आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES,"A" JAIPUR

श्री संदीप गोसाई,न्यायिक सदस्य एवंश्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No.166/JP/2020
निर्धारण वर्ष/Assessment Year : 2016-17

The DCIT Circle-4 Jaipur	बनाम Vs.	M/s. JLC Electromet Pvt. Ltd. E-153-A, Road No. 11-H, VKI Area, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCJ 8786 A		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Mahendra Gargieya
राजस्व की ओर से/Revenue by: Shri A.S. Nehra, Addl. CIT

सुनवाई की तारीख/Date of Hearing : 09/03/2022
उदघोषणा की तारीख/Date of Pronouncement: 12/04/2022

आदेश/ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal by the Department is directed against the order of the learned Commissioner of Income Tax, Appeals-2, Jaipur [Here in after referred to as ld. CIT(A)]dated 10-12-2019 for the assessment year 2016-2017.

2. The hearing of the appeal was concluded through audio-visual medium on account of Government guidelines on account of prevalent situation of Covid-19

Pandemic, both the parties have placed their written as well as oral arguments during this online hearing process.

3. The solitary ground raised by the Department is as under:-

> ''Whether in the facts and circumstances of the case and in law the ld. CIT(A) was correct in deleting disallowance of Rs.2,28,86,971/- made u/s 40(a)(ia) of the I.T. Act, 1961 in respect of the payments made on account of commission, exhibition expenses and testing expenses without deduction of tax at source as required u/s 195 of the Act.

4. The facts as culled out from the orders of the lower authorities are reproduced hereunder so as to deal with contentions raised in this appeal by the Department.

> ''The assessee company filed its E-ITR for A.Y. 2016-17 on 28-09-2016 thereby declaring total income of Rs.5,50,08,880/- which was further revised on 29-09-2016 thereby declaring Rs.5,49,71,640/-. The case was selected for complete scrutiny under CASS. Therefore, notice u/s 143(2) of the I.T. Act was issued on 9-09-2017 by fixing the case for hearing on 26-09-2017. Further to complete the assessment proceedings, notice u/s 142(1) alongwith questionnaire was issued through ITBA Portal on 05-07-2018 and in response thereto the assessee submitted required details/ documents and on perusal of the same, the following points are emerged.
>
> 2. <u>Disallowance u/s 40(a)(ia) of the I.T. Act</u>
>
> 2.1 On perusal of audited final accounts of the assessee, it has been observed that the assessee has made payment of Rs.2,11,07,351/- towards Selling Commission, Rs.15,70,429/- towards Exhibition expenses and Rs.2,09,191/- towards Testing

> Expenses without making TDS, in view of insertion of Explanation to Section 195 by Finance Act, 20212 with retrospective effect from 01-04-1962. Therefore, a show cause notice was issued to the assessee on 26-11-2018 mentioning therein as to why the above expenses shall not be disallowed u/s 40(a)(ia) of the I.T. Act and added the same to the total taxable income for the year under consideration''

Thus, the AO has issued show cause notice to the assessee stating that why the expenses towards Selling Commission of Rs.2,11,07,351/-, Exhibition expenses of Rs.15,70,429/- and Testing Expenses of Rs.2,09,191/-, totaling to Rs.Rs.2,28,86,971/- should not be disallowed u/s 40(a)(ia) of the Act. The assessee has filed the detailed reply, but the AO did not consider the reply of the assessee relying on the judgement of ITAT Panji Bench in the case of Sesa Resources Ltd (ITA No.267/PNJ/2015) dated 20-08-2015, judgement of Hon'ble Supreme Court in the case of CIT vs Gold Coin Health Food Pvt. Ltd. (2008) 304 ITR 308. The assessee also relied upon the decision of Hon'ble Supreme Court in the case of CIT vs Moser Baer India Ltd.(2009) wherein the assessee contended that amendment made by Finance Act, 2012 is retrospective in nature and, therefore, the assessee should comply and has to deduct tax while making payment to foreign entities. He has also referred to provisions of Section 9(1)(vii) of the Act and stated that income is chargeable to tax in India in accordance with the amended provision of the Act, assessee should deduct the tax and, therefore, Ld. AO has invoked the

provisions of Section 40(a)(ia) of the I. T. Act and made an addition of Rs.2,28,86,971/-.

5. Aggrieved by the order of the AO, the assessee has filed an appeal before the ld. CIT(A) challenging the disallowance of three expenses namely Rs.2,11,07,351/- towards Selling Commission, Rs.15,70,429/- towards Exhibition expenses and Rs.2,09,191/- towards Testing Expenses (totaling to Rs.2,28,86,971) made by the AO.

6. As there is only one ground before the ld. CIT(A), he has recorded his detailed findings based on the written submissions filed by the assessee and he has given his findings vide para 2.3.1 to 2.3.3 in his order which includes the contention of the AO as well as detailed reply field by the assessee in the assessment proceedings, since these facts and submission are required to be swayed and is extracted as under:-

> The relevant extract of the assessment order is as under
>
> "2.1 On perusal of audited final accounts of the assessee, it has been observed that the asses has made payment of Rs. 2,11,07,351/- towards selling commission, Rs. 15,70,429/- towards Exhibition expenses and Rs. 2,09,191/- towards Testing Expenses without making TDS, in view of insertion of explanation to section 195 by Finance Act, 2012 with retrospective effect from 01-04-1962. Therefore, a show cause notice was issued to the assessee on 26.11.2018, mentioning therein as to why the above expense shall not be disallowed u/s 40(a)(ia) of the I.T Act, and added the same to the total taxable income for the year under consideration.
>
> 2.2 In response to this show cause notice the assessee submitted its reply on 28.11.2018 stating therein that:
>
> "In this ……..Tax Act."

3. This office considered the above reply and the case laws cited therein by the AR of the assessee, but not found tenable on merits as the assessee has not deducted TDS on selling commission payment of Rs. 2,11,07,351/-, on Exhibition expenses Rs. 15,70,429/- and on Testing Expenses Rs. 2,09,191/- to non-residents. As per section 195 of the I.T. Act, the assessee was liable to make the above payments after making TDS. But the assessee has failed to do so.

3.1 The issue as to whether the assessee was liable to deduct TDS u/s 195 and whether the disallowance was liable to be made u/s 40(a)(ia) of the Act, for non deduction of the TDS u/s 195(1) of the Act has been amended by the introduction of Explanation II to the said section by the finance Act, 2012 with retrospective effect from 1.4.1962, whereby it is claimed that:

"the obligation to comply with subsection (1) and to make deduction there under applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non resident, whether or not the non-resident person has (i) a residence or place of business or business connection in India; or (ii) any other presence in any manner whatsoever in India."

3.2 The Hon'ble ITAT, Panji Bench, Panji in ITA No. 267/PNJ/2015dated 20.08.2015 in case of M/s Sesa Resources Ltd.(Earlier know as V.S. Dempo & Co. Pvt. Ltd.) held that in view of introduction of Explanation-Il to Sec. 195 of the Act, as the assessee has not deducted TDS u/s 195, the disallowance made by the AO by invoking the provisions of Sec. 40(a)(ib) of the Act, would have to be restored.

3.3 It is also relevant here to occasion to deal with interpreta mention that Hon'ble Supreme Court has of prospective or retrospective nature of amendment in the statute in the case of CIT V/S Gold Coin Health Food Pvt. Ltd (2008) 304 ITR 308 (SC). The Hon'ble Court has held as under:

"In determining..... existing law."

3.4 In the case of CIT vs. Moser Baer India Ltd. [2009] 315 ITR 460 (SC) the Hon'ble Supreme Court has followed its earlier order (Supra.) which is reproduced as below for ready reference:

"On an appeal …… assessment years."

3.5 Thus, it is abundantly clear that clarificatory nature of amendment in statute is retrospective in nature.

3.5.1 The Circular by its nature clarifies ambiguous interpretation provisions of law for the larger interest of effected parties. It is always clarificatory and, therefore, it is of retrospective character. When some circular is withdrawn with immediate effect it could

simply mean that provisions of law should be interpreted as if such circular had never been issued on the subject. Provisions of the Act will have to be interpreted without taking any help from the circular.

3.5.2 Further, in the Circular No. 7 of 2009 dated 22nd October, 2009 itself it has been mentioned that:

"Even when ……. the circular."

3.6 In light of above and after holding that the circular is declaratory i.e. it is applicable in all cases where amendments etc. are pending irrespective of A.YS., the central issue, so far as determination of total income of the assessee is concerned, is disallowance U/s 40(a)(i) of payments made to non resident where tax has not been deducted at source as required U/s 195 of the Act and whether any payments have been made to a person which is not in accordance with the provisions of Section 9 of the Income Tax Act, 1961.

Relevant provisions u/s 195 are as under:

"(1) Any person..... sub section (1)

3.7 Thus, there is no explicit provision under the Act, for making a payment to non-resident without deduction of tax at source without obtaining NOC from the income tax authorities.

3.8 In light of the above discussion and submissions filed by the assessee it is concluded that the contention of the assessee is not found acceptable as per the relevant provisions of the Act, and the following points are discussed on merit to reach at conclusion proceedings of this case:

(i) The assessee has not obtained any certificate u/s 197/195.
(ii) The assessee has not made TDS upon the commission payment.
(iii) The assessee has not taken care of any future liability of tax in the hands of nonresidence, if any arises.

3.9 Here, it would proper to examine the provisions of Section 9(1)(vii) of the Income Tax Act, 1961, which are cited as under:

"Income deemed …… by him.

3.10 This being the stated position and the factum of the case that the payment made by the assessee to a non-resident is squarely covered by the provisions of Section 195 of the Income Tax Act, 1961 which call for deduction of tax at appropriate rate forced at the time of payment to a non-resident. In view of these provisions which find place in the Statute, the provisions of Section 40(a)(ia) is also attracted wherever TDS on payment of

commission to a non-resident has not been made at appropriate rates. These provisions bar deduction of any payment on account of commission [fee for technical services] made to a non-resident, without making TDS.

3.11 In these circumstances, there is no basis to conclude that income (which is commission in our case) is not taxable under Income Tax Act, 1961. The assessee in these circumstances is liable to deduct tax at the time of credit of such income to the account of payee or at the time of payment whichever is earlier. Alternatively, the assessee has to obtain certificate for no deduction or lower deduction of tax on the payments as required u/s 1961) of act. The foreign agents can also obtain certificates for no deduction or lower deduction of tax on amount receivable / received as prescribed u/s 195(3) of act. Since, these conditions have not certified payments have been made to non-residents without deduction of tax as required u/s 195 of the act. Consequently, the expenditure on export commission and other related charges payable to a non resident for services rendered outside India is not allowable expenditure and they deserve to be disallowed u/s 40(a)(ia) of the act. Therefore, an amount of Rs. 2,11,07,351/- towards selling commission, an amount of Rs. 15,70,429/- towards Exhibition expenses and an amount of Rs.2,09,191/- towards Testing Expenses, totaling to Rs. 2,28,86,971/ (2,11,07,351 + 15,70,429 + 2,09,191) is disallowed and added to the total income of the assessee."

2.2 The relevant extract of the submission of the appellant is as under:

"1. Covered matter: 1.1 It is pertinent to note that the assessee-made similar payments and even almost to the same very parties i.e. the foreign payees in the past and the AO made disallowances u/s 40(a)(ia) in A.Y. 2013 14 & 2014-15, which was confirmed by the Id. CIT(A). However, in the second appeal the Hon'ble ITAT deleted the disallowance in JLC Electromet (P) Ltd. vs. ACIT (2019) 201 TTJ 811 (JP) (PB 552-578) holding as under:

"23. We have.....instant case."

1.2 Fully covered issue:-Pertinently, very recently this Hon'ble Bench of ITAT has again taken a view in favor of assessee holding that the payment of commission made to a non-resident for procuring sales order outside India, cannot be considered as Fees for Technical Services (FTS) in the case of Satyam Polyplast vs. DCIT (2019) 106 Taxmann.com 145 (JP)(II DPB-8-13). Interestingly, in this case also the ld. CIT(A), Ajmer, recorded finding in identical manner, as done in the case of the present appellant. In this case also, the Id. CIT(A) dismissed the appeal on the ground that the appellant failed to bring any ruling of the AAR u/s 245(2) of the act. Moreover, the applicability of Explanation II to Sec. 195 (1) is also a ground of dismissal in the case of the present appellant. In Para 5 it was held as under:

XXX

"5. We have.....is allowed.

1.3 " In Group case M/s Gem Electro Mechanicals Pvt. Ltd. also, similar 1.3. view has been taken by your good self in A.Y. 2012-13 to 2014-15 (PB 579-608).

This way, the issues involved in the appeals is squarely covered by the said decision in favor of the assessee.

2. The relevant provisions contained u/s 195, are reproduced hereunder.

2.1 Sec.195 with the Explanation 2thereto immediately after the amendment made by the Finance Act, 2012 stood as under and continued to till date are as under:

"S. 195. Any person…….....in India."

2.2 S. 40(a)(ia) of the Act, as stood at the relevant point of time, (relevant extract only) is as under:

"S. 40. Notwithstanding.. …….. sub section (1) of section 139 :]

3 Firstly, we strongly rely upon our written submissions (relevant extract only) filed before the ld. AO on dated 30.11.2016 reproduced as under:

"In this.....Tax Act."

4. Sec. 195 not applicable: 4.1 From the Crux of the various judicial pronouncements and the guidance provided (cited later in this w/s), it is clear that the only test of applying Sec. 195 is whether the subjected payment is a sum chargeable under the provisions of this Act or not. The assessee had already submitted in great detail duly supported with all the evidences that all the subjected expenses viz. Selling Exp., Exhibition Exp, Testing Exp. were incurred outside India and in all the three cases the respective services were also rendered by the respective payees, only outside India. All the requisite details were submitted vide letter dated 17.11.2016 & 18.11.2015. The jurisdictional facts thus, are not denied and duly admitted therefore, it cannot be said that any income accrued or arose in respect of all the three subjected payments u/s 4, 5 or 9 of the Act in India.

4.2.1 Commission Expenses: The subjected payments included commission expenses of Rs.1.63 crore which was paid to the foreign selling agents who rendered their services to the appellant outside India. The payments in this respect were also made outside India only. Kindly refer ledger accounts of Selling commission (Export) providing the complete detail as regard the name of the payee, reference to the export invoice of the appellant, the rate / amount of commission etc. and when the same was credited to the

account of the payee or paid to him, is enclosed. (PB 9-16) along with Copies of Agency agreement, Certificate of the payee, Foreign bills transaction advice, Letter by the assessee to the concerned bank with enclosure to make payment outside India (PB 17-457). In the case of CIT vs. Toshoku Ltd 125 ITR 0525 (SC) it was held that the commission amounts which were earned by the non resident assessee for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The AO wrongly considered such payment as FTS u/s 9(1)(vii). This aspect is also covered by the ITAT order (supra). (PB 552-578).

4.2.2 Exhibition expenses: Similarly the exhibition expenses were incurred in making payment to various non-residents outside India on account of the stall booking in different conferences exhibitions held outside India. Thus, the services were rendered outside India and respective payments were also made outside India. Kindly refer the detailed ledger account (PB 458-459) along with Copies of Invoice, Foreign bills transaction advice, Letter by the assessee to the concerned bank with enclosure to make payment outside India (PB 460-527), containing the relevant details.

4.2.3 Testing Expenses: Lastly, the testing expenses were also paid to the non-resident outside India for getting the Samples / Goods which were tested by the non-resident outside India. Payments to these persons were also made outside India. Copy of the detailed ledger of Testing Expenses along with Invoices (PB 528-551), contains the relevant details (PB 1) is enclosed herewith.

4.3. From a perusal of the above submissions and the voluminous it evidences; it is evidently clear that undisputedly:

- All the payees actually rendered the services outside India only,
- The payments were made to him outside India only,
- None of the payees had any office or other fixed place of business in India
- The payee did not have any dependent employee/ correspondent performing any business connection/activity in India.
- They did not have any permanent establishment (PE) or any sort of business connection, directly or indirectly, in India

4.4 All these details were admittedly produced vide our letter dated 28.11.2018 to the AO. The Id. AO examined the details thoroughly but these facts are not denied.

4.5 Thus, it is not a case where non-resident agents are carrying out any business activity in India as enumerated in Explanation 2 to Section 9(1) and consequently there is no business connection between the assessee and the Non-Resident Payees. Moreover, all the countries of the respective payees and India have already entered into DTAAS providing the taxing of the income, if any, in the hands of the concerned payee.

Thus, it is fully established that the subjected amounts so received by the respective payees, were not the income chargeable to tax in India in any manner whatsoever, hence s. 195 of the Act was not applicable in this case.

4.6 Moreover, no Certificate is required u/s 195/197, when S.195 is not at all applicable to the appellant.

5. Even Explanation is not applicable:

5.1 Firstly, the ld. AO has completely misread and misapplied Explanation 2 in as much as Sec.195 requires "Any person responsible for paying...." Any person includes all the persons be a resident or non-resident as defined u/s 2(31) of the Act. Therefore, even a non-resident person responsible for paying to a non-resident was liable to deduct TDS u/s 195 however, certain judicial pronouncements had created doubts about the scope and purpose of S.195. It is only therefore, with a view to clarify that the obligation to make TDS u/s 195(1) applies to all the persons whether resident or non-resident if such person is responsible for making payment to a non-resident whose income is chargeable to tax in India, therefore, Explanation 2 was inserted by the Finance Act, 2012 w.r.t. 01.04.1962. This is evident from the following extract from part capital -F. Rationalization of International Taxation Provisions in the memorandum explaining the provisions of the Finance Bill, 2012

"Section 195.....assessment years."

Thus, the Explanation 2 does not at all positively say that despite the fact that income of the non-resident payee is not chargeable to tax in India yet however, Sec. 195 shall applies on the payer resident.

5.1.12 Supporting case laws: The aspect relating to invoking of Explanation-2, has been considered in various cases, decided in favor of the assessee, as under:

5.12.2 Similar view has been taken by the Hon'ble ITAT Hyderabad in the case of Prithvi Information Solutions Ltd. Vs. ITO (2014) 34 ITR 0028 (Hyd Trib) (DPB 14-25) which is a detailed order, considering Explanation 2. In that case held as under:

"Section 195.. ..of assessee]"

5.12.3 Also kindly refer Gujarat Reclaim & Rubber Products Ltd. (2015) 94 CCH 0148 (Mum) (DPB 1-7), CIT, Coimbatore Vs. Kikani Exports(p) Ltd. (2014) 49 66taxmann.com601 (Madras) (DPB- 108-113)and CIT, Chennai Vs.Farida Leather Company (2016) 238 Taxman 473/66taxmann.com321 (Madras) (DPB- 114-121). Also refer a direct decision in the case of ITO vs Kulbeer Singh in ITA No.5204/Del/2014 vide order dated 03.10.2018 (DPB 133-169)

5.2 Further the AO has misinterpreted the said Explanation 2. What all is provided in the Explanation 2 is that S.195 applies to all the persons who is responsible to pay (payer), is liable to make TDS whether he is a resident or non-resident person and irrespective the fact that such person has (a) a residence (b) place of business (c) or business connection in India or (d) any other presence in any manner whatsoever in India. Thus, Explanation speaks of the payer only and not of the payee.

5.3 Alternatively and without prejudice, even assuming for a moment that Explanation 2 applies, the way the Id. AO interpreted yet however, on the factual matrix the conditions mentioned therein were not at all satisfied by the AO.

It has never been the case of the AO that the payee non-resident was having a residence/place of business/ business connection in India or was present in any manner whatsoever in India so as to apply Explanation 2 r.w.s.195 and nor was the case of the appellant depended upon the same because it never contended that the payees did not have their residence/place of business/no business connection or did not have their presence in any manner in India. Thus, the simply admitted facts were that all the payees rendered services outside India and payments were also made to them outside India therefore, by no stretch of imagination it could be said that income accrued or have arisen or deemed to have accrued or have arisen in India by virtue of Sec.5 or Sec.9. Consequently neither Sec. 195 nor Explanation 2 could be made applicable.

5.4 Explanation cannot override the main provision: Yet another settled rule of interpretation is that an Explanation though can explain the main provision but can never override or violate the terms of the main provision. Kindly refer Prithvi Information Infra.

6.1 Supporting case laws:

6.1.1 GE India Technology Cen. P Ltd v. CIT

6.1.2 The issue in hand is directly70) 327 ITR 456(SC) covered by the decision of Hon'ble Rajasthan High Court in the case of CIT vs. M/s Modern Insulators Ltd. (2014) 110 DTR 0297 (Raj)

6.1.3 Similar view has been taken by the Hon'ble ITAT Hyderabad in the case of Prithvi Information Solutions Ltd. Vs. ITO (2014) 34 ITR 0028 (Hyd Trib)

6.1.4 Also kindly refer Gujarat Reclaim & Rubber Products Ltd. (2015) 94 CCH 0148 (Mum)

7. The only basis, apart from relying Explanation 2 to Sec.195 by the AO, was the case of DCIT vs. M/s Sesa Resources Ltd. in ITA No.267/PAN/2015 dated 20.08.2015. The Hon'ble Bombay High Court at Goa, in Tax Appeal No. 11/2016 vide order dated 07.03.2016, restored the issue back to the file of the Tribunal for re-adjudicating the same

afresh. Notably in second round the Hon'ble ITAT Panaji Bench, Panaji in ITA No./ 267/PAN/2015 dated 27.04.2016has now decided the issue in favour of the assessee and against the department. The Hon'ble ITAT Panaji has relied upon a decision of Hon'ble Mumbai High Court CIT vs. Gujarat Reclaim & Rubber Products Ltd. (2015) 94 CCH 0148 (Mum)

8. Other Supporting Case Laws:

TDS u/s 195 w.r.t. Commission Paid to Agents outside India:

8.1 ACIT vs. IIC Systems (P) Ltd. (2010) 33 DTR 0422 (Hyd trib)

8.2 DCIT vs. Ardeshi b. Cursetjee & Sons Ltd. (2008) 7 DTR 0051 (Mum Trib)

8.3 Armayesh Global vs. ACIT (2012) 32 CCH 0159 (Mum Trib)

8.4 CIT vs. Eon Technology (P) Ltd. (2012) 343 ITR 0366 (Del)

8.5 CIT vs. Toshoku Ltd (1980) 125 ITR 0525 (SC) held as under:

8.6 DIT (International Taxation) vs. credit Lyonnais (2016) 95 CCH 0141 MumHC:

8.7 NEC HCL System Technologies Ltd. vs. ACIT (2016) 46 CCH 0396 DelTrib

8.8 ACIT vs. Pahilajrai Jaikishin (2016) 157 ITR 1187 (Mum. Trib)

8.9 ACIT vs. Gupta H.C. Overseas (1) Pvt. Ltd. (2016) 46 CCH 0576 (Agra Trib)

8.10 DCIT Vs. Avt Mccormick Ingredients Ltd. (2016) 137 DTR 0092 (Chennai) (Trib)

8.11 Latest supporting case laws: A.B. Hotel Ltd. (Radisson Hotel) Vs. DCIT [2008] 25 SOT 368 (Delhi),

9.1 Accordingly, with regard to commission expenses accordingly, we are submitting herewith a chart along with all the relevant papers(PB 9-551), as under:

- Agency agreement,
- Certificate of the payee,
- Foreign bills transaction advice,
- Letter by the assessee to the concerned bank with enclosure to make payment outside India.

The above sets of papers are available with reference to all the parties to whom the subjected amount of commission has been paid.

9.2 Further with regard to the exhibition expenses also we are submitting herewith Copies of Ledger, Bills, Bank advice, correspondence and Form A2 of FEMA in respect of every expenses.

9.3 Also with regard to the testing expenses we submitting herewith Copies of Ledger, laboratory expenses and transaction receipt (Details) in respect of every expense relating to Testing expenses. (PB 528-551)

10. From a perusal thereof it is evidently clear that

- The payee actually rendered the services outside India only,
- The payments were made to him outside India only,
- The payee did not have any office or other fixed place of business in India
- The payee did not have any dependent employee/ correspondent performing any business activity in India.
- They did not have permanent establishment or any sort of business connection, directly or indirectly, in India

Thus, it is fully established that the subjected amount so received by respective payees, were not the income chargeable to tax in India in any manner whatsoever.

11. Cases cited by Revenue are completely distinguishable: The Id. AO also relied upon some decisions. However, the same was based on the peculiar facts available in those cases only which are not obtaining in the present case. They were rendered in different legal factual context and therefore hence are not at all applicable being completely distinguishable and hence kindly be ignored.

12. Commission cannot be termed as Fees for Technical Services (FTS):

12.1 The ld. AO, this year raised one more contention as was raised in A.Y. 2014-15, that the subjected amount of the commission paid was in the nature of fees for technical services (FTS) as defined in Explanation 2 to Sec. 9(1)(vii). However, except making a balled statement and suspicion, he could not at all prove as to how such payment of commission could be termed as fees for technical services or what type of technicalities were involved in the work carried out by the foreign agents outside India working for the assessee. The procuring of sales order did not involve any technical expertise, knowledge or skills. It is evident that managerial services are those services which involved the activity of managing or controlling. Foreign commission agents have neither any control over the export activity of the assessee nor they are the final authority in respect of the same. They only perform a subsidiary function outsourced to them for saving the cost and convenience. Hence, the activity of the foreign commission agents does not amount to managerial services and does not fall within the definition of "Fees for Technical Services". Even the agreements do not require any such qualities from the agents. Exhibition & testing are routine exp. & not FTS.

Interestingly, similar payments were made in the other years also when firstly, no disallowance at all was made u/s 40(a)(ia) in those years and also even in 2013-14 when the disallowance was made u/s 195, the AO did not term such commission payment as fees for technical services. Thus, there being no special reason and without bringing any change in facts & circumstances, the AO wrongly considered such commission payment as FTS.

12.2 Supporting case laws: Commission is not FTS

12.2.1 Fully covered issue: -1.1 It is pertinent to note that the AO in A.Y. 2014 15, also held that the payment in question is fee for technical services (FTS) because the non-residents have rendered the service of managerial nature which falls in the ambit of definition of Fee for Technical Services under s. 9(i)(vii) of the Act. However, the Honb'le ITAT considering the contention of the assessee that the provisions of s. 40(a)(ia) can be applied only in respect of sum payable or paid to a non-resident towards interest, royalty or fee for technical services (FTS) or other sum chargeable under this Act which is payable to non-resident, deleted the disallowance in assessee's own case in JLC Electromet (P) Ltd. vs. ACIT (2019) 201 TTJ 811 (JP). Thus, this issue is fully covered in favour of the assessee.

12.2.2 Director of income tax (International Taxation) vs. Credit Lyonnais (2016) 95 CCH 0141 (Mum HC). In this case, the services of the non-resident sub-arrangers of attracting deposit to IMDS Scheme were carried out entirely outside India, which were held as not a case of FTS.

Business Expenditure
Appeal dismissed."

12.2.3 ACIT (International Taxation) vs. Sumit Gupta, (2015) 152 ITD 0533 (Jp).

12.2.4. CIT vs. Farida Leather Company (Mad. HC) [2016] 66 laxmann.com 321 (Madras) (Pr. 11)

2.2.5. Subhash Chand Gupta vs. ACIT in ITA No. 1122/JP/2016 for A.Y. 2013-14 Dated 26/12/2017 (Pr. 5 Page 61)(I DPB 69 & 70)

12.2.6. ACIT vs. Pahilajrai Jaikishin (2016) 157 ITR (trib) 1187 (Mum. Trib.).

12.2.7. CIT vs. Kikani Exports P. Ltd (Mad.HC) (2014) 369 ITR 0096 (Mad): (2015) 232 Taxman 0255 (Madras) (Pr. 5) (I DPB-108-113).

Hence the impugned disallowance kindly be deleted in full."

2.3 I have perused the facts of the case, the assessment order and the submissions of the appellant. Assessing Officer made disallowance of Rs. 2,28,86,971/- under section

40(a)(ia) being commission, testing expense and exhibition expense paid without making deduction of tax at source under section 195 of the I.T. Act, 1961.

2.3.1 From the record, it is seen that assessee has made payment towards selling commission, towards exhibition expenses and towards testing expenses totalling to Rs. 2,28,86,971/- to some parties on export sale made during the year and no technical service was provided. Assessee contended that commission of Rs. 2,11,07,351/- was paid for providing the export order and copies of agency agreements were submitted. Copies of agreements etc. with all the recipients who are non residents were also submitted. The recipients did not have any business connection in India and commission paid to them is not taxable in India.

2 that they were paid to parties having no permanent business establishment in India.

2.3.1 On perusal of overall facts, the similar issues have been decided in favour of assessee in assessee's own case by Hon'ble ITAT, Jaipur bench in ITA No. 1494/JP/2018 and 23/JP/2019 dated 04.09.2019 wherein it is held as under:

> "30. In the present case, undisputed facts are that the commission has been paid to various non-resident entities in respect of sales affected by the assessee outside of India, the services have been rendered outside of India and the payments have been made outside of India. In light of these undisputed facts, the legal proposition laid down in the aforesaid decision equally applies in the instant case and such commission payment cannot be held chargeable to tax in India. Similarly the exhibition expenses have been paid in respect of participation in various exhibitions held outside of India and even the testing charges have been paid for testing services outside of India. Therefore, these payments will not fall in the category of income which has accrued or arisen or deemed to accrued or arise in India. Further, payments have been made outside of India. dia. Accordingly, we are of the considered view that there was no liability to deduct tax at source under section 195(1) as these payments are not chargeable to tax and the provisions of section 40(a)(ia) cannot be invoked in the instant case.
>
> 31. In light of above discussions and considering the entirety of facts and circumstances of the case, the disallowance made by the Assessing Officer is directed to be deleted.
>
> 32. Now, coming to ITA No. 23/JP/19 for AY 2014-15 undisputedly, the facts and circumstances of the case are exactly identical to facts and circumstances of the case in ITA No. 1494/JP/2018, out findings and directions contained therein shall apply mutatis mutandis to this appeal.
>
> In the result, both the appeals filed by the assessee are allowed.

2.3.2 Since the facts in this year are similar to the earlier years and assessee gave certificate of recipients who are non residents and also have no permanent business establishment in India, therefore, the commission received by them from appellant for services rendered outside India cannot be taxed in India. Regarding exhibition expenses also, since it was paid to the non resident exhibitors, the same cannot be said to be covered under the ambit of section 195. Regarding testing expenses, it is seen that few payments were made in cash in INR but since they are very low and do not exceed the prescribed limit for making TDS, therefore, even though certain payments were made in India, yet no TDS is required to be made. Balance payment towards testing charges was since made to non residents having no business establishment in India and covered by the decision of Hon'ble ITAT.

2.3.3 Therefore, following decision of Hon'ble ITAT, Jaipur in assessee's own case, facts being similar, the same is hereby deleted. This ground of appeal is allowed.

7. Aggrieved from the order of the ld. CIT(A), the department has filed an appeal before us contending that the ld. CIT(A) has erred in deleting the addition of Rs.2,28,86,971/-made by the AO. During the course of hearing, the Ld. AR of the assessee has relied on the order of the ld. CIT(A) where in all most all the arguments have been raised and is considered by the Ld. CIT(A) in his order. Before us, the Ld. AR has almost reiterated the submission made before CIT(A) and stated that the Ld. CIT(A) has given his finding on all the aspects, issues or concerns raised by the Ld AO, even the decision relied upon by the AO is differentiated and discussed so as to why the same is not accepted. Thus, the AR of the assessee heavily relied on the finding of the Ld. CIT(A) and submitted that the finding of the CIT(A) is rendered afterconsidering the overall facts of the case and submissions made before him.He has passed very well-reasoned and speaking

order. The Ld. AR stated that in the earlier year the order of the CIT(A) in assessee's own case was not favourable, but the considering the decision of the co-ordinate bench of this tribunal in earlier years and after considering the submission and details placed on record the Ld. CIT(A) has hold that the disallowance for the year under consideration is uncalled for and has deleted the same and the said order is disputed by the department in this appeal.

8. On the contrary the Ld. DR has not controverted any of the fact that the assessee is contending in connection with the contention for alleged non-deduction of tax at source. The Ld. AR contended that there is no requirement to withhold the tax on this paymentbased on the evidences placed on record by the assessee running into 635 pages. Against the written submission filed the Ld. AR, the Ld. DR has not challenged any contentions on the written arguments supported by evidence placed on record. The submission were filed in two part one is on28.07.2021 and another on 23.10.2020. Even the fact submitted by the Ld. AR is not challenged and the decision relied upon where also not differentiated by the Ld. DR. He has only contended that payment made to non resident without deduction of tax and based on the finding of the assessing officer he prayed that the addition should sustained. He has heavily relied upon the finding of the Ld. AO and has not pointed any legal arguments or decision stating so as to why and how the finding of the Ld. CIT(A) for this year and ITAT Jaipur bench decisions for

past year are incorrect. He has only filed a clarificatory letter obtained from the assessing officer dated 27.07.2021. The relevant portion of the contention of the AO is extracted here in below ;

> In this connection it is stated that during the A. Y. 2013-14 & A. Y. 2014-15 the decision of the Hon'ble ITAT was not accepted on merits as ITAT has totally ignored the various defects pointed by the AO and the same was also confirmed by the CIT(A) in toto. However, the tax effect was below the prescribed limit for filling further appeal as per CBDT circular no. 17/2019 dated 08.08.2019. Hence no further appeal was filed on this issue.

9. The ld. AR of the assessee has submitted a chart showing the breakup of the payment made to various parties to whom selling commission was paid with their complete address, a chart showing the breakup of various parties to whom selling commission was paid with their complete address for A. Y. 2013-14 & 2014-15 along with comparative chart for last 3 years, copies of ledger account of selling commission, copies of agency agreement, certificate of payee, Foreign bills transaction advise, letter by the assessee to the concerned bank with enclosure to make payment outside India for each of the parties to whom the selling commission was paid. The assessee also filed the copies of the Form no. 15CA and 15CB for making payment outside India as per provisions of the I. T. Act, 1961. The assessee also filed the ledger, bills, Bank advise, correspondence and Form A2 of FEMA in respect of expenses relating to Exhibition Expenses claimed by the assessee also. The Ld. AR of the assessee also placed in the paper book ledger

account for testing expenses along with the invoice for every expenses claimed as testing expenses.

10. The Ld. AR appearing on behalf of the assessee submitted that all the evidences placed on record is verified by the assessing officer. He has not raised single question about the payment under each head of expenses claimed. All the expenses were supported by bills and agreement, have complied the provisions of law under the I. T. Act as well as under FEMA. The only grievance raised by the revenue that TDS is not deducted on these payments made by the assessee while making to payment of the parties to whom the payments were made.

11. During the course of hearing the Ld. AR appearing on behalf of the assessee has argued in detailed. He has placed reliance on his written submission and the same is extracted here in below to have all that aspect of it is raised;

> 1. **Covered matter**:
>
> 1.1 It is pertinent to note that the assessee made similar payments and even almost to the same very parties i.e. the foreign payees in the past and the AO made disallowances u/s 40(a)(ia) in A.Y. 2013-14 & 2014-15, which was confirmed by the ld. CIT(A). However, in the second appeal the Hon'ble ITAT deleted the disallowance in JLC Electromet (P) Ltd. vs. ACIT (2019) 201 TTJ 811 (JP) (PB 552-578) holding as under:
>
> > "23. We have heard the rival contentions and perused the material available on record. During the course of assessment proceedings, the Assessing Officer found that the assessee has made payment of selling commission, exhibition expenses and testing expenses to various non-resident entities, without deducting tax at source and a show cause was issued as to why this payment should not be disallowed u/s 40(a)(ia) in view of insertion of Explanation 2 to section 195 by the Finance Act, 2012 with retrospective effect from 01.04.1962.
> >
> > X

30. In the present case, undisputed facts are that the commission has been paid to various non-resident entities in respect of sales affected by the assessee outside of India, the services have been rendered outside of India and the payments have been made outside of India. In light of these undisputed facts, the legal proposition laid down in the aforesaid decision equally applies in the instant case and such commission payment cannot be held chargeable to tax in India. Similarly the exhibition expenses have been paid in respect of participation in various exhibitions held outside of India and even the testing charges have been paid for testing services outside of India. Therefore, these payments will not fall in the category of income which has accrued or arisen or deemed to accrued or arise in India. Further,payments have been made outside of India. Accordingly, we are of the considered view that there was no liability to deduct tax at source u/s 195(1) as these payments are not chargeable to tax and the provisions of section 40(a)(ia) cannot be invoked in the instant case."

1.2 Fully covered issue:- Pertinently, very recently

2. The relevant provisions contained u/s 195, are reproduced hereunder.

2.1 Sec.195 with the Explanation 2 thereto immediately after the amendment made by the Finance Act, 2012 stood as under and continued to till date are as under:

S. 195. Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereofin cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force: Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or byany other mode :

Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-0.

Explanation 1.-For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation 2.-For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction there under applies and shall be deemed to have always applied and extends and shall be deemed to have always

extended to all persons, resident or non-resident, whether or not the non-resident person has

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

2.2 S. 40(a)(ia) of the Act, as stood at the relevant point of time, (relevant extract only) is as under:

S. 40. Notwithstanding anything to the contrary in sections 30 to [38], the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",

(a) in the case of any assessee

(ia) any interest, commission or brokerage, [rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, (has not been paid on or before the due date specified in sub-section (1) of section 139 :

xxxxxxxxxx

3. Firstly, we strongly rely upon our written submissions (relevant extract only) filed before the ld. AO on dated 30.11.2016 reproduced as under:

"In this connection we submit as under:

1.1 The assesse company has made following payments in foreign currency to non residents for services rendered outside india and theses non-residents have nopermanent establishment in India :
(i) Commission on Export Sale Rs. 2,11,07,351/
(ii) Exhibition Expenses Rs. 15,70,429/
(iii) Testing ExpensesRs. 2,09,191/

In this connection It is submitted that the above payments were made to non-residents having no PE in India, for services rendered outside India and no chargeable income accrues or arises in India in respect of above payments made to non-residents.

1.2 In this connection We reproduce below the relevant provision of section 195(1) of the Income Tax Act:

Section 195(1) of the Income tax Act states as

"Any person responsible for paying to a non-resident, not being a company, or a foreign company, any interest(not being interest referred to in section 194LB or section 194LC

or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head" Salaries") shall at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:"

1.3 As per provisions of section 195(1) of the Income tax Act, the tax at source is required to be deducted in respect of any sum paid to non-resident which is chargeable to tax in India under the provisions of the Income Tax Act. It means that if any payment made to non-resident is chargeable to tax in India under the provisions of the Income tax Act then person responsible for paying to a non resident is required to deduct income tax thereon at the rates in force. The provisions of section 195 of the Income Tax Act are applicable only in those cases where the payment made to non-resident is chargeable to tax in India under the provisions of the Income Tax Act. If any payment made to non-resident is not chargeable under the provisions of the Income Tax Act then the provisions of section 195 of the Income tax act are not applicable.

a. The assessee company is not required to deduct any tax at source as per provisions of section 195(1) of the Income Tax Act on Rs.2,11,07,351.00 towards Selling Commission, Rs. 15,70,429.00 towards Exhibition Expenses and Rs.2,09,191.00 towards Testing Expenses made to non-residents since these payments made to non resident are not chargeable to tax in India as the no income accrues or arises in India in respect of these payments made to non-residents. The services in respect of these transactions have been rendered outside India by non-resident and as such no income accrues or arises in India in respect of these payments made to non-residents. Further these non-residents has no PE in india. It is also submitted here that as per provisions of section 195(1) of the Income tax act, the assessee company is not required to deduct the tax at source on these payments, the Explanation 2 to section 195 of the Income tax Act inserted by the Finance Act, 2012 w. r. e. f. 1-4-1962 has no relevance.

b. In respect of Explanation 2 to section 195 of the Income tax Act inserted by the Finance Act, 2012 w. r. e. f. 1-4-1962, It is submitted that It is a clarificatory explanation and states that a non- resident person is also required to deduct tax at source before making payments to another non-resident, if the payment represents income of the payee non-resident, chargeable to tax in India. There are no other conditions specified in the Act and if the income of the payee non-resident is chargeable to tax, then tax has to be deducted at source, whether the payment is made by a resident or non-resident. The Explanation 2 to section 195 of the Income tax Act inserted by the Finance Act, 2012 w. r. e. f. 1-4-1962 is rationalization of taxprovisions to restate the legislative intent in respect of scope and applicability of section 195 and also for providing certainty in law.

Even though Explanation 2 to section 195 clarifles position of payments made to non-resident is subject to TDS irrespective of whether or not a non-resident person has a residence or place of business or business connection in India. The Explanation cannot override main provision of Section 195 about 'Sum chargeable'

The Explanation 2 cannot be invoked without establishing that the sum paid to non resident is chargeable under the provision of the act. In this connection We place reliance on the following decisions:

(a) CIT, Chennal Vs. Farida Leather Company reported in (2016) 238 Taxman 473/66taxmann.com321 (Madras)

> Agency commission/sales commission paid by assessee to non-resident agents, for services rendered by them, outside India, in procuring export orders for assessee, would not partake character of 'fees for technical services' as explained in context of section 9(1)(vii) and, therefore, provisions of section 195 would not apply.

(b) Obligation to deduct tax at source under section 195(1) arises, only if payment is chargeable to tax in hands of non-resident recipient.

Prithvi Information Solutions Ltd. V. Income Tax Officer reported in 47 taxmann.com 214 (2014). We give below the headlines of the decision of Prithvi Information Solutions Ltd. V. Income Tax Officer:

> Section 195 of the Income-tax Act, 1961- Deduction of tax at source Payment to non resident (Explanation to section 195)-Assessment year 2007-08- Whether where amounts are paid outside India to persons outside Indian territory, who does not have any tax liability as far as Income-tax Act, is concerned, said sum cannot be considered as 'sums chargeable under provisions of Act - Held, yes - **Whether even though Explanation 2 to section 195 clarifles position payments made to non-resident is subject to TDS irrespective of whether or not a non-resident person has a residence or place of business or business connection in India, Explanation cannot override main provision of section 195 about 'sum chargeable' under provisions of Act - Held, yes [Para 20] [In favour of assessee]**

(c) Deduction of export commission paid to foreign agents for sourcing of export orders in favour of assessee firm without deduction of tax at source under section 195 is to be allowed **where export commission paid to foreign brokers is not chargeable to tax in hands of foreign brokers as contemplated under section 195** and is neither a fee for technical/managerial services as defined in Explanation 2 to section 9(1)(vii) so as to bring it to tax under fiction created by deeming provisions section 9.

ACIT,Mumbai Vs. PahilajralJaikishin(2016) 66 taxmann.com 30(Mumbai-Trib.)

(d) Commission payment made by assessee to commission agents outside India for procuring export orders could not be brought to tax in India and as a consequence, TDS was not deductible.

Apsara Silk Vs. ITO, International Taxation (2016) 69 taxmann.com399 (Bangalore-Trib,)

(e) We also rely on following judgments:

(i) Dy. CIT VS. TVS Srichakra Ltd.(2015) 64 taxmann.com 18 (Chennai-Trib,)
(ii) (ii) CIT, Coimbatore Vs. Kikani Exports(p) Ltd. (2014) 66 taxmann.com 601(Madras)
(iii) CIT, Chennai Vs. Faizan Shoes (p) Ltd (2014) 48 taxmann.com 48(Madras)

(f) The Honorable Apex court in the case of GE India Technology Cen. P Ltd v. CIT(2010) 327 ITR 456(SC) held as under:

- Section 195 of the Income tax Act, 1961- deduction of tax at source payment to non resident
- Whether the moment a remittance is made to non-resident, obligation to deduct tax at source does not arise; it arises only when such remittance is a sum chargeable under the Act, Le. chargeable sections 4, 5 and 9 **Held, Yes**..
- The jurisdictional Rajasthan High Court has also dealt this issue in the case of Commissioner of Income Tax v. Modern Insulators Ltd. reported in 55 taxmann. com 260 (2015) (Rajasthan) and the departmental appeal has been dismissed by the Hon'ble Rajasthan High Court.

(g) It is also submitted that the Hon'ble Jaipur Bench of Income Tax Appellate Tribunal in various cases, having similar and identical facts of the assessee, have allowed the appeal of the assessee and rejected departmental appeal on the same issue.

(h) In this connection we rely on the judgment of Hon'ble Jaipur Bench of Income Tax Appellate Tribunal in the case of Subhash Chand Gupta vs. ACIT, Alwar, ITA No. 1122/JP/2016 decided on 26 Dec, 2017. The facts of the appellant assessee are similar and identical to acts of the case Subhash Chand Gupta vs. ACIT, Alwar and it was decided in favour of the assessee. The copy of the appellate order dated 26-12-2017 of Hon'ble Jaipur Bench of Income Tax Appellate Tribunal is enclosed herewith for your ready reference. It is submitted that the Hon'ble Jaipur Bench of Income Tax Appellate Tribunal in this case allowed theappeal of assesse considering the decision of the Hon'ble Madras High Court andalso the factual aspect of the case as mentioned before Para no.8 on Page no. 15 of the appellate order dated 26th Dec., 2017. The issue of explanation to section 195 by the finance act, 2012 with retrospective effect from 01-04-1962 has been properly dealt with in the decision of Hon'ble Madras High Court and considered by the Hon'ble Jaipur Bench of Income TaxAppellate Tribunal in the case of Subhash Chand Gupta Vs. ACIT, Alwar. In thisconnection Page No.14 and 15 of the appellate order dated 26th Dec, 2017 may beperused.

We also rely on the following judgment of Hon'ble Jaipur Bench of Income TaxAppellate Tribunal in following cases:

(i) The ACIT, Circle-6, Jaipur vs. M/s KanhiyalalKalyanmal (ITA No:324/JP/16)

(ii) M/s Classic Enterprises Ltd. Vs. Jt. Commissioner of Income Tax, Range2, Alwar (ITA No: 808/JP/2014

The assessee company is not required to deduct tax at source u/s 195 of the Income Tax Act in respect of commission on export sale to non-residents and as such no disallowance can be made u/s 40(a)/(ia) of the Income Tax Act.

2. In respect of payment of Exhibition Expenses for stall booking outside India to non-resident, it is submitted that no income accrues or arises in India to non-resident in respect of payment of Exhibition Expenses for stall booking outside India to non resident. The details and other evidences in respect Exhibition Expenses were produced before you on the last date of hearing. We enclose herewith the details of Exhibition Expenses. No tax at source u/s section 195 of the Income Tax Act is required to be deducted in respect of Exhibition Expenses for stall booking outside India made to non-resident by the assessee company. **In this connection We place reliance on the decision of Apex court in the case of GE India Technology Cen. P Ltd v. CIT (2010) 327 ITR 456(SC) wherein it was held as under:**

- Section 195 of the Income tax Act, 1961- deduction of tax at source-payment to non resident
- Whether the moment a remittance is made to non-resident, obligation to deduct tax at source does not arise; it arises only when such remittance is a sum chargeable under the Act, i.e. chargeable sections 4, 5 and 9-Held, Yes.
- It is also submitted that The Delhi bench of the Income Tax Appellate tribunal, in a recent ruling in the case of ITO Vs.M/s Brahmos Aerospace Pvt. Ltd. decided on 14-09-2016 in ITA No. 966/Del/2015 held that payments made to foreign entities in the nature of rent, advertisement and exhibition expenses are not subject to TDS since they are business expenditure. The Tribunal opined that such expenses are subject to the provisions of TDS only if the payee had a "PE" in India as per the provisions of the relevant DTAA. Accordingly, the assessee was under no obligation to deduct taxes at source while making these payments. Accordingly, Ld. CIT(A) has rightly held that the taxes were not required to be withheld u/s. 195(1) of the Act on the impugned payments made by the assessee and allow the issue in dispute in favour of the assessee which in my considered opinion, does not need any interference on my part, hence, I uphold the order of the Ld. CIT(A) on the issue in dispute and reject the grounds raised by the raised by the Revenue."

3. Similarly the Testing Charges were paid to non- resident for getting the samples/goods tested outside India and as such no income accrues or arises in India to non-resident in respect of payment of Testing Charges paid to non resident for getting the samples/goods tested outside India. The details and other evidences in respect Testing Charges were produced before you on the last date of hearing. We enclose herewith the details of Testing Charges. No tax at source u/s section 195 of the Income Tax Act is required to be deducted in respect of Testing Charges paid to non- resident for getting the samples/goods tested outside India made to non-resident by the assessee company. In this connection place reliance on the decision of Apex court in the

case of GE India Technology Cen. P Ltd v. CIT (2010) 327 ITR 456(SC) wherein it was held as under :

- Section 195 of the Income tax Act, 1961- deduction of tax at source payment to non resident
- Whether the moment a remittance is made to non-resident, obligation to deduct tax at source does not arise; it arises only when such remittance is a sum chargeable under the Act, i.e. chargeable sections 4, 5 and 9 Held, Yes.

The assessee company is not required to deduct tax at source u/s 195 of the Income Tax Act in respect of above payments made to non-residents and as suchno disallowance can be made u/s 40(a)/(la) of the Income Tax Act."

4. Sec. 195 not applicable: 4.1 From the Crux of the various judicial pronouncements and the guidance provided (cited later in this w/s), it is clear that the only test of applying Sec.195 is whether the subjected payment is a sum chargeable under the provisions of this Act or not. The assessee had already submitted in great detail duly supported with all the evidences that all the subjected expenses viz. Selling Exp., Exhibition Exp, Testing Exp. were incurred outside India and in all the three cases the respective services were also rendered by the respective payees, only outside India. All the requisite details were submitted vide letter dated 17.11.2016 & 18.11.2015. The jurisdictional facts thus, arenot denied and duly admitted therefore, it cannot be said that any income accrued or arose in respect of all the three subjected payments u/s 4, 5 or 9 of the Act in India.

4.2.1 Commission Expenses: The subjected payments included commission expenses of Rs.1.63 crore which was paid the foreign selling agents who rendered their services to the appellant outside India. The payments in this respect were also made outside India only. Kindly refer ledger accounts of Selling commission (Export) providing the complete detail as regard the name of the payee, reference to the export invoice of the appellant, the rate amount of commission etc. and when the same was credited to the account of the payee or paid to him, is enclosed. (PB 9-16) along with Copies of Agency agreement, Certificate of the payee, Foreign bills transaction advice, Letter by the assessee to the concerned bank with enclosure to make payment outside India (PB 17-457). In the case of CIT vs. Toshoku Ltd (1980) 125 ITR 0525 (SC) it was held that the commission amounts which were earned by the non-resident assessee for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The AO wrongly considered such payment as FTS u/s 9(1)(vii). This aspect is also covered by the ITAT order (supra). (PB 552-578).

4.2.2 Exhibition expenses: Similarly the exhibition expenses were incurred inmaking payment to various non-residents outside India on account of the stallbooking in different conferences exhibitions held outside India. Thus, the serviceswere rendered outside India and respective payments were also made outside India. Kindly refer the detailed ledger account (PB 458-459) along with Copies of Invoice, Foreign bills

transaction advice, Letter by the assessee to the concerned bank with enclosure to make payment outside India (PB 460-527), containing the relevant details.

4.2.3 **Testing Expenses**: Lastly, the testing expenses were also paid to the nonresident outside India for getting the Samples / Goods which were tested by the nonresident outside India. Payments to these persons were also made outside India. Copyof the detailed ledger of Testing Expenses along with Invoices (PB 528-551), containsthe relevant details (PB 1) is enclosed herewith.

4.3. From a perusal of the above submissions and the voluminous evidences, it is evidently clear that undisputedly:

- All the payees actually rendered the services outside India only,
- The payments were made to him outside India only,
- None of the payees had any office or other fixed place of business in India.
- The payee did not have any dependent employee/ correspondent performing any business connection/activity in India.
- They did not have any permanent establishment (PE) or any sort of business connection, directly or indirectly, in India

4.4 All these details were admittedly produced vide our letter dated 28.11.2018 to the AO. The Id. AO examined the details thoroughly but these facts are not denied.

4.5 Thus, it is not a case where non-resident agents are carrying out any businessactivity in India as enumerated in Explanation 2 to Section 9(1) and consequently there is no business connection between the assessee and the Non-Resident Payees. Moreover, all the countries of the respective payees and India have already entered into DTAAS providing the taxing of the income, if any, in the hands of the concerned payee. Thus, it is fully established that the subjected amounts so received by the respective payees, were not the income chargeable to tax in India in any manner whatsoever, hence s. 195 of the Act was not applicable in this case.

4.6 Moreover, no Certificate is required u/s 195/197, when S.195 is not at all applicable to the appellant.

5. Even Explanation 2 is not applicable:

5.1 Firstly, the ld. AO has completely misread and misapplied Explanation-2 in as much as Sec.195 requires "Any person responsible for paying...." Any person includes all the persons be resident or non-resident as defined u/s 2(31) of the Act. Therefore, even a non-resident person responsible for paying to a non-resident was liable to deduct TDS u/s 195 however, certain judicial pronouncements had created doubts about the scope and purpose of S.195. It is only therefore, with a view to clarify that the obligation to make TDS u/s 195(1) applies to all the persons whether resident or non-resident if such person is responsible for making payment to a non-resident whose income is chargeable

to tax in India, therefore, Explanation was inserted by the Finance Act, 2012 w.r.t. 01.04.1962.

This is evident from the following extract from part capital F. Rationalization of International Taxation Provisions in the memorandum explaining the provisions of the Finance Bill, 2012

> "Section 195 of the Income-tax Act requires any person to deduct tax at source before making payments to a non-resident if the income of such non-resident ischargeable to tax in India. "Person", here, will take its meaning from section 2 and would include all persons, whether resident or non-resident. Therefore, a non resident person is also required to deduct tax at source before making payments to another non-resident, if the payment represents income of the payee non resident, chargeable to tax in India. There are no other conditions specified in the Act and if the income of the payee non-resident is chargeable to tax, then tax has to be deducted at source, whether the payment is made by a resident or a non resident.

Certain judicial pronouncements have created doubts about the scope and purposeof sections 9 and 195. Further, there are certain issues in respect of incomedeemed to accrue or arise where there are conflicting decisions of various judicialauthorities.

Therefore, there is a need to provide clarificatory retrospective amendment to restate the legislative intent in respect of scope and applicability of section 9 and 195 and also to make other clarificatory amendments for providing certainty in law.

I. It is, therefore, proposed to amend the Income Tax Act in the following manner:
XXXXXXXXXXXXX

(v) Amend section 195(1) to clarify that **obligation to comply** with sub-section (1)and to make deduction thereunder applies and shall be deemed to have alwaysapplied and extends and shall be deemed to have always extended to allpersons, resident or non-resident, whether or not the non-resident has:

(a) a residence or place of business or business connection in India; or

(b) any other presence in any manner whatsoever in India.

These amendments will take effect retrospectively from 1st April, 1962 and willaccordingly apply in relation to the assessment year 1962-63 and subsequentassessment years."

Thus, the Explanation 2 does not at all positively say that despite the fact that income of the non-resident payee is not chargeable to tax in India yet however, Sec.195 shall applies on the payer resident.

5.1.1 Supporting case laws: The aspect relating to invoking of Explanation-2, hasbeen considered in cases, decided in favor of the assessee, as under: 5.1.2 Similar view has been taken by the Hon'ble ITAT Hyderabad in the case of Prithvi Information Solutions Ltd. Vs. ITO (2014) 34 ITR 0028 (Hyd Trib) (DPB 14-25)which is a detailed order, considering Explanation 2. In that case held as under. "Section 195 of the Income Tax Act, 1961- Deduction of tax at source - Payment to non-resident (Explanation 2 section 195)-Assessment year 2007-08-Whether where amounts are paid outside India to persons outside Indian territory, who does not have any tax liability as far as Income-tax Act, is concerned, said sum cannot be considered as 'sums chargeable under provisions of Act - Held, yes - Whether Even though Explanation 2 to section 195 clarifies position payments made to non-resident is subject to TDS irrespective of whether or not a non-resident person has a residence or place of business or business connection in India or any other persons in any other manner whatsoever in India, Explanation cannot override main provision of section 195 about 'sum chargeable' under provisions of Act - Held, yes [Para 20] [In favour of assessee]"

5.1.3 Also kindly refer Gujarat Reclaim & Rubber Products Ltd. (2015) 94 CCH 0148 (Mum) (DPB 1-7), CIT, Coimbatore Vs. Kikani Exports(p) Ltd. (2014) 49 66taxmann.com601(Madras) (DPB-108-113) and CIT, Chennai Vs. Farida Leather Company (2016) 238 Taxman 473/66taxmann.com321 (Madras) (DPB- 114-121). Also refer a direct decision in the case of ITO vs Kulbeer Singh in ITA No.5204/Del/2014 vide order dated 03.10.2018 (DPB 133-169)

5.2 Further the AO has misinterpreted the said Explanation 2. What all is provided in the Explanation 2 is that S.195 applies to all the persons who is responsible to pay (payer), is liable to make TDS whether he is a resident or non-resident person and irrespective the fact that such person has (a) a residence (b) place of business (c) or business connection in India or (d) any other presence in any manner whatsoever in India. Thus, Explanation speaks of the payer only and not of the payee.

5.3 Alternatively and without prejudice, even assuming for a moment that Explanation 2 applies, the way the ld. AO interpreted yet however, on the factual matrix the conditions mentioned therein were not at all satisfied by the AO.

It has never been the case of the AO that the payee non-resident was having a residence/place of business/ business connection in India or was present in any manner whatsoever in India so as to apply Explanation 2 r.w.s.195 and nor was the case of the appellant depended upon the same because it never contended that the payees did not have their residence/place of business/no business connection or did not have their presence in any manner in India. Thus, the simply admitted facts were that all the payees rendered services outside India and payments were also made to them outside India therefore, by no stretch of imagination it could be said that income accrued or have arisen or deemed to have accrued or have arisen in India by virtue of Sec.5 or Sec.9. Consequently neither Sec.195 nor Explanation 2 could be made applicable.

5.4 Explanation cannot override the main provision: Yet another settled rule of interpretation is that an Explanation though can explain the main provision but can never override or violate the terms of the main provision. Kindly refer Prithvi Information Infra.

6.1 Supporting case laws:

6.1.1 GE India Technology Cen. P Ltd v. CIT (2010) 327 ITR 456(SC) held as under:

> "TDS-Payment to non-resident-Obligation to deduct tax vis-a-vis taxability of remittance-Most important expression in s. 195(1) consists of the words "chargeable under the provisions of the Act"-Payer is bound to deduct tax at source only if the sum paid is assessable to tax in India-A person paying interest or any other sum to a non resident is not liable to deduct tax if such sum is not chargeable to tax under the IT Act-Sec. 195 also covers composite payments which have an element of income embedded or incorporated in them-Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct tax in respect of such composite payments However, obligation to deduct tax is limited to the appropriate proportion of income which is chargeable under the Act-This obligation flows from the said words used in s. 195(1) Sec. 195(2) pre-supposes that the person responsible for making the payment to the non resident is in no doubt that tax is payable in respect of some part of the amount to be remitted but is not sure as to what should be the portion so taxable or the amount of tax to be deducted-In such a situation he is required to make an application to ITO(TDS) for determining the amount-It is only when these conditions are satisfied that the question of making an order under s. 195(2) arises-If the contention of the Department that the moment there is remittance the obligation to deduct tax arises is to be accepted, then thewords "chargeable under the provisions of the Act" in s. 195(1) would stand obliterated If the contention of the Department is accepted then the department would be entitled to appropriate the moneys deposited by the payer even if it is not chargeable to tax because there is no provision in the Act whereby a payer can obtain refund-Sec. 237 r/w s. 199 implies that only the recipient of the sum can seek a refund-Thus, the interpretation of the Department leads to an absurd consequence-Entire basis of the Department's contention is based on administrative convenience in support of its interpretation-There are adequate safeguards in the Act which would prevent revenue leakage"

6.1.2 The issue in hand is directly covered by the decision of Hon'ble Rajasthan HighCourt in the case of CIT vs. M/s Modern Insulators Ltd. (2014) 110 DTR 0297 (Raj)in which it has been held that:

> "Business Expenditure-Interest, commission, brokerage etc to resident-Disallowance u/s. 40(a)(ia)-Deletion of disallowance-Assessee-limited company manufacturing insulators and bushings paid commission to three non-resident agents during assessment year 2007-08 and did not deduct tax at source-AO held that latest Circular 7 dated 22/10/2009 was applicable requiring Assessee to deduct tax-AO disallowed entire submit amount u/s. 40(a)(ia) on failure to explain business expediency for such payment CIT(A) deleted disallowance made by AO and further held that Assessee was not liable to deduct tax at source u/s. 195-ITAT upheld view of CIT(A)-Held, under section 40(a)(ia), in so far as payment is concerned, it is restricted to payment made to a resident and it nowhere specifies as to amount of commission having been paid to foreign agents/non residents-Relevant provision for disallowance, if any, would have

> been 40(a)(i) and not 40(a)(ia)--Merely because amount was more, that by itself did not justify disallowance and AO had to bring on record something more to disallow any payment-Liability for deduction of TDS u/s. 195, arises for payment made to a non resident, not being a company or to foreign company any interest or royalty-Any other sum was chargeable under provisions of IT Act and it was finding of fact by lower authorities that all three foreign agents were not assessed to tax in India and none of them had any office in India-Section 40(a)(ia) applied only to payments made to resident whereas section 40(a)(i) applies in case commission to foreign agents-TDS u/s. 195 arises only if payment to non-resident was taxed in India as payments were made abroad, not chargeable in India-Commission payments to be judged from angle of Assessee and did not call for interference from revenue officers-Revenue's Appeal dismissed."

6.1.3 Similar view has been taken by the Hon'ble ITAT Hyderabad in the case of Prithvi Information Solutions Ltd. Vs. ITO (2014) 34 ITR 0028 (Hyd Trib) which is a detailed order, considering Explanation 2.

6.1.4 Also kindly refer Gujarat Reclaim & Rubber Products Ltd. (2015) 94 CCH 0148 (Mum)

7. The only basis, apart from relying Explanation 2 to Sec. 195 by the AO, was the case of DCIT vs. M/s Sesa Resources Ltd. in ITA No.267/PAN/2015 dated 20.08.2015. The Hon'ble Bombay High Court at Goa, in Tax Appeal No. 11/2016 vide order dated 07.03.2016, restored the issue back to the file of the Tribunal for re-adjudicating the same afresh. Notably in second round the Hon'ble ITAT Panaji Bench, Panaji in ITA No./ 267/PAN/2015 dated 27.04.2016 has now decided the issue in favour of the assessee and against the department.

The Hon'ble ITAT Panaji has relied upon a decision of Hon'ble Mumbai High Court CIT vs. Gujarat Reclaim & Rubber Products Ltd. (2015) 94 CCH 0148 (Mum) which is a very detailed decision and has been reproduced by the Hon'ble ITAT in its order. Thus, the only basis of the AO remains no more.

8. Other Supporting Case Laws:

TDS u/s 195 w.r.t. Commission Paid to Agents outside India:

8.1 ACIT vs. IIC Systems (P) Ltd. (2010) 33 DTR 0422 (Hyd trib)
8.2 DCIT vs. Ardeshi b. Cursetjee & Sons Ltd. (2008) 7 DTR 0051 (MumTrib)
8.3 Armayesh Global vs. ACIT (2012) 32 CCH 0159 (Mum Trib)
8.4 CIT vs. Eon Technology (P) Ltd. (2012) 343 ITR 0366 (Del)
8.5 CIT vs. Toshoku Ltd (1980) 125 ITR 0525 (SC) held as under:

> "The commission amounts which were earned by the non-resident assessee for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India-CIT vs. R.D. Aggarwal & Co. (1965) 56 ITR 20 (SC): TC39R. 1098 and Carborandum Co. US. CIT 1977 CTR (SC) 209: (1977) 108 ITR 335 (SC): TC39R.1145 relied on."

8.6 DIT (International Taxation) vs. credit Lyonnais (2016) 95 CCH 0141 Mum HC:

"Business Expenditure-Interest, commission, brokerage etc. to a resident-Non applicability of provisions of 40(a)(i)-During Assessment Year 2001-02,- Assessee was appointed by State Bank of India (SBI) as arranger for mobilizing deposits in its India Millennium Deposits Scheme (IMDS)- In turn, Assessee was entitled to appoint sub arrangers for mobilizing IMDs both inside and outside India-Assessee explained that it mobilized deposits worth Rs.1235.8 crores and SBI accordingly provided long termdeposit of Rs.617.9 crore for period of 5 years-Besides, Assessee received a sum of crores from SBI as Arranger fees and commission in turn paid amount of Rs.37.07 crores to sub-arrangers by way of sub-arranger fees and commission-Amount of Rs.26.75 crores out of Rs.37.07 crores was paid by way of sub-arranger fees and commission to non-residents- Assessee had failed to deduct tax at source on Rs.26.75 crores paid to non-residents as sub-arranger fees and commission-Therefore, AO invoked section 40(a)(i) for failing to deduct tax u/s 195 to disallow expenditure to extent of Rs.26.75 crores by Assessment Order-CIT(A) held that amount paid to non-resident sub-arranger was in nature of commission / brokerage and not fees for technical services in terms of section 9(1) (vii)-Consequently, CIT(A) held that there was no question of deducting tax at source and deleted disallowance of Rs.26.75 crores paid as sub-arranger fees to non-residents-Tribunal held that provisions of section 40(a)(i) were not applicable as assessee was not obliged to withhold taxes u/s 195-Held, section 195 obliges person responsible for paying to non-resident any sum chargeable to tax under the Act, to deduct tax at time of payment or at time of credit to such non-resident-In terms of section 5 nonresident was chargeable to tax received or deemed to be received in India or accrued or arising in India-Services were admittedly rendered by non-resident sub-arrangers outside India-In such case, there was no occasion for any income accruing or arising to non-resident in India- Services of non-resident sub-arrangers of attracting deposit to IMDS Scheme was carried out entirely outside India- As held by Apex Court in case of CIT, A.P. v/s Toshoku Ltd no income could be said to accrue or arise in India where payment was made for service by non-resident outside India- As no income had accrued or arisen to non-resident sub-arrangers in India, question of deduction of tax U/S 195 would not arise-Assessee would not fall within category of managerial, technical or consultancy services in terms of Explanation (2) to section 9(1) (vil) so as to deemed to accrue or arise in India Revenue's Appeal dismissed."

8.7 NEC HCL System Technologies Ltd. vs. ACIT (2016) 46 CCH 0396 DelTrib

"TDS-Non-deduction-Disallowance u/s 40a(i)-Assessee was established for purposeof providing offshore centric software engineering services and solutions to NEC Group and its subsidiaries-No tax was withheld on payment made by Assessee to HCL Japan being non resident company, as Assessee believed that payment was covered by exception carved out u/s. 9(1)(vii)(b) being fees paid in respect of its business carried on by Japan BO outside India-AO asked Assessee to furnish reasons as to why no disallowance should be made u/s. 40(a) (i), as no tax was deducted on outsourcing cost paid by Japan BO to HCL Japan-AO held that impugned expenses were covered by

exception carved out by S. 9(1)(vii)(b) and disallowed outsourcing cost in accordance with provisions of S. 40(a) (i) as tax had not been withheld on that payment-CIT (A) held that as per article 12 (6) of Indo Japan DTAA, fees for technical services paid by Japan PE of Assessee (JapanBranch) would be taxed in Japan only because, Assessee had PE in Japan and Fees for technical services was in connection with business of PE-CIT(A) heldthat there was no liability fastened on Assessee company of withholding tax u/s 195 and deleted disallowance u/s 40a(i)-**Held, Assessee was carrying on business outside India through its Japan Branch office-Japan BO was branch office of Assessee company and financial statements of japan branch were required to be incorporated in financial statements of Assessee company to complete accounts of Assessee company-However, it could not be said that expense of Fees for technical services were borne out by Assessee and not by Japan BO of Assessee Payments of fees for technical services borne by Japan BO of Assessee was not subject to withholding tax u/s 195, because there was no income deemed to accrue or arise in India in hands of recipient of such fees-Impugned sum was not chargeable to tax in India according to domestic tax laws and consequently there was no withholding tax liability in case of such payments-Finding of CIT (A) regarding deletion of disallowance u/s 40a (i) was confirmed-Appeal of Revenue dismissed."**

8.8 ACIT vs. Pahilajrai Jaikishin (2016) 157 ITR 1187 (Mum.Trib)

"Business Expenditure Interest, commission, brokerage etc.to a resident Disallowance u/s 40a(ia)- Deletion of disallowance-. It was observed by AO from perusal of Profit and Loss A/c that assessee firm claimed expenses on foreign commission of Rs. 34,18,126-AO observed that no tax was deducted at source by assessee firm on such payments-Assessee firm was asked to explain why expenses should not be disallowed u/s. 40(a)(i)-AO held that payment made to foreign commission agent were covered under managerial services and were not commission simply as claimed by assessee firm-Thus, since assessee firm had not deducted tax at source, it was hit by provisions of section 40(a)(i) and tax should have been deducted at source by assessee firm u/s 195-AO held that those payments to non-resident by assessee firm was income deemed to accrue or arise in India and chargeable to tax u/s 9(1)(vii) and as per explanation to section 9(2), fees for technical services means any consideration for rendering of managerial, technical or consultancy services-AO held that services offered by agents were covered under managerial services that were included in fee for technical services and since assessee firm had not obtained certificate u/s 195(2), payment made to foreign agent of Rs.34,18,126/- was disallowed by AO u/s 40(a)((i)- CIT(A) held that commission agents were not having permanent establishment in India, amount in question did not accrue or arise in India and, thus, there was no need for deducting tax at source u/s. 195- CIT(A) deleted disallowance u/s 40a(ia) of Rs.34,18,126/- holding that assessee was using services of overseas commission agent for procuring export orders and not for providing managerial/technical services attracting TDS- **Held, assessee firm paid export commission of Rs. 34,18,126/- to foreign agents for rendering services abroad in relation to sourcing of export orders and for collecting payments on behalf of assessee firm, on which no tax was deducted at source by assessee firm u/s 195-AO disallowed expenses of Rs. 34,18,126/- on account of export commission paid by assessee firm**

u/s 40(i)(a) read with Section 195 holding said services to be managerial / technical services as defined under explanation 2 to Section 9(1)(vil).Those foreign agents were operating in their respective countries and rendering services to assessee firm from abroad and no part of such income could be reasonably attributable to any operation carried out in India by these foreign brokers as per facts which had emerged from records- Payments to said foreign brokers had been sent by assessee firm from India directly to their bank accounts abroad through banking channels with approval of Reserve Bank of India or payments were deducted by foreign buyers from payment due to assessee firm for making payment to these foreign agents directly-Foreign agents had rendered services for sourcing export orders and for collecting payments for and on behalf of assessee firm which was their business income not liable to tax in India- Other services such as sample approvals etc. were incidental to main activity of sourcing of export orders by these foreign brokers for assesssee firm-Services could not be described as managerial, consultancy or technical services as contemplated under explanation 2 to Section 9(1)(vii) to come within deeming provisions of Section 9(1)(vii) U/s 9(1)(vil) income wasdeemed to accrued or arise in India if fees payable for any technical services utilised in business or profession in India or for earning any income from any source in India- Fees for technical services included managerial, technical or consultancy as stipulated in explanation 2 to Section 9(1)(vil)- Delhi High Court in case of DIT v. Panalfa Autoelektric Limited (2014 49 taxmann.com 412(Delhi) for assessment year 2010-11 had elaborately discussed export commissions payable for generation of export orders in hand of taxpayer and held that these services could not be held to be managerial, technical or consultancy services to fall within definition as contemplated under explanation 2 to Section 9(1)(vii) and held that commission paid to foreign agent was for performing sales related activity i.e. procurement of order and did not constitute managerial services-Assessee firm was entitled for deduction of export commission of Rs.34,18,126/- paid to foreign agents for sourcing of export orders in favour of assessee firm without deduction of tax at source u/s 195 as these export commission payments to foreign brokers in not sum chargeable to tax in hands of foreign brokers as contemplated u/s 195 and was neither fee for technical/managerial services as defined in explanation 2 to Section 9(1)(vii) to bring it to tax under fiction created by deeming provisions of Section 9- Revenue's Appeal dismissed.

8.9 ACIT vs. Gupta H.C. Overseas (I) Pvt. Ltd. (2016) 46 CCH 0576 (AgraTrib)

"Business Expenditure-Expenses or payments not deductible in certain circumstances Disallowance of design charges-Deletion of disallowance-Assessee was exporter of leather footwear and footwear uppers-AO held that Assessee was under obligation to deduct tax at source from disputed payments and as Assessee failed to do so, payments were rendered ineligible for business deduction in view of provisions of S.40(a)(i)-AO made disallowance of design charges-CIT(A) held that since no services were rendered in India with respect to impugned payments, no disallowance u/S.40(a)(i) could be madeon account of retrospective amendment to S.9(1)- CIT(A) deleted disallowance made by AO-Held, in order to bring fees for technical services to taxability in India, not only that such services should be utilized in India but such services should be rendered

in India No material to demonstrate and establish that design and development services, for which impugned payments were made, were rendered in India-Therefore Assessee had no liability u/S.195 read with S. 9(1)(vii) to deduct tax at source from such payments-Once Assessee had no obligation to deduct tax at source from such payments, no disallowance made in respect of such payments- Entire amount was paid and nothing was outstanding for payment- No services in respect of impugned payments were rendered in India- Services were not rendered in India by foreign parties to whom payment was made under head Design & Development charges-Further it was also not disputed that entire amount had been paid and nothing was outstanding for payment-payment having been made before 8 May 2010, and no services having been rendered in India **ITAT upheld conclusion arrived at by. CIT(A) that assesee did not have any tax withholding liabilities from foreign remittance for fees for technical services and thus no disallowance under section 40(a)(i) was warranted-Revenue's Appeal dismissed."**

8.10 DCIT Vs. Avt Mccormick Ingredients Ltd. (2016) 137 DTR 0092(Chennai)(Trib)

Business Expenditure-Interest, commission, brokerage etc. to a resident Disallowance Disallowance of Lab Analysis Fee-Non-deduction of TDS-Assessee company filed return of income with total income of Rs.12,91,49,070/- and case was selected for scrutiny under CASS and notice u/s. 143(2) was served on assessee-Since assessee had international transactions, AO referred matter to Transfer Pricing Officer and TPO-I, held that international transactions of assessee company were within Arm's Length Price and hence no adjustment was necessary for assessment year 2010-2011-AO made disallowance of lab analysis fees of Rs.8,92,635/- on account of non deduction of TDS u/s.40(a)(i)- **Held, non residents service were availed only for opinion of certifying process- Since services rendered outside India and payments made outside Country and did not attract TDS provisions- Alternatively u/sec.9(1)(vii) fees for technical services, lab analysis fees would not fall into category of technical fees also there was no permanent establishment in India to charge such income to tax-It found that services were rendered in India and report was obtained in India- Therefore, ITAT remitted issue to AO for limited purpose to verify working system of Audited and consultancy work or inspection was carried by Auditors on lab analysis and ITAT set aside order of CIT(A) and directed AO to consider issue and pass order after providing adequate opportunity of hearing before passing order on merit**

8.11 Latest supporting case laws: A.B. Hotel Ltd. (Radisson Hotel) Vs. DCIT [2008] SOT 368 (Delhi),

9.1 Accordingly, with regard to commission expenses accordingly, we are submitting herewith a chart along with all the relevant papers (PB 9-551), as under:

- Agency agreement,
- Certificate of the payee,
- Foreign bills transaction advice,
- Letter by the assessee to the concerned bank with enclosure to make outside India. payment

The above sets of papers are available with reference to all the parties to whom thesubjected amount of commission has been paid.

9.2 Further with regard to the exhibition expenses also we are submitting herewith Copies of Ledger, Bills, Bank advice, correspondence and Form A2 of FEMA in respect of every expenses.

9.3 Also with regard to the testing expenses we submitting herewith Copies of Ledger, laboratory expenses and transaction receipt (Details) in respect of every expense relating to Testing expenses. (PB 528-551)

10. From a perusal thereof it is evidently clear that

- The payee actually rendered the services outside India only,
- The payments were made to him outside India only,
- The payee did not have any office or other fixed place of business in India
- The payee did not have any dependent employee/ correspondent performing any business activity in India.
- They did not have any permanent establishment or any sort of business connection, directly or indirectly, in India

Thus, it is fully established that the subjected amount so received by respective payees, were not the income chargeable to tax in India in any manner whatsoever.

11. Cases cited by Revenue are completely distinguishable: The ld. AO also relied upon some decisions. However, the same was based on the peculiar facts available in those cases only which are not obtaining in the present case. They were rendered in different legal factual context and therefore hence are not at all applicable being completely distinguishable and hence kindly be ignored.

12. Commission cannot be termed as Fees for Technical Services (FTS):

12.1 The ld. AO, this year raised one more contention as was raised in A.Y. 2014-15, that the subjected amount of the commission paid was in the nature of fees for technical services (FTS) as defined in Explanation 2 to Sec. 9(1)(vii). However, except making a balled statement and suspicion, he could not at all prove as to how such payment of commission could be termed as fees for technical services or what type of technicalities were involved in the work carried out by the foreign agents outside India working for the assessee. The procuring of sales order did not involve any technical expertise, knowledge or skills. It is evident that managerial services are those services which involved the activity of managing or controlling. Foreign commission agents have neither any control over the export activity of the assessee nor they are the final authority in respect of the same. They only perform a subsidiary function outsourced to them for saving the cost and convenience. Hence, the activity of the foreign commission agents does not amount to managerial services and does not fall within the definition of "Fees for Technical Services". Even the agreements do not require any such qualities from the agents. Exhibition & testing are routine exp. & not FTS.

Interestingly, similar payments were made in the other years also when firstly, no disallowance at all was made u/s 40(a)(ia) in those years and also even in 2013 14 when the disallowance was made u/s 195, the AO did not term such commission payment as fees for technical services. Thus, there being no special reason and without bringing any change in facts & circumstances, the AO wrongly considered such commission payment as FTS.

12.2 Supporting case laws: Commission is not FTS:

12.2.1 Fully covered issue:- 1.1 It is pertinent to note that the AO in A.Y. 2014-15, also held that the payment in question is fee for technical services (FTS) because the non-residents have rendered the service of managerial nature which falls in the ambit of definition of Fee for Technical Services under s. 9(i)(vii) of the Act. However, the Honb'le ITAT considering the contention of the assessee that the provisions of s. 40(a)(ia) can be applied only in respect of sum payable or paid to a non-resident towards interest, royalty or fee for technical services (FTS) or other sum chargeable. under this Act which is payable to non-resident, **deleted the disallowance in assessee's own case in JLC Electromet (P) Ltd. vs. ACIT (2019) 201 TTJ 811 (JP).**Thus, this issue is fully covered in favour of the assessee.

12.2.2 Director of income tax (International Taxation) vs. Credit Lyonnais (2016) 95 CCH 0141 (Mum HC). In this case, the services of the non-resident sub-arrangers of attracting deposit to IMDS Scheme were carried out entirely outside India, which were held as not a case of FTS.

> "Business Expenditure-Interest, commission, brokerage etc. to a resident-Non-applicability of provisions of 40(a)(1)- During Assessment Year 2001-02,- Assessee was appointed by State Bank of India (SBI) as arranger for mobilizing deposits in its India Millennium Deposits Scheme (IMDS)- In turn, Assessee was entitled to appoint sub-arrangers for mobilizing IMDs both inside and outside India-Assessee explained that it mobilized deposits worth Rs.1235.8 crores and SBI accordingly provided it long term deposit of Rs.617.9 crore for period of 5 years-Besides, Assessee received a sum of Rs.22.19 crores from SBI as Arranger fees and commission in turn paid amount of Rs.37.07 crores to sub-arrangers by way of sub-arranger fees and commission- Amount of Rs.26.75 crores out of Rs.37.07 crores was paid by way of sub-arranger fees and commission to non-residents- Assessee had failed to deduct tax atsource on Rs.26.75 crores paid to non-residents as sub-arranger fees and commission Therefore, AO invoked section 40(a)(1) for failing to deduct tax u/s 195 to disallow expenditure to extent of Rs.26.75 crores by Assessment Order-CIT(A) held that amount paid to non resident sub-arranger was in nature of commission / brokerage and not fees for technical services in terms of section 9(1) (vil)-Consequently, CIT(A) held that there was no question of deducting tax at source and deleted disallowance of Rs.26.75 crores paid as sub-arranger fees to non-residents- Tribunal held that provisions of section 40(a)(1) were not applicable as assessee was not obliged to withhold taxes u/s 195
>
> Held: section 195 obliges person responsible for paying to non-resident any sum chargeable to tax under the Act, to deduct tax at time of payment or at time of credit to such non resident-In terms of section 5 nonresident was chargeable to tax received or

deemed to be received in India or accrued or arising in India-Services were admittedly rendered by non-resident sub-arrangers outside India-In such case, there was no occasion for any income accruing or arising to non-resident in India-Services of non-resident sub-arrangers of attracting deposit to IMDS Scheme was carried out entirely outside India- As held by Apex Court in case of CIT, A.P. v/s Toshoku Ltd no income could be said to accrue or arise in India where payment was made for service by non-resident outside India- As no income had accrued or arisen to non-resident sub-arrangers in India, question of deduction of tax U/S 195 would not arise-Assessee would not fall within category of managerial, technical or consultancy services in terms of Explanation (2) to section 9(1) (vii) so as to deemed to accrue or arise in India-Revenue's Appeal dismissed."

12.2.3 ACIT (International Taxation) vs. Sumit Gupta, (2015) 152 ITD 0533 (Jp). Considering the contentions on FTS made in para 3 & 5, it was held that:

"6. We have heard the rival contentions of both the parties and perused the material on record. The assessee exported granite to USA and paid commission of Rs. 85,21,582/-on export sale made to M/s Amshum & Ash, USA and also paid Rs. 12,61,181/-towards advertisement charges to M/s BNP Media USA for advertisement of its product in an international monthly magazine Stone World" printed and published in USA. The recipient of commission rendered services outside the India and claimed as business income. The recipient of commission is non-resident and had no permanent establishment in India. No income had accrued or arisen to the non-resident U/s 9 of the Act in the India. The Coordinate Bench in ITA Nos. 42,43,44,45 & 46/JP/2012 had decided identical issue and held that no TDS U/s 195 of the Act is liable to be deducted. Therefore, respectfully following the Coordinate Bench decision on similar fact, we upheld the order of the learned CIT(A). Accordingly, the Revenue's appeal is dismissed."

12.2.4. CIT vs. Farida Leather Company (Mad. HC) [2016] 66 taxmann.com 321 (Madras) (Pr. 11)

"11. In the instant case, it is seen, admittedly that the nonresident agents were only procuring orders abroad and following up payments with buyers. No other services are rendered other than the above. Sourcing orders abroad, for which payments have been made directly to the non résidents abroad, does not involve any technical knowledge or assistance in technical operations or other support in respect of any other technical matters. It also does not require any contribution of technical knowledge, experience, expertise, skill or technical know-how of the processes involved or consist in the development and transfer of a technical plan or design. The parties merely source the prospective buyers for effecting sales by the assessee, and is analogous to a land or a house/ real estate agent/broker, who will be involved in merely identifying the right propertyfor the prospective buyer / seller and once he completes the deal, he gets the commission. Thus, by no stretch of imagination, it cannot be said that the transaction partakes the character of "fees for technical services" as explained in the context of Section 9(1)(vii) of the Act." 2.2.5. Subhash Chand Gupta vs. ACIT in ITA No. 1122/JP/2016 for A.Y. 2013-14Dated 26/12/2017 (Pr. 5 Page 61)(I DPB 69 & 70)

12.2.6. ACIT vs. Pahilajrai Jaikishin (2016) 157 ITR (trib) 1187 (Mum. Trib.).

Held: Assessee firm has paid the export commission of Rs. 34,18,126/- to the foreign agentsfor rendering services abroad in relation to sourcing of export orders and for collecting payments on behalf of the assessee firm, on which no tax was deducted at source by the assessee firm u/s 195 of the Act. The AO has disallowed the expenses of Rs. 34,18,126/- on account of export commission paid by the assessee firm u/s 40(1)(a) of the Act read with Section 195 of the Act by holding the said services to be managerial / technical services as defined under explanation 2 to Section 9(1)(vil) of the Act. The facts as emerging from records reveals that these foreign agents do not have any permanent establishment or any place of establishment in India .These foreign agents are operating in their respective countries and rendering services to the assessee firm from abroad and no part of the such Income can be reasonably attributable to any operation carried out in India by these foreign brokers as per the facts which has emerged from records. The payments to said foreign brokers have been sent by the assessee firm from India directly to their bank accounts abroad through banking channels with the approval of Reserve Bank of India or payments are deducted by the foreign buyers from the payment due to the assessee firm for making payment to these foreign agents directly. ITAT have observed from the facts as emerging from records that commission income neither accrued nor arose in India in view of the decision of Hon'ble Delhi High Court in the case of EON Technology Pvt. Limited, 343 ITR 366 (Del.) Revenue has not brought on record any cogent material to substantiate that there is any PE or business association in India of these foreign agents, nor any evidence is brought on record to establish that there is any portion of services rendered by these foreign agents from India. In ITAT considered view, these foreign agents have rendered services for sourcing export orders and for collecting payments for and on behalf of the assessee firm which is their business income not liable to tax in India. The other services such as sample approvals etc. are Incidental to the main activity of sourcing of export orders by these foreign brokers for the assesssee firm. These services cannot be described as managerial, consultancy or technical services as contemplated under explanation 2 to Section 9(1)(vii) of the Act to come within deeming provisions of Section 9(1)(vil) of the Act, rather the foreign brokers have rendered services from abroad to the assessee firm for sourcing of export orders in favour of the assessee firm and collection of payments for the assessee firm. Under Section 9(1)(vii) of the Act, income is deemed to accrued or arise in India if fees payable for any technical services utilised in a business or profession in India or for earning any income from any source in India. Fees for technical services include managerial, technical or consultancy as stipulated in explanation 2 to Section 9(1)(vil) of the Act. The Hon'ble Delhi High Court in the judgment in the case of DIT v. Panalfa Autoelektric Limited (2014 49 taxmann.com 412(Delhi) for the assessment year 2010-11 has elaborately discussed the export commissions payable for generation of export orders in the hand of taxpayer and has held that these services cannot be held to be managerial, technical or consultancy services to fall within the definition as contemplated under explanation 2 to Section 9(1)(vii) of the Act and held that commission paid to foreign agent is for performing sales related activity i.e. procurement of order and does not constitute managerial services. Based on ITAT above detailed discussions and reasoning, ITAT hold that keeping in view the facts

andcircumstances of the instant appeal, the assessee firm is entitled for deduction of export commission of Rs.34,18,126/- paid to foreign agents for sourcing of export orders in favour of the assessee firm without deduction of tax at source u/s 195 of the Act, as these export commission payments to the foreign brokers in not a sum chargeable to tax in the hands of the foreign brokers as contemplated u/s 195 of the Act and is neither a fee for technical/managerial services as defined in explanation 2 to Section 9(1)(vii) of the Act to bring it to tax under fiction created by the deeming provisions of Section 9 of the Act. ITAT order accordingly. (Para19)

12.2.7. CIT vs. Kikani Exports P. Ltd (Mad.HC) (2014) 369 ITR 0096 (Mad): (2015) 232 Taxman 0255 (Madras) (Pr. 5) (I DPB-108-113).

The Ld. AR of the assessee filed another submission in continuation and in addition to the earlier submission Dt.23-10-2020, furtherdetails and clarification as desired by the Hon'ble ITAT are as under:

13. As directed, we are enclosing herewith a chart (PB 636-638) showing the turnover/sales orders procured by the NRI sales agent-payee vis-à-vis the amount of commission paid to them. However, it may be clarified that the rate of commission is different on the various products and one agent may be dealing in more than one products of the Company at given point of time, hence for this reason and otherwise also the rate of commission paid may be different. There apart, the conversion rate prevailing at the time of payment of commission to a particular payee, may also differ when compared with other occasions.

14. A recent decision in the case of Prime Oceanic Pvt. Ltd. Vs. ITO ITA NO. 652/JP/2019. Dt. 14/06/2021. (DPB 170-199): by this Hon'ble Bench, which Icovers all the issues raised by the AO involved in our case. Hence, the issues involved are fully covered in favor of the assesse. We also place reliance on GVK Industries 3711TR453(SC), applying which also, Sec 9(1)(vii) is not applicable in our case.

15 As directed, we may submit that out of as many 17 payees (PB 17-457) to whom commission was paid this year, there is no single party which is new in this year in as much as the 4 payees were added in AY2015-16(wherein the claimed commission payment was allowed), which continued this year as well. The rest of the parties are continuing since AY2013-14 and AY2014-15 as well. Kindly refer the above mentioned chart. All the 4 parties have been shown in the abovementioned chart in Bold.

15.1 It may be clarified that even in the cases of these parties (though not new in this year in much as in AY 2015-16 the amount of commission paid to them has been duly allowed by the department), the terms of the agreements are the same as all other parties. These new parties have also supplied us certificate of having no permanent establishment (PE) or business connection (BC) in India and the evidence of payment made outside India in similar manner, are already placed in Paper Book.

15.2 the Ld. AO has nowhere stated that the facts & circumstances of the current year and in particular relating to these parties is something different than the earlier years. Moreover, the Ld. CIT(A) has already recorded categorical finding of fact that she has perused and verified the record and found the facts & circumstances of the current year as similar to those in the earlier years and therefore, held the subjected year as covered by the ITAT order in AY 2012-13 & AY 2013-14.

16. No disallowance in AY 2018-19: Another notable development is that even in AY 2018-19, the assessment was completed under scrutiny wherein the AO raised pointed query vide para no.17 of the notice u/s142(i) regarding payment of commission "17. Please furnish details of payment of commission amounting to Rs. 1,90,19,744/-in the following format." furnish copies of sales invoice for which commission was paid. Please justify receipt of services and again vide Para no. 11 raised the following queries: Details of the sales made by you, kindly provide details as under:"----TDS deducted.?? This was duly replied by the assesse vide its letter dt. 25.01.2021 submitting all the details which, ultimately resulted into the Assessment Order dt.10.03.2021 wherein no disallowance u/s195 r.w.s. 40(a)(ia) has been made. (P.B 649)

The order of the Tribunal in earlier year was passed on 04.09.2019 which was very much available before the AO who passed the Assessment Order for AY2017-18 and AY2018-19 on 24.11.2019 & 10.03.2021 respectively, both under scrutiny, hence for this reason and otherwise also on merits, the AO did not make any disallowance.

17. Moreover, department not having gone in appeal before the High Court, theissue involved has attained finality and that is also the reason no disallowance hasbeen made in these 2 years as also in AY2015-16.

18. Rule of Consistency: The law is well settled that in absence of any material change in the facts & circumstances, the Rule of Consistency require that the view already taken must be followed in later years as well. Kindly refer:

18.1 Godrej & Boyce Manufacturing Company Ltd. Vs. Dy. Commissioner Income-Tax & ANR. [394 ITR 449 (SC)/ [2017] 81 taxmann.com 111 (SC)]

> "38. In the present case, we do not find any mention of the reasons which had prevailed upon the Assessing Officer, while dealing with the Assessment Year 2002-2003, to hold that the claims of the Assessee that no expenditure was incurred to earn the dividend income cannot be accepted and why the orders of the Tribunal for the earlier Assessment Years were not acceptable to the Assessing Officer, particularly, in the absence of any new fact or change of circumstances. Neither any basis has been disclosed establishing a reasonable nexus between the expenditure disallowed and the dividend income received.
>
> That any part of the borrowings of the assessee had been diverted to earn tax free income despite the availability of surplus or interest free funds available (Rs. 270.51 crores as on 1.4.2001 and Rs. 280.64 crores as on 31.3.2002) remains unproved by any material whatsoever. While it is true that the principle of res judicata would not apply to

assessment proceedings under the Act, the need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out which conspicuously is absent in the present case. In this regard we may remind ourselves of what has been observed by this Court in **Radhasoami Satsang vs. Commissioner of Income-Tax [6].**

"We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but **where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a sub.sequent year."**

18.2 DCIT v/s Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 84 CCH 271 Guj HC: (2013) 215 TAXMAN 72 (Gujarat)

Preliminary expenses-Amortization of certain preliminary expenses-Assessee claimed deduction u/s. 35D-AO restricted deduction on ground that only eligible expenses were allowed to be spread over u/s. 35D and therefore, expenses only to extent that had nexus to eligible projects were admissible However, Tribunal, noted that in last seven years, no such disallowances were made and directed such benefit to be granted-Held, **since last several years, AO had granted such claim on same consideration-Following rule of consistency, Tribunal therefore, correctly held that such claim could not have been suddenly disallowed-Revenues' appeal dismissed**

Hence, the appeal of the revenue deserves to be dismissed.

12. Based on the detailed argument, the Ld. AR of the assessee fervently contested the disallowance made being the payment made to the foreign parties and stated that based on the facts, circumstance, evidence and decisions relied upon the disallowance is unwarranted and required to be deleted.

13. On the other hand the Ld. DR relied upon the orders of the assessing officer, and stated that the relief granted by the Ld. CIT(A) is unwarranted and thus, the order of the AO be restored.

14. We have persuaded the paper book filed by the assessee and have gone through the copies of the bills,ongoing thorough those bills it is evident that services were rendered outside India for the purpose of export outside India. It was submitted that the products are being tested and certified by the various agencies outside India to enable the assessee company to export its products, as it is the requirement of importing countries to get the products tested by designated agencies in their own countries. Thus, the contention of the assessee is that such fees for technical services are paid for services rendered outside India and has been utilized for the export business outside India and thus, the same are outside the purviews of section 9(1)(vii) and shall not be chargeable to tax in India so with holding of tax does not arise.

15. The ld AO rejected the contention of the assessee and held that the above payment is chargeable to tax in India in terms of provision of section 9(1)(vii) of the Act as they fall into the definition of fees for technical services. With respect to the applicability of Double Taxation Avoidance Agreement, also he held that it also satisfied the make available criteria of technical services. Therefore, the sum was disallowed.

16. On the contrary the ld. AR of the assessee has argued before us that there is no sum chargeable to tax as all the payees are of outside India, there is not a single

party in whose case the criteria for their residency for charging to tax in India is proved,services are also rendered outside India. Even the Testing Fees are paid as per requirement of customers and testing services are also rendered outside India. These entities do not have permanent establishment and, therefore, the impugned disallowance of the sum is also not chargeable to tax therefore, the provisions of section 9(1)(vii) cannot be invoked in the present facts.It has been pointed out that the said services are rendered and utilized outside India and payment has also been received by the foreign entities outside India, the case of the assessee is squarely covered in the exemption provided in section 9(1)(vii)(b) of the Act which is reproduced as under

> "a person who is a resident, except where fees are payable in respect of services utilized in a business or profession earned on by such person outside India or for the purpose of making or earning any income from any source outside India"

Therefore, in case where fees for technical services has been rendered outside India and has been utilized for the purpose of making or earning any income from any sources outside India, such payments would fall outside the purview of provision section 9(1)(vii) and will not be deemed to accrue or arise in India.

17. We have carefully considered the rival contentions and perused the orders of the lower authorities. The ld AR Shri Shri Mahendra Gargieya, raised contentions

relying on plethora of judicial precedents and has also placed on record the copies of bills, service agreement, payment advice, nature of service rendered in respect of the payments which is disputed by the Department in this appeal. The ld. AR of the assessee has filed detailed paper book containing all these evidences and various decisions relied upon. Here it is noteworthy that assessee's own case is covered by the decision of the co-ordinate bench of this tribunal for the assessment year 2013-14 and 2014-15.

18. Against the submission of the AR of the assessee, the Ld. DR has not pointed that why and how the decision that is relied upon by the AO which in detailed distinguished by the Ld CIT(A) are in correct. In fact, the department has accepted the contention that this sum is not disallowable as the subsequent assessment is completed by the department at retuned income. Not only that the ld. DR has also not countered the notable argument of the AR of the assessee that the subsequent year i.e. 2017-18, the AO raised a pointed query vide para no. 17 in a notice issued to the assessee and the assessee filed a detailed reply vide letter dated 25.01.2021 and Ld. AO after considering the overall facts presented being similar to the year under considered preferred not to make any addition on the similar issue and has accepted the contention of the assessee for that A. Y.2017-18.Considering this development for the subsequent year even the disallowance

made by the AO shall not sustained as the claim under this year is similar with that of A. Y. 2017-18.On this aspect Ld. DR choose to remain silent, whereas, the Ld. AR of the assessee relied on the judicial decision that in absence of any material change in the facts and circumstances, the Rule of Consistency require that the view already taken must be followed in later years as well and has relied on the judgment in the case of Godrej & Boyce Manufacturing Company Ltd. Vs. Dy. Commissioner Income-Tax & ANR. [394 ITR 449 (SC)/ [2017] 81 taxmann.com 111 (SC)] the relevant extract is as under :

> "38. In the present case, we do not find any mention of the reasons which had prevailed upon the Assessing Officer, while dealing with the Assessment Year 2002-2003, to hold that the claims of the Assessee that no expenditure was incurred to earn the dividend income cannot be accepted and why the orders of the Tribunal for the earlier Assessment Years were not acceptable to the Assessing Officer, particularly, in the absence of any new fact or change of circumstances. Neither any basis has been disclosed establishing a reasonable nexus between the expenditure disallowed and the dividend income received.
>
> That any part of the borrowings of the assessee had been diverted to earn tax free income despite the availability of surplus or interest free funds available (Rs. 270.51 crores as on 1.4.2001 and Rs. 280.64 crores as on 31.3.2002) remains unproved by any material whatsoever. While it is true that the principle of res judicata would not apply to assessment proceedings under the Act, the need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out which conspicuously is absent in the present case. In this regard we may remind ourselves of what has been observed by this Court in **Radhasoami Satsang vs. Commissioner of Income-Tax [6].**
>
> "We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but **where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a sub.sequent year."**

The learned departmental representative did not point out any distinguishing feature during the current year with respect to the facts prevalent in 2013-14, 2014-15 & 2017-18.

19. The ld. AR of the assessee further submitted that since the matter is fully covered in assessee's own case by the decision of Coordinated Bench of this Tribunal only and the issue being similar, the appeal should be decided in accordance with the judicial precedence available in assessee's own case. As the facts are identical relating to A.Y. 2017-18 wherein the AO has not preferred to dispute and has not made any disallowance on such foreign party's payments. Therefore, looking to the overall facts of the case, the addition made by the AO be deleted and the order of the ld. CIT(A) be upheld dismissing the appeal of the Department.

20. The ld. DR on the other hand vehemently argued before us that the considering the amendment made by the Finance Act, 2012, the assessee is required to deduct tax and, therefore, he has relied on the order of the AO. The ld. DR has also argued that Department has not filed any appeal in respect of earlier years orders of ITAT on account of CBDT instructions and, therefore, the issue may be decided afresh looking to the findings given by the AO in his order. He has

also filed the copy of the letter dated 27.07.2021 being the status report on the filling of an appeal for A. Y. 2013-14 & 2014-15. The relevant contention of the AO is as under :

> No. DCIT/C-4/PR/2021-22/70 Date : 27.07.2021
>
> The Addl. Commissioner of Income Tax (Sr. DR-1) ITAT,
> Jaipur
>
> Sub:- Appeal before Hon'ble Bench ITA No. 166/JP/20 in the case of M/s JLC Electromet Pvt. Ltd. PAN: AABCJ8786A for A.Y. 2016-17 - seeking certain report - reg.
>
> Ref: Addl. CIT(Sr.DR)/ITAT/JPR/2021-22/82 dated 26.7.2021
>
> Kindly refer to the subject cited above.
>
> In this connection, it is stated that during the A.Y. 2013-14 & A.Y. 2014-15 the decision of the Hon'ble ITAT was not accepted on merits as ITAT has totally ignored the various defects pointed out by the AO and the same was also confirmed by the CIT(A) in toto. However, the tax effect was below the prescribed limit for filing further appeal as per CBDT circular No. 17/2019 dated 08.08.2019. Hence no further appeal was filed on this issue.

21. On this issue the ld. AR of the assessee has argued before us that the parties to whom payments have been made for AY 2013-14 and 2014-15 are similar in the year under consideration i.e. 2016-17 and he has given detailed chart mentioning therein name of each entities to whom payment has been made in the year under consideration and the ld. AR of the assessee has also filed the names and addresses of the parties. Here the Ld. DR has not challenged any of the facts and his silence on the issue suggests that there are merits in the arguments and submissions made

by the Ld AR of the assessee. Therefore, considering the overall facts, judicial precedents relied upon before us, we hold that all the payments involved in these years are similar to earlier years, wherein the ITAT has in detailed dealt with the issue and it is in assessee's own case. The relevant extract from the order of the co-ordinate bench decision for A. Y. 2013-14 & 2014-15 is extracted here in below for the sake of concision

> 30. In the present case, undisputed facts are that the commission has been paid to various non-resident entities in respect of sales affected by the assessee outside of India, the services have been rendered outside of India and the payments have been made outside of India. In light of these undisputed facts, the legal proposition laid down in the aforesaid decision equally applies in the instant case and such commission payment cannot be held chargeable to tax in India. Similarly the exhibition expenses have been paid in respect of participation in various exhibitions held outside of India and even the testing charges have been paid for testing services outside of India. Therefore, these payments will not fall in the category of income which has accrued or arisen or deemed to accrued or arise in India. Further,payments have been made outside of India. Accordingly, we are of the considered view that there was no liability to deduct tax at source u/s 195(1) as these payments are not chargeable to tax and the provisions of section 40(a)(ia) cannot be invoked in the instant case."

Therefore, respectfully following the decision of the coordinate bench in assessee's own case in earlier year given on the identical issue and on facts, we dismiss solitary ground of appeal in the appeal of the department.

22. In the result, the appeal of the Department is dismissed.

Order pronounced in the open court on 12 /04/2022

Sd/- Sd/-

(संदीप गोसाई) (राठोड कमलेश जयन्तभाई)
(Sandeep Gosain) (Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य / Judicial Member लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 12/04/2022
*Mishra
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:
1. The Appellant- The DCIT, Circle-4, Jaipur
2. प्रत्यर्थी / The Respondent- M/s. JLC Electromet Pvt. Ltd. Jaipur
3. आयकर आयुक्त / The ld CIT
4. आयकर आयुक्त(अपील) / The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 166/JP/2020)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar