**आयकर अपीलीय अधिकरण,'बी'न्यायपीठ,चेन्नई**
**IN THE INCOME TAX APPELLATE TRIBUNAL , 'B' BENCH, CHENNAI**
**श्री वी.दुर्गा राव, न्यायिक सदस्य एवं श्रीजी.मंजुनाथ, लेखासदस्यके समक्ष**
**BEFORE SHRI V.DURGA RAO, JUDICIAL MEMBER**
**AND SHRI G.MANJUNATHA, ACCOUNTANT MEMBER**

आयकरअपीलसं./**I.T.A.No.1376 & 1254/Chny/2018**

(निर्धारणवर्ष / Assessment Year: 2013-14 & 2014-15)

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| The Deputy Commissioner of Income Tax,<br>Corporate Circle-6(2),<br>Chennai. | Vs | M/s. Sundaram Clayton Ltd.<br>29, Jayalakshmi Estates,<br>Haddows Road,<br>Chennai-600 006. |
| | | PAN: AAACS 4920J |
| (अपीलार्थी/Appellant) | | (प्रत्यर्थी/Respondent) |

**&**

आयकरअपीलसं./**I.T.A.No.1355 & 1356/Chny/2018**

(निर्धारणवर्ष / Assessment Year: 2013-14 & 2014-15)

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| M/s. Sundaram Clayton Ltd.<br>29, Jayalakshmi Estates,<br>Haddows Road,<br>Chennai-600 006. | Vs | The Deputy Commissioner of Income Tax,<br>Corporate Circle-6(2),<br>Chennai. |
| PAN: AAACS 4920J | | |
| (अपीलार्थी/Appellant) | | (प्रत्यर्थी/Respondent) |

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| अपीलार्थीकीओरसे/ Revenue by | : | Mr. Suresh Periasamy, JCIT |
| प्रत्यर्थीकीओरसे/ Assessee by | : | Mr. Vikram Vijayaraghavan, Advocate |

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| सुनवाईकीतारीख/Date of hearing | : | 29.03.2021 |
| घोषणाकीतारीख /Date of Pronouncement | : | 14.06.2021 |

## आदेश / O R D E R

**PER G.MANJUNATHA, AM:**

These cross appeals filed by the Revenue and assessee are directed against separate, but identical orders of the learned CIT(A)-15, Chennai, both dated 27.12.2017 and pertain to assessment year 2013-14 & 2014-15.Since, facts are identical and issues are common, for the sake of convenience, these appeals filed by the Revenue and assessee were heard

together and are being disposed off by this consolidated order.

2. The Revenue has more or less raised common grounds of appeal for both assessment years, therefore, for the sake of brevity, grounds of appeal filed for the assessment year 2013-14 in ITA No.1376/Chny/2018 are reproduced as under:-

> *"1).The Order of the Commissioner of Income Tax (Appeals) is contrary to the law and facts of the case.*
>
> *2) The Learned A.R CIT(A) erred in directing the AO to verify the assessee submission with the respect to assessment record and to restrict the disallowance of excess deduction claimed u/s 35(2AB).*
>
> *2.1) The Ld CIT(A) ought to have appreciated that the DSIR is the central agency which assessee the R&D work done by the assessee and quantified the eligible amount The assessee is not eligible to claim more than that is certified by the DSIR itself.*
>
> *2.2) The Ld CIT(A) failed to note that the assessee claimed the excess deduction u/s35(2AB).*
>
> *3)The CIT(A) erred in restricting the disallowance u/s 14A to the amount of dividend income.*
>
> *3.1)The CIT(A) ought to have appreciated that as per section 251(1)(a) of the Act, the "power to set aside" are " examining the issue afresh" has been omitted with effect from 01.06.2001 as per Finance Act 2001.*
>
> *3.2) The order of the Hon'ble ITAT on the similar issue in the case of M/s.EIH Associated Hotels Limited (2013-TOIL-796--*

*ITAT-MAD, dt. 17.07.2013) has not been accepted by the Department and further appeal in TCVA No.227 of 2014 is pending before the Hon'ble High Court.*

*3.3 The Ld CIT(A) ought to have appreciated that as per the decision of Honourable Karnataka HC in the case of M/s United Brewaries Ltd Vs DCIT reported in 241 taxman 299 (Karnataka) with respect to investment in subsidiaries is very much applicable to the facts of the present case.*

*3.4) The CIT(A) ought to have appreciated that the investments made by the assessee company in its subsidiary company is also entitled for dividend and hence the same should be treated on par with the other investments made*

*3. 5)The CIT(A) ought to have appreciated that Rule 8D (iii) do not mention of exempting any investments made in the wholly owned subsidiary companies.*

*3. 6) The CIT(A) erred in directing the AO to allow the balance of the additional depreciation carried forward from the earlier assessment year.*

*3.7) The CIT(A) ought to have appreciated that as per the proviso to section 32(1)(iia) of the Act where the asset is acquired and put to use by the assessee for the purpose of business for a period of less one hundred and eighty days in that previous year deduction under this subsection shall be restricted to fifty per cent of such asset.*

*3.8) The Ld CIT(A) ought to have appreciated that the department has filed an appeal u/s260Abefore the Hon'ble High Court in the case of Sundaram Fasteners Ltd for the A Y 2008-09 against the order of ITAT on the same issue*

*3.9) The CIT(A) ought to have appreciated the decision in the case of Bharat Hotels Ltd (2016) 380 ITR 552/65 taxmnn.com 39 (Delhi)(HC), wherein it was he'd that the additional depreciation was allowable on the plant and machinery only for the year in which the capacity expansion had taken place*

*which had resulted in the substantial increase in the installed capacity Each assessment year was separate and independent assessment year The provision of section 32 of the Act did not provide for carry forward of the residual additional depreciation*

*4) For these and other grounds that may be adduced at the time of hearing, it is prayed that the Order of the Commissioner of Income Tax (Appeals) be set aside and that of the Assessing Officer be restored."*

3. The assessee has more or less raised common grounds of appeal for both assessment years, therefore, for the sake of brevity, grounds of appeal filed for the assessment year 2013-14 in ITA No.1355/Chny/2018 are reproduced as under:-

*"1. The commissioner of Income Tax (Appeals) erred in upholding the disallowance of interest expenditure u/s 14A of the Income tax Act read with Rule 8D(2)(ii) amounting to Rs. 2,41,82,017/-.*

*The learned CIT (A) ought to have appreciated that the appellant has sufficient internal accruals to cover the entire amount of the investments made and that no part of the borrowed funds were used by the appellant to make the investments.*

*The learned CIT (A) ought to have appreciated that no part of the borrowed funds could be attributed for making the investments and consequently no part of interest expenditure could be disallowed by invoking section 14A r.w. Rule 8D(2)(ii).*

*Ground No 2:*

*The learned CIT (A) erred in not providing a specific direction in his order allowing our claim of deduction u/s 35(1)(iv) of the capital expenditure in respect of the R&D building.*

*The learned CIT (A) ought to have appreciated that the clause (2) of section 35(2AB) restricts that the expenditure claimed u/s 35(2AB) should not be again claimed under any other provisions of the Act. But since this amount is claimed only u/s 35(1)(iv) and not under section 35(2AB), the said clause is not applicable to the case.*

*The learned CIT(A) ought to have appreciated that the appellant had also submitted the workings for the quantum of deduction claimed under section 35(2AB) and section 35(1)(iv) of the Act to substantiate that the capital expenditure incurred on R&D building was not claimed as deduction twice and the same was duly accepted by the CIT (A).*

*Ground No 3:*
*The learned CIT(A) erred in upholding the disallowance u/s 40(a)(i) of the Income tax Act in respect of the foreign remittances made by the appellant.*

*The learned CIT (A) ought to have appreciated that the foreign remittances made to various nonresidents towards warehousing & logistics services, export commission, payments for registration of trademark and independent personal services are not subject to with-holding taxes as per the provisions of DTAA. AIs the services of warehousing & logistics services, export commission are not of the nature of technical services but are in the nature of business profits.*

*The learned CIT(A) ought to have appreciated that the payments of the nature of business profits are taxable in India only to the extent attributable to the PE in India Since there is no PE of the non-resident in India the same is not taxable in India. In the case of Independent Personal Services the stay in India by the non-resident was less than 182 days and hence not taxable as per DTAA. Since no tax was needed to be*

*deducted the said expenditure could not be disallowed u/s 40(a)(i) ofthe Income tax Act."*

4. Brief facts of the case extracted from ITA No.1376/Chny/2018 for the assessment year 2013-14 are that the assesse company is engaged in the business of manufacture of automotive components and application. The assessee has filed its return of income for the assessment year 2013-14 on 30.11.2013 and for assessment year 2014-15 on 30.11.2014 declaring total loss of Rs.26,13,44,210/- and total income of Rs.5,67,16,260/- for the assessment year 2014-15. The assessments for the impugned assessment year has been completed u/s.143(3) of the Income Tax Act, 1961, where the Assessing Officer has made various additions including additions towards disallowance of expenditure u/s.14A of the Act, disallowance of expenditure incurred for R&D u/s.35(2AB) / 35(1)(iv) of the Act, disallowance of various expenditure incurred in foreign currency u/s.40(a)(i) of the Act for non-deduction of TDS u/s.195 of the Act and disallowance of balance 50% additional depreciation claimed on new plant

&machinery acquired and put to use during the relevant previous year.

5. The assessee carried matter in appeal before the first appellate authority and challenged various additions made by the Assessing Officer. The learned CIT(A) vide its appellate order dated 27.12.2017 has partly allowed appeal filed by the assessee, where he has allowed partial relief in respect of additions made towards disallowance of expenditure u/s.14A of the Act, deleted additions made towards disallowance of balance 50% of additional depreciation and further deleted additions made by the Assessing Officer towards disallowance of capital expenditure incurred on R&D u/s.35((1)(iv) of the Act. However, he confirmed additions made by the Assessing Officer towards disallowance of various payments made to non-residents u/s.40(a)(i) of the Act for non-deduction of TDS u/s.195 of the Act. Aggrieved by the order of the learned CIT(A), the Revenue as well as assessee are in appeal before us.

6. The first issue that came up for consideration for both assessment years from the appeal of Revenue as well as the

assessee is disallowance of expenditure incurred relatable to exempt income u/s.14A of the Income Tax Act, 1961.During financial year relevant to the assessment year 2013-14 and 2014-15, the assessee has earned dividend income, which was claimed exempt u/s.10(34) of the Income Tax Act, 1961. The assessee had also made *suo motu* disallowance of expenditure relatable to exempt income, as identified by the assesse. The Assessing Officer had invoked Rule 8D of Income Tax Rules,1962 and determined disallowances of direct expenditure, interest expenditure and other expenditure at Rs.2,70,38,767/- for the assessment year 2013-14 and Rs.2,50,46,342/- for the assessment year 2014-15. The learned CIT(A), on appeal, has allowed partial relief where he has confirmed additions made towards disallowance of direct expenditure under Rule 8D(2)(i). However, recomputed disallowance of interest expenditure under Rule 8D(2)(ii), after excluding investments in subsidiary companies from total investments. Similarly, the learned CIT(A) has also directed the Assessing Officer to recompute disallowances under Rule 8D(2)(iii) by excluding investments in subsidiary companies.

7. The learned AR for the assesse, at the time of hearing, submitted that issue is squarely covered in favour of the assessee by the decision of the Tribunal in assessee's own case for assessment year 2012-13 in ITA No. 3398/Chny/2018, where under identical set of facts the Tribunal has deleted additions made by the Assessing Officer towards interest expenditure under Rule 8D(2)(ii) and further directed the Assessing Officer to recompute disallowance of other expenditure under Rule 8D(2)(iii) by considering only those investments which earned exempt income for the year by following the decision of ITAT., Delhi Special Bench in the case of ACIT Vs. Vireet Investments Pvt .Ltd. ( 165 ITD 27)(SB ) .

8. The learned DR, on the other hand, submitted that although the issue is covered in favour of the assessee by decision of the ITAT, Chennai in assessee's own case, but fact remains that assessee itself has computed *suo motu* disallowances of direct expenditure of Rs.42.49 lakhs in the original return of income filed for relevant assessment year. Therefore, disallowances required u/s.14A should be restricted

to the extent of *suo motu* disallowances computed by the assesse.

9. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. As regards direct expenses relatable to exempt income, as required to be computed under Rule 8D(2)(i), the assessee itself has computed total disallowance of Rs.42.49 lakhs and hence, question of reduction of disallowance computed by the assessee in its original return of income does not arise. Therefore, disallowance computed by the assessee under Rule 8D(2)(i), is restricted to *suo motu* disallowance as computed by the assessee for both assessment years.

10. As regards disallowance of interest under Rule 8D(2)(ii), it was claim of the assessee that it has sufficient own funds in the form of share capital and reserve, which is over and above total investments made in dividend bearing investments. We find that co-ordinate Bench of ITAT., Chennai in assessee's own case has considered identical issue and after considering

relevant facts and has also by following decision of Hon'ble Bombay High Court in the case of CIT Vs. HDFC Bank Ltd. (366 ITR 505) held that no disallowance could be made towards interest expenditure, when assessee has sufficient own funds, which is over and above the amount of investments in exempt bearing investments. We further noted that the Hon'ble Bombay High Court in the case of CIT Vs. Reliance Utilities &Power Ltd. ( 33 ITR 340) has held that when mixed funds are used for making investments in exempt bearing investments, then it would have to be presumed that investments made in exempt bearing investments are out interest free funds available with the assessee. In this case, the assessee has filed necessary details to prove that it has own funds in excess of investments made in shares and securities which yielded exempt income. Therefore, by following the decision of ITAT, Chennai in assessee's own case for earlier assessment year, we are of the considered view that Assessing Officer as well as learned CIT(A) were erred in disallowing interest expenditure under Rule 8D(2)(ii) of IT Rules, 1962. Hence, we direct the Assessing

Officer to delete disallowance of interest expenditure made u/s.14A of the Act.

11. As regards disallowance of other expenditure @ 0.5%, average value of investments under Rule 8D(2)(iii), we find that it is well settled principle of law that only those investments which yield exempt income for the relevant assessment year needs to be considered for computation of disallowance of other expenses under section 14A r.w.r 8D(2)(iii) of IT Rules, 1962. We further noted that the coordinate Bench has taken similar view in assessee's own case for the assessment year 2012-13 in ITA No.3398/Chny/2018, where the Tribunal by following the decision of ITAT., Delhi Special Bench in the case of ACIT vs. Vireet Investments Pvt.Ltd. (supra) has directed the Assessing Officer to consider only those investments which yielded exempt income for the relevant previous year to compute disallowance under Rule 8D(2)(iii) of IT Rules, 1962. Therefore, consistent with view taken by coordinate Bench, we direct the Assessing Officer to recompute disallowance under Rule 8D(2)(iii) by considering only those investments which yield exempt income for the relevant assessment years.

12. The next issue that came up for our consideration for assessment year 2013-14 is disallowance of R&D expenditure u/s.35(2AB) and section 35(1)(iv) of the Act. During the year under consideration, the assessee has incurred capital expenditure other than building a sum of Rs.86,75,846/- and revenue expenditure of Rs.6,09,24,237/- for research & development expenditure and claimed 200% weighted deduction u/s.35(2AB) of the Act amounting to Rs.13,92,00,166/-. In support of its claim, the assessee has produced certificate from the Department of Scientific and Industrial Research in form 3CL, in which DSIR has certified a sum of Rs.85,81,000/- for capital expenditure other than building and a sum of Rs.5,89,43,000/- for revenue expenditure and thus, out of total expenditure claimed by the assessee of Rs.6,09,24,237/-, the DSIR has certified and quantified a sum of Rs.6,75,24,000/-. The Assessing Officer has allowed weighted deduction of 200% under section 35(2AB) on the basis of certificate issued by DSIR in form 3CL and accordingly, disallowed a sum of Rs.41,52,000/- out of total deduction claimed by the assessee u/s.35(2AB) of the Act. Further, the

assessee has also claimed 100% deduction of R&D expenditure incurred towards building construction amounting to Rs.1,02,85,856/-. Since the capital expenditure is not entitled for weighted deduction u/s.35(2AB) of the Act, the Assessing Officer has disallowed capital expenditure on R&D on building amounting to Rs.1,02,85,856/-.

13. The learned AR for the assessee submitted that learned CIT(A) has erred in confirming disallowance of capital expenditure on R&D u/s.35(1)(iv) amounting to Rs.1,02,85,856/- without appreciating fact that any capital expenditure, which was not claimed as deduction u/s.35(2AB) can be claimed u/s.35(1)(iv) of the Act.In this regard, the assessee has relied upon decision of Hon'ble Madras High Court in the case of M/s.Tube Investments Ltd. Vs. CIT 216 ITR 94. The AR further submitted that as regards disallowance of weighted deduction claimed u/s.35(2AB), any uncertified portion of R&D expenditure is not eligible for only weighted deduction u/s.35(2AB) of the Act. However, actual expenditure incurred towards R&D expenditure can be claimed as deduction

either u/s.35(1) or 37 of the Act, because said expenditure was wholly and exclusively incurred for business of the assessee.

14. The learned DR, on the other hand, strongly supporting order of the Assessing Officer submitted that authority for certifying eligible deduction u/s.35(2AB) is DSIR and hence, the Assessing Officer has rightly allowed weighted deduction u/s.35(2AB),as per certificate of DSIR in Form 3CL. As regards disallowance of capital expenditure on R&D Building, the Assessing Officer has brought out clear facts to the effect that any expenditure relating to R&D building is claimed u/s.35(2AB) cannot be considered u/s.35(1)(iv) of the Act. Therefore, there is no error in the reasons given by the Assessing Officer to disallow capital expenditure on R&D building.

15. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. As regards disallowance of uncertified portion of expenditure incurred towards R&D u/s.35(2AB) of the Act, we find that although, DSIR has not certified expenditure for the

purpose of section 35(2AB), but the assessee has placed on record various evidences to prove that said expenditure is incurred wholly and exclusively for purpose of business of the assessee. Once a particular expenditure was incurred wholly and exclusively for purpose of business of the assessee, then such expenditure needs to be allowed either under specific head of expenditure or under residual head of expenditure u/s.37(1) of the Act. If any expenditure is not certified by DSIR in Form 3CL, then the same is not entitled for weighted deduction u/s.35(2AB) of the Act, but there is no restriction under law to claim such expenditure u/s.35(1) / 37(1) of the Act. The learned CIT(A), after considering relevant facts has rightly deleted additions made by the Assessing Officer towards disallowance of uncertified portion of R&D expenditure. Hence, we are inclined to uphold the findings of learned CIT(A) and reject ground taken by the Revenue.

16. As regards disallowance of capital expenditure incurred on R & D building u/s.35(1)(iv), it was claim of the assessee that capital expenditure on R&D building has not been claimed u/s.35(2AB) of the Act and hence, same is very much

allowable u/s.35(1)(iv) of the Act. We find that the Hon'ble Jurisdictional High Court of Madras in the case of M/s. Tubes Investments Ltd vs. CIT(supra), has considered an identical issue and held that in order to claim deduction u/s.35(1)(iv), approval of the authority prescribed u/s.35(2AB) is not an essential pre-requisite, if it is found that a part of the claim falls within ambit of section 35(1)(iv) of the Act. Further, mere fact of a claim not having been found admissible u/s.35(2AB) will not constitute a bar to allow an expenditure u/s.35(1)(iv), if that expenditure is capital expenditure and falls squarely within ambit of section 35(1)(iv) of the Act. In this case, the assessee has filed necessary evidence to prove that capital expenditure on R&D building has not been claimed u/s.35(2AB) of the Act. Therefore, we are of the considered view that once capital expenditure was incurred for scientific research purposes, then same is eligible for deduction u/s.35(1)(iv) of the Act. The Assessing Officer as well as learned CIT(A) without appreciating fact has simply disallowed capital expenditure on R&D building u/s.35(1)(iv) of the Act. Hence, we direct the Assessing Officer to delete additions made towards

disallowance of capital expenditure on R&D building u/s.35(1)(iv) of the Act.

17. The next issue that came up for our consideration from ground no.3 of revenue appeal for assessment year 2013-14 is disallowance of balance 50% of additional depreciation claimed on assets acquired and put to use for less than 180 days during the preceding previous years. The facts with regard to impugned dispute are that the assessee has acquired and put to use certain new plant and machinery, which are eligible for additional depreciation of 20%, as per clause (iia) of section 32(1) of the Act. Since assets acquired and put to use are used for less than 180 days in the year of acquisition, the assessee has claimed 50% of actual depreciation and balance 50% of depreciation was brought forward and claimed during impugned assessment year. The Assessing Officer has disallowed balance 50% of additional depreciation claimed on plant and machinery on the ground that there is no provision, under the Act to carry forward additional depreciation to subsequent years.

18. The learned DR submitted that the learned CIT(A) has erred in directing the Assessing Officer to allow balance of additional depreciation carry forward from earlier assessment year, without appreciating fact that as per proviso to section 32(1)(iia) of the Act, where an asset is acquired and put to use for the purpose of business for a period of less than 180 days in that previous year deduction under this sub-section will be restricted to 50% of such asset.

19. The learned AR for the assessee, on the other hand, strongly supporting order of the learned CIT(A) submitted that additional depreciation should be allowed based on the amount of investments made in new plant and machinery and further, if such plant and machinery was used for less than 180 days during preceding previous year, then balance 50% of additional depreciation should be allowed in subsequent years, because there is no bar under the Act to claim full additional depreciation, if other conditions prescribed for claiming additional depreciation are fulfilled.

20. We have heard both the parties, perused material available on record and gone through orders of the authorities below. There is no dispute with regard to fact that the assessee has acquired additional plant and machinery over and above prescribed limit, which is eligible for 20% additional depreciation as per section 32(1(iia) of the Act. The only dispute is with regard to period of acquisition of said asset and claiming depreciation as per proviso (iia) to section 32(1) of the Act. The Assessing Officer has disallowed balance 50% of additional depreciation on the ground that there is no provision under the Act to carry forward balance additional depreciation to subsequent years. It was claim of the assessee that additional depreciation should be allowed, if conditions prescribed for claiming additional depreciation are fulfilled. We find that the Hon'ble Karnataka High Court in the case of CIT Vs. Rittal India Pvt .Ltd. (2016) 380 ITR 423 (Kar) has considered an identical issue and held that if plant and machinery is eligible for additional depreciation u/s.32(1)(iia) and such plant and machinery is put to use for less than 180 days in said financial year, then balance of additional depreciation can be claimed in

subsequent years. The Hon'ble Madras High Court in the cases of Brakes India Ltd. vs. DCIT (2017 – TIOL 710-HC-MAD-IT) and TVS Motors Company Ltd. Vs.ACIT (2017 – TIOL 553-HC-MAD-IT) has considered an identical issue and held that balance of 50% of additional depreciation can be claimed in subsequent years, provided conditions for claiming additional depreciation is satisfied. In this case, there is no dispute with regard to fact that assessee has satisfied conditions prescribed for claiming additional depreciation. Therefore, we are of the considered view that assessee is entitled for balance 50% additional depreciation in subsequent years, when it was claimed only 50% of additional depreciation in the year of acquisition and put to use said plant and machinery. The learned CIT(A), after considering relevant submissions has rightly deleted additions made by the Assessing Officer towards disallowance of balance 50% additional depreciation. Hence, we are inclined to uphold findings of the learned CIT(A) and reject ground taken by the Revenue.

21. The next issue that came up for our consideration for assessment year 2013-14 and 2014-15 of assessee appeal is disallowance of various payments made to non-residents u/s. 40(a)(i) of the Act for non-deduction of tax deducted at source u/s.195 of the Act. The Assessing Officer has disallowed warehousing & logistic service charges paid to non-residents u/s. 40(a)(i) of the Act on the ground that the impugned payment is in the nature of fees for technical services and said payment is directly relatable to income earning activity situated in India and hence, it falls under definition of fees for technical services as defined u/s. 9(1)(vii)(b) of the Act. Similarly, the Assessing Officer has disallowed professional fees paid to Tileke & Gibbins International Ltd. towards professional services on the ground that said payment is in the nature of fees for technical services . Likewise, the Assessing Officer has disallowed payments made to Mr. Yoshikazu Tsuda towards consultancy charges by holding that period of stay of the consultant in India is more than 183 days and hence, same is taxable in India, as per section 9(1)(i) of the Act, since he becomesa resident in India u/s. 6(1)(a) of the Act. Similarly, for

assessment year 2014-15, the Assessing Officer has disallowed rework charges and subscription charges paid to non-residents on the ground that payment is in the nature of fees for technical services, which falls under definition as per section 9(1)(vii)(b) of the Act . The Assessing Officer has also made disallowance towards fees paid to Michigan University and Centre for creative leadership towards tuition fee for course conducted by them to the employees of the assessee on the ground that same was covered by definition of royalty in Explanation 2 to section 9(1)(vi) of the Act. It was claim of the assessee before the Assessing Officer that payments to warehousing and logistic service charges and export commission is covered by Article 7 of DTAA and hence, which is in the nature of business profits and not liable to tax in India, consequently, requirement of deduction of TDS u/s.195 does not arise. The assessee further claimed that professional fees paid to Tileke & Gibbins International Ltd. is also covered by Article 7 as business profits and hence, is not taxable in India. Likewise, Independent professional service rendered by non-

residents is not liable to tax in India, if stay of said consultant is less than 183 days in India.

22. We have heard both the parties, perused material available on record and gone through orders of the authorities below. As regards warehousing and logistic service charges paid to four parties amounting to Rs.89,82,340/-, we find that warehousing & logistic service charges is covered by Article 7 of DTAA as business profits of the respective DTAAs and hence, is outside scope of definition of section 9(1)(vii)(b) of the Act. We further noted that in order to bring any payment within the ambit of royalty or fees for technical services under section 9(1)(vii)(b) of the Act, recipient of service should be made available for technical knowledge of such service . In this case, payments made by assessee towards warehousing and logistic service charges and also rework & subscription charges is a mere payment for rendering services by non-residents in the territory of outside India. Therefore, we are of the considered view that said payment is not in the nature of fees for technical services which can be brought to tax u/s.9(1)(vii)(b) of the Act. Since the payments are in the nature of business profits, as per

Article 7 of respective DTAAs, same cannot be brought to tax in India in the absence of any permanent establishment in India of the service provider. Since payment is not liable for tax in India, the assessee is not required to deduct TDS u/s.195 of the Act and consequently, payments cannot be disallowed u/s.40(a)(i) of the Act. The Assessing Officer as well as learned CIT(A) without appreciating facts has simply made additions u/s.40(a)(i) of the Act and hence, we direct the Assessing Officer to delete additions made towards warehousing and logistic service charges for the assessment year 2013-14 and rework and subscription charges for the assessment year 2014-15.

23. As regards professional fees paid to Tileke & Gibbins International Ltd., we find that Article 12 of the India-Thailand DTAA does not cover fees for technical services. Further, payment made for professional services is covered by Article 7 as business profits and hence, is not taxable in India, because service provider does not have permanent establishment in India. Since the payment is not liable tax in India, the assessee is not required to deduct TDS as per section 195 of the Act and

consequently, payments cannot be disallowed u/s.40(a)(i) of the Act.

24. Insofar as payment made to Mr.Yoshikazu Tsuda towards consultancy charges amounting to Rs.87,056/-, we find that the assessee has placed on record necessary evidence to prove that Consultant stay in India is less than 183 days and hence, said payment is not taxable in India, as per Article 14 of DTAA between India and Japan. Since payment is outside scope of tax in India, the assessee is not required to deduct TDS u/s.195 of the Act and consequently, said payment cannot be disallowed u/s.40(a)(i) of the Act.

25. As regards tuition fee paid to Michigan University and Center for Creative Leadership for assessment year 2014-15 amounting to Rs.11,79,390/-, we find that payments made for teaching in/by educational institutions are excluded from the definition of fees for technical services as per Article 12(5)(c) of respective DTAAs and hence, said payments are outside scope of taxation in India. Since the impugned payment is not liable to tax in India, the assessee is not liable to deduct TDS

u/s.195 of the Act and consequently, payment cannot be disallowed u/s.40(a)(i) of the Act. The Assessing Officer as well as the learned CIT(A) without appreciating relevant facts has simply made additions towards various payments u/s.40(a)(i) of the Act. Hence, we direct the Assessing Officer to delete additions made towards payments made to non-residents u/s.40(a)(i) of the Act.

26. In the result, appeals filed by Revenue and the assessee for assessment years 2013-14 & 2014-15 are partly allowed.

Order pronounced in the open court on 14th June, 2021

| | |
|---|---|
| Sd/- | Sd/- |
| **( वी.दुर्गा राव)** | **(जी.मंजुनाथ)** |
| (V.Durga Rao) | (G.Manjunatha) |
| न्यायिक सदस्य /Judicial Member | लेखा सदस्य / Accountant Member |

चेन्नई/Chennai,
दिनांक/Dated 14th June, 2021
DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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