essential for continued payment of royalty under the Automatic Route. However no Government approval is required for extending these agreements.

Payment of royalty can continue under a renewed agreement provided the rate of royalty is within the limits qualifying for Automatic Route Government's approval is not required for extending the duration of the agreement provided there is no change in the royalty rates & they qualify for automatic approval route

*Yours faithfully,*

*Sd/-  
(Pramila Raghavendran)  
Under Secretary to the Govt. of India  
Fax No.23017227.*

Subsequently on perusal of letter of dated 02.07.2004 on extension by Government of India at page no.111 and 112 as under:-

*Government of India,  
Ministry of Commerce and Industry,  
(Dept. of Industrial Policy and  
Promotion )  
Udyog Bhawan, New Delhi 110 001.  
Dated 02.07.2004*

*To*

*M/s. AVT McCormick Ingridents Pvt. Ltd  
64, Rukmini Lakshmipathy Salai,  
Egmore,  
Chennai 600 008.*

*Subject: Application for extension /renewal of foreign  
technology & trademark license agreements.*

*Sir,*

*I am directed to refer to your letter dated 17<sup>th</sup>  
June, 2004 on the subject mentioned above and to say  
that as per the provisions of Press Note 2 of 2003(copy  
enclosed) the restriction on the duration of the royalty  
payments for the foreign technology agreements has*

*been removed. Accordingly, no Government approval is required for your present request.*

*Yours faithfully,*

*Sd/-  
(Pramila Raghavendran)  
Under Secretary to the Govt. of India  
Fax No.23017227.*

Considering the submissions, the payment of royalty is in order and TPO has erred in considering the adjustment to Arms Length Price. The Id. Authorised Representative drew attention to the financial statements and also made submissions on product wise variation filed referred at page no.75 to 83 and the facts were brought on record in assessment proceedings. The Id. Authorised Representative substantiated his arguments with the decision of *SGS India Pvt. Ltd. Addl. CIT in ITAT Mumbai Bench decision in ITA Nos.963 & 3107/Mum2011, dated 22<sup>nd</sup> May, 2013* where it was held that the Arms Length Price and the licence fees for use of intellectual property, the payment of 3% of turnover as licence fee to the Associated Enterprise is accepted as Arms Length Price by Tribunal. Similarly Delhi Bench of the Tribunal in the case *of Sona Okegawa Precision Forgings Ltd vs. Addl. CIT in ITA No.4781/Del/2010, dated 16<sup>th</sup> Dec. 2011* held that assessee has sold only a part of goods manufactured to its Associated Enterprise and bulk of sales were made to uncontrolled

parties, and the Assessing Officer has failed to bring any material on record to show that payment of royalty @ 3 per cent was not at arm's length which was also approved by RBI, hence disallowance of royalty is not justified and assessee also relied on various judicial decisions to support his case and as per the directions of Government of India the approval of RBI is very much necessary for determination of Arms Length Price and considered by the Hyderabad Bench of Tribunal in the case of *DCIT vs. Owens Corning Industries (India) Pvt Ltd (2014) 41 CCH 0152 (Hyd Trib)* where the decision was based on the ALP rate and it held as under;-

*Transfer pricing-Arms' Length price-Payment of royalty to AE-Assessee engaged in business of manufacturing and trading of glass fibre products and articles thereof was provided technical assistance by Netherlands and claimed that quantum of royalty payment was at 5% and 4% of net of its sales- TPO restricted payment of royalty to 2% of net sales made by assessee by bench- marking assessee's perform comparability analysis with payment of royalty by a comparable company and that there was no comparable increases in turnover or profits and hence value addition of royalty was not apparent-TPO accordingly made addition to income of assessee-DRP affirmed findings of TPO-Held, assessee was being rendered technical assistance through royalty agreement entered into with Netherlands and royalty agreement had been in application from 1.7.2008-TPO was incorrect in going into business expediency of payment of royalty and arriving at quantum of royalty-Further once RBI approval of royalty rate was obtained and*

*payment was considered to be held at arm's-length, no further adjustment were warranted- TPO erred in holding that no tangible benefits were derived by assessee out of royalty payments made by it and restricting payment to 2% of net sales-Assessee's appeal allowed.*

and finally the RBI approval for royalty rate paid by the assessee itself implied that payments are at Arms Length Price and the Id. Authorised Representative prayed for dismissal of Revenue appeal.

7. We heard the rival submissions and perused the material on record, judicial decisions and circulars. The Id. Departmental Representative contesting the rate approved by the RBI prior to 1994 and cannot be considered for the purpose of Arms Length Price. Fact that royalty agreement between the assessee company and USA company referred in the paper book was entered much prior to the applicability of TPO provisions and as per the notification applicable to assessment year the royalty paid at 0.75% on the FOB value of exports is below the 8% rate prescribed under automatic route for the year 2004. The Id. Commissioner of Income Tax (Appeals) has directed the Assessing Officer to calculate royalty at Arms Length Price @0.75% rejecting the determination by TPO. The Id. Authorised Representative explained the provisions and conditions of agreements and approval of the RBI at page no.87 of paper book. We on perusal

of the documentary evidence filed by the Authorised Representative and also judicial decisions approving the royalty payments which the RBI prescribed, found the approval of Government of India and RBI was in 1994 and as per the terms royalty rate is calculated. The assessee company substantiated their grounds with financial statements and comparable statements. We perused the RBI letter and follow the decision of Hyderabad Bench of Tribunal in the case of *Owens Corning Industries (India) Ltd (supra)* where it has been held that RBI approval of the royalty rates paid by assessee itself implies that the payments were at Arm's Length. So considering the apparent facts and circumstances the Id. Commissioner of Income Tax (Appeals) has examined the issue and verified the statements and material filed and viz a viz explanations of the assessee. We, therefore are not inclined to interfere with the order of the CIT(A) on this ground. Accordingly, this ground of the Revenue is dismissed.

7.1 Before Tribunal on second ground, the Id. Departmental Representative submitted that the price variation of Arms Length Price transaction is at higher and volatile. The variation of positive and negative impact considering the spices rates on the determination of Arms Length Price and price variation has arised with the transactions of Associated Enterprise. The Id. Commissioner of Income Tax

(Appeals) has erred in deleting the addition on account of negative variation being negligible in comparison to the exports made to Associated Enterprise.

7.2 On the other hand, the Id. Authorised Representative submitted the reasons for variations and impact on determination of Arms Length Price in spice transactions with Associated Enterprise and non Associated Enterprise and drew attention to the page no.75 of paper book showing products wise variations and determination of Arms Length Price under CUP Method. The Id. Authorised Representative demonstrated the variance and impact in value and such variation on the transaction's below or equal to 5%. The Assessing Officer should consider such variance and the turnover and supported his arguments with the judicial decisions.

7.3 We heard the rival submissions and perused the material on record and judicial decisions cited. The contention of the Id. Departmental Representative that the Commissioner of Income Tax (Appeals) has erred in not considering the adjustment of Arms Length Price in respect of spices where the market is highly volatile and variation will have bearing on determination of Arms Length Price. The Id. Departmental Representative further relied on the order of

TPO were the adjustment were considered. The Id. Authorised Representative substantiated his arguments that the adjustment is negligible compared to the turnover and global presence of the company and the Commissioner of Income Tax (Appeals) on comparison with over all positive variations had deleted the addition. Before us, the Revenue has not brought any evidence to show that price variation is on higher side and impact on the Arms Length Price. Though Id. Authorised Representative justified his arguments with the submissions and judicial decisions. Considering the summary of module and agreements entered by the assessee company with Associated Enterprise, we find the order of Commissioner of Income Tax (Appeals) is in order and we do not interfere with the findings and uphold the findings of the Commissioner of Income Tax (Appeals) and direct the Assessing Officer to delete the addition. This ground of the Revenue is dismissed.

8. In addition to two common grounds as in assessment year 2004-05 and 2005-06, the Department has raised ground in appeal for the assessment year 2008-09.

8.1 The Assessing Officer disallowed ₹94,83,978/- on account of foreign sales commission as assessee failed to deduct TDS. The explanation of the assessee that payments were to procure orders

outside India and no party has permanent establishment in India and provisions of Sec. 195 does not apply. But the Id. Assessing Officer based on the Finance Act 2010 and CBDT circular distinguished the decision relied by the assessee and made addition. Aggrieved, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals).

8.2 Before Commissioner of Income Tax (Appeals) the assessee has reiterated his submissions in respect of Agency commission paid to foreign sales agent. The assessee has given bifurcation of foreign agencies commission and relied on the amendment of Finance Act, 2010 and CBDT circulars and criteria of deduction of TDS as there is no permanent establishment in India and also relied on the decision of Co-ordinate bench and argued that the commission earned outside the country is taxable in respective recipient countries. The Id. Commissioner of Income Tax (Appeals) considered the submissions and distinguished the decisions and made a finding that payments are neither fees for technical services nor royalty nor interest and also these payments are commission payments to foreign agents and relied on decision of *GE Technology Private Lt (supra)* and also the *jurisdictional Tribunal decisions in the case of TVS Motor Company vs. ACIT (ITA No.697 & 757/Mds2009,)* *Farida Shoes vs. ACIT (ITA*

*No.359/Mds/2013) Faizan Shoes vs. ACIT (ITA No.2095/Mds/2012) and Tamil Nadu News Prints & Papers Ltd vs. ACIT (ITA No.555/Mds/2011)* and allowed the appeal of the assessee. Aggrieved, the Revenue has filed an appeal before the Tribunal.

8.3 The Id. Departmental Representative argued that Commissioner of Income Tax (Appeals) erred in directing the Assessing Officer to delete the addition on account of non deduction of tax by assessee on payments to overseas commission agents and has overlooked the business connection which developed with the assessee company and the explanations 4 to Sec. 9(1)(i) and Explanation 2 to Sec. 195(1) such commission is liable to tax and subject to TDS and prayed for set aside of the Commissioner of Income Tax (Appeals) order.

8.4 Contra, the Id. Authorised Representative relied on the findings of the Commissioner of Income Tax (Appeals) and supported arguments with technicalities, judicial decisions and circulars. The foreign agency commission was paid to non-residents and the provisions of Sec. 195 shall not apply and relied on the decision of *CIT vs Kikani Exports Pvt. Ltd 369 ITR 0096 (Mad)* where it was held that services rendered by a non-resident agent can at best be called as a

service for completion of the export commitment, same would not fall within the definition of "fees for technical services" and consequently, provision of Section 9 of the Act will not be applicable in such a case and hence, Section 195 of the Act shall be applicable and also Section 195 of the Act. Further in the light of decision of *CIT vs. Faizan Shoes Pvt. Ltd* 89 CCH 0213 which fits to assessee's submissions directly as payments were made to non residents for procuring export orders and held that the assessee paid commission to nonresident agent outside India for procuring export orders from overseas buyers and the nonresident agent did not provide any technical services for purposes of running business of assessee in India, therefore assessee is not liable to deduct tax on source on such commission payment.

8.5 We heard the rival submissions and perused the material on record and judicial decisions and Double Taxation Avoidance Agreements. The assessee has paid foreign commission to outside foreign agencies who do not have business establishment in India and liable for taxation in their respective countries. We rely on the Co-ordinate Bench decision in the case of *ACIT vs. Euro Leder Fashions Ltd* (2015) 44 ITR (Trib) 571 (Chennai) it was observed at para 10 & 11 as under:-

*'The aforesaid clause makes it clear that the disallowance shall be made in case of any payment made which is chargeable under this Act and is payable outside India or in India to a nonresident not being a company or to a foreign company on which tax is deductible at source. Therefore, the first condition required to be fulfilled is the payment must be chargeable under the Act, thereafter the question of deduction of tax will arise. Section 195 (1) of the Act also prescribes that tax has to be deducted while making payment to non-resident which is chargeable under the provisions of the Act. Therefore, the condition precedent for deduction of tax is the income must be chargeable under the provisions of the Act. In the facts of the present case, the assessee has not produced the agreement entered into by the assessee with foreign agents to show that they were appointed to act as Commission agents outside India in their respective countries. The AO has disallowed commission payment u/s 40(a)(i) of the Act, since, there was no agreement to suggest the payment of sales commission.*

*As seen from the order s of the lower authorities, the assessee has not discharged the burden cast upon it to show the nature of services rendered by non-resident agent. If there are services rendered by non-residents, who have no permanent establishment in India or have any business connection in India, by virtue of which the payment of commission accrued or arose in India then, it is exempted, if the assessee is able to prove that the services were rendered by those non-residents at abroad. In the present case, the assessee has not established the facts on record that the non-resident has rendered services at abroad and there is no business connection in India by producing relevant records, viz., either agreement entered into by the assessee with them or correspondence took between the parties. Without examining these details, we are not in a position to decide the nature of services rendered by the non-resident agent. Therefore, it is appropriate to remit the entire issue back to the file of the AO with direction to the assessee to prove that it was sales commission*

*towards procurement of orders from abroad. Accordingly, the entire issue is remitted back to the file of the AO for fresh consideration and the AO is directed to make necessary enquiry regarding the nature of services rendered by the non-resident agent and the payments made thereof. With these observations, the appeal is allowed for statistical purposes”.*

Respectfully, following the decision of Co-ordinate Bench, we remit the issue to the file of Assessing Officer for verification and examination and the appeal of the Revenue is partly allowed for statistical purpose.

9. In the result, the appeals of the Revenue in ITA Nos. 2167 & 2168/Mds/2013 are dismissed and ITA No.2169/Mds/2013 is partly allowed for statistical purpose.

10. We take up assessee appeal in ITA No.58/Mds/2015, assessment year 2010-2011 for adjudication :- The assessee company filed return of income on 17.09.2010 with total income of ₹12,91,49,070/- and the case was selected for scrutiny under CASS and notice u/s.143(2) of the Act was issued by the Assessing Officer and served on 06.09.2011 on the assessee. Due to change in jurisdiction, letter dated 11.11.2013 alongwith notice u/s.142(1) was issued. In reply to the notice, the Id. Authorised Representative appeared on various dates of hearing and filed details called for. The

Assessing Officer upon verification of details and submissions and discussions completed assessment u/s.143(3) of the Act. Since the assessee had international transactions the Assessing Officer referred the matter to Transfer Pricing Officer and TPO-I, Chennai in order dated 09.01.2014 in F.No.104/TPO-I/A.Y.2010-11 held that international transactions of the assessee company are within Arm's Length Price and hence no adjustment is considered necessary for the assessment year 2010-2011 and the assessment order was passed u/s.143(3)r.w.s. 92CA(3) of the Act dated 17.03.2014. The sole dispute before the Tribunal being the disallowance of lab analysis fees of ₹8,92,635/- on account of non deduction of TDS u/s.40(a)(i) of the Act. In the assessment proceedings, the Id. AR submitted details of lab analysis fees paid to the various organizations in USA, Europe and Germany and copies of lab report of organizations were produced. On the sample basis, the lab analysis report of Auditor Martin Clare was considered in the assessment order. The Id. Assessing Officer made in depth study into Audit summary report of the assessee company on the dried spices for certain period and the audit type being dried spice combined hygiene and PPC audit, the audit summary considered the extent of raw materials and finished goods. The Id. Assessing Officer found that parameters of the assessee company were audited and list of conformances and non-conformances was filed and also involves

technical knowledge about the spice and spice blends manufacture and evaluation of the facilities available at the premises of the assessee. The assessee company in order to confirm the standards of the US & European Markets get lab analysis and technical, consultancy and managerial service to the assessee company. Even as per the Double taxation Avoidance agreement with US & UK, the services are available in India as observed at page no.12 of Assessing Officer order as under:-

*‘5.5 It clearly shows that, even as per DT AA with US & UK, the services are made available in India because, the training for Audit is also a part of the Lab Analysis and the Audit Report clearly mentions that, they have verified the induction training programme of the assessee company*

*5.6 Also, from the above, it is clear that, site verification has been done, which shows that the services have been rendered in India. Therefore, the payment made should be treated as payment for 'technical services' which are taxable in India.*

*5.7 In view of the above discussion, the assessee's argument that, none of the entities to whom payment has been made by the assessee have a Permanent Establishment (PE) in India and as per the relevant Articles of the DT AA entered into by India with the respective countries, the income earned is taxable only in those countries and no part of the said amount is taxable in India is not acceptable and the payment made towards lab analysis fee amounting to Rs.8,92,635/-without withholding tax is disallowed from the expenditure claimed by the assessee as per provisions of Sec.40(a)(i) of the Income-tax Act, 1961’.*

and Id. Assessing Officer made an addition. Aggrieved, the assessee assailed an appeal before the Commissioner of Income Tax (Appeals).

10.1 In the Appellate proceedings, the Id. Authorised Representative alleged that Assessing Officer has disallowed lab analysis fee paid to various foreign parties ₹8,92,635/- under the provisions of u/s.40(a) (i) of the Act on the presumption that technology is available to the assessee and report has been furnished and subject to tax in India. The Id. Authorised Representative further submitted that only Audit report was given to the assessee and no technology was available and also no scope to consider taxing of such payments in foreign currencies. Further, Assessing Officer should know that even assuming such payments brought into scope of technical services as per Explanation 2 to Sec. 9(1)(vii) of the Act and such receipt constitute business receipts in the hands of the recipients. Further double taxation avoidance agreement shall come into effect the payment does not constitute income chargeable to taxation in India and none of the recipients have permanent establishment and such payments are not routed through permanent establishment of recipients of foreign countries. On the issue of fees for technical services, interest and royalty to non residents the issue in dispute is pure agency commission for canvassing export orders outside India and the amendment provisions of Sec. 9 shall not apply and assessee submitted written submissions. The Id. Commissioner of Income Tax (Appeals) has examined the material, evidence and also judicial

decisions relied by the assessee and also provisions applicable in respect of non resident and permanent establishment in India and further relied on the findings of the Assessing Officer that lab analysis report was submitted by the foreign agencies and the Auditor Martin Clare has given his opinion and commented on non-conformances in three categories such as critical non-conformances, major non-conformances and minor non-conformances in the areas of various criteria of products, safety, quality management, factory environment and standards. The Id. Commissioner of Income Tax (Appeals) is of the opinion that the Audit report involves technical knowledge of spice and spice blends manufacture and market and evolution of the facilities available at the premises of the assessee company to confirm to the standards of the USA and European Markets. The Audit team has done site verification in India and comes into the purview of services rendered in India as technical services were availed by the assessee company. Based on this analogy, it was presumed that lab analysis fees paid in foreign currency is for technical services. Hence provisions u/s.40(a)(ia) are applicable. The Id. Commissioner of Income Tax (Appeals) further observed at para 4.3.7 and confirmed the findings of the Assessing Officer as under:-

*"I have gone through the facts of the case, the AO has made efforts to study the fee paid towards lab analysis and has come to the conclusion that the fee paid is towards technical services since the outcome of lab*

*reports Will have a direct impact on the composition and quality of the product which the appellant exports. I am also of the opinion. that. the appellant will, modify the quality and content of the, product . exported based on the lab analysis. If the product is 'approved without any remarks, the appellant company will continue to export the same product without making any alterations. It means to say that the technical know-how is made available to appellant in India indirectly. If on the other hand, any defects were noticed or modifications were suggested by these lab reports and the appellant modifies and exports its product accordingly, it means the technical knowledge is made available to the appellant in India. The argument of the appellant that the payments were made outside India and there is no PE in India, therefore TDS provisions will not attract for such remittances, is rejected. In view of the above discussion, I confirm the disallowance made by the AO u/s 40(a)(i) in this regard'.*

Aggrieved, the assessee assailed an appeal before the Tribunal.

10.2 Before the Tribunal, the Id. Authorised Representative raised sole substantive ground that the Commissioner of Income Tax (Appeals) erred in confirming the order of the Assessing Officer and also disallowance u/s.40(a)(i) r.w.s.195 of the Act in respect of lab analysis fees paid and the income of such foreign agencies are not liable to be taxed in India. The payment of lab analysis fees are not covered under the meaning of technical services u/s.9(1)(vii) of the Act or under Double Taxation Avoidance Agreements (DTAA) with the foreign countries. Further the assessee company does not have technical know how which has been considered as available and foreign agencies does not have permanent establishment in India.

The provisions of Sec. 40(a)(i) of the Act shall not apply on lab analysis fees where assessee has made following payments:-

Name of the Party	Country	Amount in ₹
ASTA	USA	37,150
Campden Technology Ltd	UK	3,98,246
CVRS	UK	22,134
Champagne Foods	UK	3,15,843
Eurofins	Germany	27,233
Lab M ltd	UK	92,039
<b>Total</b>		<b>8,92,635</b>

The Id.AR reiterated submissions made before the Assessing Officer and Commissioner of Income Tax (Appeals) and also provisions applicable for considering it as technical service since the assessee is in the business of export of spices to US, UK and Germany and the products are to be tested in accredited labs in these countries and a certificate has to be obtained that the products are fit for sale in the international market and also to comply with "Food Safety and Standards Authority of India" Rules. The testing lab will provide the report of the product alongwith list of conformances and non conformances with the prescribed standards and if the product gets favourable report proceed with export sale. Under the provisions of Sec.195 of the Act tax is to be deducted on payment to non residents due in nature of income chargeable to tax in India, where as nature of lab analysis fees falls in the category of service rendered outside India in the Foreign country and similar to Diagnostic centre which shall

give report without going into advisory or consultancy. The Id. Authorised Representative relied on the decision of jurisdictional High Court in case of *Skycell Communications Ltd. vs. DCIT (2001) 251 ITR 0053(Mad)* where the technical fees service has been defined.

*'Technical service' referred in Section 9(1)(vii) contemplates rendering of a "service" to the payer of the fee. Mere collection of a 'fee' for use of a standard facility provided to all those willing to pay for it does not amount to the fee having been received for technical services'.*

on applying the findings of the Jurisdictional High Court, The lab analysis fees will not fall into category of technical service. The lower authorities presumed that the Audit report know how is available to the assessee and site inspection was carried out hence income has accrued in India. The Id. Authorised Representative also relied on the operative parts of Double Taxation Avoidance Agreements with the USA, UK and Germany and made a elaborate submissions regarding permanent establishment and technical fees and concluded that the lab fees to non resident does not come into purview of Sec.9(1)(vii) of the Act and does not constitute managerial consultancy or technical service and as per the Double Taxation Avoidance Agreements with three countries USA, UK and Germany, such payments are not chargeable and relied on the decisions of *CIT vs. De Beers India Minerals (P) Ltd (2012) 346 ITR 0467 (Kar)* where it was held that technical services as defined u/s 9(1)(vii) of the Act and Explanation 2

such payments does not satisfy the requirement of technical services considered in India and supported the arguments on technical fees with decision of *Tuv Bayren (India) Ltd vs. DCIT (2012) 33 CCH 0212 (Mum Trib)* where it was held that income from ISO 9000 certification activities carried out by the assessee comes within the realm of professional services and not within the meaning of FTS as provided in the Article 12(4) and section 9(1)(vii) of the Act and the Id. Authorised Representative vehemently argued considering the factual aspects, provisions of non residents, Double Taxation Avoidance Agreement and the activities of the assessee company payment made towards lab analysis are outside the purview of Sec.40(a)(ia) of the Act and same be allowed.

10.3 On the other hand, the Id. Departmental Representative relied on the orders of the lower authorities and objected to the submissions of the assessee.

10.4 We have heard the rival submissions, perused the material on record and judicial decision cited and the agreements. The Id. Authorised Representative has given an authentic view of lab analysis fees paid to non residents of US, UK and Germany and the report was prepared outside the country based on the details of the assessee

unit. The non residents service are availed only for the opinion of certifying the process. Since the services rendered outside India and payments made outside Country and does not attract TDS provisions. Alternatively u/sec.9(1)(vii) fees for technical services, the lab analysis fees will not fall into category of technical fees and also there is no permanent establishment in India to charge such income to tax. The Id. Authorised Representative demonstrated the DTAA clauses with USA, UK and Germany and such payments are outside the purview and not chargeable as per provisions of DTAA. On the other hand, the Id. Departmental Representative relied on the findings of the Commissioner of Income Tax (Appeals) that the know how was available and there was site inspection and reference was made in Audit Report on verification of training programme. We after considering the matrix of facts, judicial decisions and Audit report observed in assessment order which indicates the services are rendered in India and report was obtained in India. Therefore, we remit the issue to the Assessing Officer for limited purpose to verify the working system of Audited and consultancy work or inspection was carried by the Auditors on lab analysis and we set aside the order of the Commissioner of Income Tax (Appeals) and direct the Assessing Officer to consider the issue and pass the order after providing adequate opportunity of hearing before passing the order on merits. In

the result, the appeal of the assessee is partly allowed for statistical purpose.

11. In the result, the appeals of the Revenue in ITA No.2167 & 2168/Mds/2013 are dismissed and ITA No.2169/Mds/2013 is partly allowed for statistical purpose and appeal of the assessee in ITA No.58/Mds/2015 is partly allowed for statistical purpose.

Order pronounced on Friday, the 19th day of February, 2016, at Chennai.

Sd/-

(चंद्र पूजारी)

**(CHANDRA POOJARI)**

**लेखा सदस्य /ACCOUNTANT MEMBER**

Sd/-

(जी. पवन कुमार)

**(G. PAVAN KUMAR)**

**न्यायिक सदस्य/JUDICIAL MEMBER**

चेन्नई/Chennai

दिनांक/Dated:19.02.2016

**KV**

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant   | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT           | 6. गार्ड फाईल/GF        |