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

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 652/JP/2019
निर्धारण वर्ष/Assessment Year :2013-14

M/s Prime Oceanic Pvt. Ltd., Gandhi Nagar, Upla Sonava, Scheme No. 8, Alwar (Raj.)	बनाम Vs.	The Income Tax Officer, Ward-2(3), Alwar (Raj)
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAFCP0730Q		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Manish Agarwal (CA)
राजस्व की ओर से/ Revenue by : Smt Monisha Choudhary (JCIT)

सुनवाई की तारीख/ Date of Hearing : 06/04/2021
उदघोषणा की तारीख/Date of Pronouncement: 14/06/2021

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of ld. CIT(A)-22, Alwar dated 26.02.2019 wherein the assessee has taken the following grounds of appeal:-

"1. On the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in confirming the disallowance of Rs.28,40,000/- made by Ld. AO u/s 40(a)(i) of the Act in respect to payment made to Trans Coral Shipping, FZE ,Sharjah (UAE) arbitrarily.

1.1 That, ld. AO has further erred in holding that the payment made by assessee to Trans Coral Shipping, FZE ,Sharjah (UAE) was liable for deduction of tax at source u/s 195 of the Income Tax Act

by completely brushing aside the submission made and evidences adduced. Appellant prays disallowance so made is not in accordance with law and deserves to be deleted.

2. On the facts and in the circumstances of the case and in law, ld. CIT(A) has grossly erred in confirming the action of ld. AO in making lump sum disallowance of Rs.1,60,000/-out of various expenses debited to profit & loss account, i.e. Vehicle, Diesel & Petrol expenses, entertainment expenses, telephone and mobile expenses and travelling expenses, arbitrarily.

2.1. That, ld. CIT(A) has further erred in confirming the disallowance of Rs.1,60,000/- merely on the basis of assumptions and presumptions, without in any manner pointing out any specific defect instance of expenses being excessively incurred/incurred for non business purposes. Appellant prays that all the expenses were incurred wholly and exclusively for the purposes of business and therefore disallowance so made deserves to be deleted."

2. Briefly, the facts of the case are that during the course of assessment proceedings, the Assessing officer observed that the assessee has claimed sales promotion expenses of Rs. 28,40,000/- in its profit & loss account towards amount credited to M/s Trans Coral Shipping, FZE, Sharjah (UAE) without deduction of tax at source and the assessee was asked to explain as to why the expenses should not be disallowed due to contravention of section 40(a)(ia) of the Act r/w section 195 of the Act. On perusal of the reply filed by the assessee, the agency agreement dated 11.02.2012 entered into between the assessee and M/s Trans Coral Shipping and copy of bills issued by M/s Trans Coral Shipping FZE, the AO observed that the sales promotion expenses of Rs.28,40,000/- is not an expenditure but distribution of income of the company for the reasons as under:-

"(i) The services have been taken only from one company i.e. from M/s Trans Coral Shipping FZE but the business has been made at different ports of the world including India.

(ii) The details of services have not been mentioned in the bill raised by M/s Trans Coral Shipping FZE (UAE). In the bill, fixed amount (one-third) of the freight commission has been shared in addition to sharing in the form of so called incentive of Rs.6,69,050/- (i.e. 10% of total commission receipt of Rs. 66,90,497/-).

(iii) An Agency Agreement between M/s Prime Oceanic and M/s Trans Coral FZE (UAE) which has been prepared is a mutual understanding of both the companies. The agreement was not registered by any government agency or authority, so it is not treated as authentic. The agreement is the mutual understanding for making business.

(iv) No any evidences of specific service provided by the M/s Trans Coral FZE (UAE) has been furnished by the assessee.

(v) No payment of so called sales promotion expenses of Rs.28,40,000/- has been made to M/s Trans Coral FZE (UAE) till date. If anyone give services, the expenses and skills of service provider are also invested. How can any service provider leave its charges for a long time while freight commission has been received by the assessee company during the year."

3. The assessee was thereafter issued another show cause on 08.03.2016 wherein the AO stated that the assessee is engaged in the joint venture business with M/s Trans Coral Shipping FZE (UAE) and

have disbursed the profit as an expenditure and therefore, the assessee was asked to explain as to why the so called expenditure of Rs.28,40,000/- may not be treated as income for taxation. In response, the assessee submitted as under:

" In continuation to the earlier submissions, again we would like to put emphasis on the fact that invoices raised by M/s trans coral shipping FZE are just declaring the amount of fees in relation with principals earning as per agreement and the Services provided by Trans Coral Shipping FZE are mentioned in details in contract which is already submitted to you, also the invoice amount is as per agreement. Apart from the above we have furnished contract agreement entered by the assessee with M/s Trans Coral Shipping FZE (UAE) is on record in which services are mentioned kindly take note from that document.

10% of total income earned by the assessee company is paid to trans coral shipping FZE as per cl no 6(A) of agreement which states that- agent will also get 10% (of total amount earned by principal) as incentive if total earning of the principal is more than Rs. 50 lac and as the total income of the principal is 66,90,497/- in subjected Financial year 10% i.e. Rs. 66,90,497/- is paid as incentive.

Further we inform you that the assessee company only having business relation and no joint venture as M/s trans coral shipping fze is a UAE registered company and details of directors are submitted with you, Therefore the expenditure in no manner to be held income of the assessee company. "

4. The reply so filed by the assessee was considered by the AO but not found acceptable as the AO noted that it merely contains description of the agreement and no evidences of the sale promotion has been furnished. Since such business is made through electronic media, in such circumstances, copy of mails could have been furnished. The AO further held that even where the amount is treated as sale promotion expenses, in that case, TDS should have been deducted u/s 195 as the income has deemed to accrue or arise in India u/s 9(1)(vii)(b) of the Income Tax Act. Further CBDT's Circular No. 7/2009 dated 22.10.2009 is also applicable in the case. It was also held by the AO that it is a case of sharing of profits and the amount has been shown as sale promotion expenses for avoidance of taxation and therefore, the same cannot be allowed as deduction and hence, the amount of Rs.28,40,000/- was disallowed and added to the total income of the assessee.

5. Being aggrieved, the assessee carried the matter in appeal before the ld. CIT(A) and his findings are contained at para 5.3 and 5.3.2 of his order which is reproduced below:-

> "5.3 I have considered the assessment order and the appellant's submission. Following facts have emerged;
>
> *1. That the appellant is engaged in the business of Service provider as commission agent and also extend its business in dairy under the name of M/s Nirmal Dairy, Alwar.*
>
> *2. That during the year under consideration the appellant had declared a gross receipts of Rs.66,90,497/-declaring net loss of Rs.81,554/- for the year under consideration.*

3. That during the under consideration the appellant had claimed sales promotion expenditures of Rs.28,40,000/-

4. That the said commission was paid to M/s Trans coral shipping, FZE, Sharjah, UAE. However, the appellant has not deducted any tax before remitting the amount to the NRI.

5. That the appellant has claimed before the A.O that since the income so remitted in the hand of the NRI is not taxable in India therefore there was no requirement to deduct any TDS.

6. That the A.O had cited CBDT's circular in this regard relied on explanation 2 to section 9(1))(vii)(b) of the Act and rejected the assessee's claim, resulting in an addition of Rs.28,40,000/- under section 40(a)(ia) of the Act.

5.3.2 It is important to note here that the Finance Act 2010 has inserted an explanation to the section 9(2) of the Act w.e.f 01/04/1976 which is given below:

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the nonresident, whether or not,—

(i) the business or business connection in India; or

(ii) the non-resident has rendered services in India.

In view of the explanation inserted in the section 9(2) with regard to NRI, the income of the NRI on the amount paid to the by the appellant is deemed to accrue in India.

I have further considered the following points;

Fee for technical services(FTS) is defined in explanation 2 to section 9(1) (vii) of the Act to mean "any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under head "Salaries" .

As per Article 12(a) of the DTAA, the term FTS means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:

a) Are ancillary and subsidiary .... ; or

b) Make available technical knowledge, experience, skill, know-how or processes or consists of the development and transfer of a technical plan or technical design.

Therefore, taking into account factual matrix of the case, it is my considered view that the A.O is justified in disallowing the payment as it had attracted provision of section 195 of the Act, which the appellant had failed to deduct tax at source. Accordingly, the disallowance of Rs.28,40,000/- on account of sales promotion paid for consultancy/managerial services under section 40(a)(ia) of the Act is sustained. Appellant's ground of appeal is dismissed."

Against the aforesaid findings, the assessee is now in appeal before us.

6. During the course of hearing, the ld AR raised various contentions as are contained in the written submissions and the same read as under:-

"Ground of Appeal No. 1 & 1.1:
Under these grounds of appeal, assessee has challenged the disallowance of Rs,28,40,000/- , being Sales Promotion Expenses paid to foreign agent by alleging that assessee has failed to deduct TDS on such payment as per provisions of section 195 of the Income Tax Act,1961, which was confirmed by ld. CIT(A).

Brief facts of the case are that assessee is a commission agent and provides shipping services to its clients at various ports located all over world. Since assessee company is located in India, and nature of business is such that to capture business from outside India, and also to provide services to its clients located outside India, it has availed services of M/s Trans Coral Shipping FZE, which is a company incorporated under the laws of Government of Hamriyah Free Zone, Sharjah, UAE. Trans Coral Shipping FZE is engaged in the transport of Heavy Lift, Project and Wet Bulk and Dry Bulk cargos across all oceans of the world. Trans Coral Shipping FZE is representing assessee company in UAE shipping market, which are primarily in the nature of introducing to new client as well as obtaining business. For such services, assessee has paid Rs. 28,40,000/- to Trans Coral Shipping FZE, which have been debited to profit & loss account under the head "Sales Promotion Expenses". Ld. AO, vide order sheet entry dated 08.12.2015 raised query as to why the sum of Rs. 28,40,000/- should not be disallowed as per section 40(a)(i) as no tax has been deducted at source from such payment in terms of section 195. Detailed submission was filed by assessee explaining as to how the payment on account of Sales Promotion expenses of Rs. 28,40,000/- does not attract TDS provisions.

During the course of assessment proceedings, Ld. AO asked the assessee about the applicability of the provisions of section 9(1)(vii)(b) and further stated that section 195 is also attracted in the case of assessee and CBDT Circular No.7/2009 dated 22.10.2009 is also applicable in the case as well. Assessee submitted that such payments were made for procuring the business outside India for which no technical services were required nor rendered and moreover the recipient company's income is not "chargeable to tax under the provisions of the Indian Income Tax Act" and therefore payment of sale promotion expenses is not subject to tax deduction of tax at source. However, Ld. AO has not accepted the same and concluded that payment made by assessee is not in the nature of "Sales Promotion expenses" and rather is "distribution of income" by relying upon the Bills raised by Trans Coral Shipping FZE, wherein a fixed amount equivalent to 6,69,050/-(i.e. 10% of total commission receipt) has been shared in addition to incentives paid. In this regard it was submitted that additional sharing of revenue to the tune of 10% of commission receipts is in accordance with clause 6(A) of agreement between assessee and Trans Coral Shipping FZE, which provided additional incentive in the event total earning of assessee exceeded Rs.50 lacs.

After considering submission made, Ld. AO in para 1 at page 10 of assessment order has concluded with following remarks:

> *"In view of above if the amount would be sale promotion expenses, in that case TDS should have been deducted u/s 195. Since the so called service provider has been credited the amount from the freight commission of Rs.66,90,497/- received by the assessee company. Such as the income is deemed to accrue or arise in India u/s 9(1)(vii)(b) of the Income Tax Act. Further, CBDT's Circular No.7/2009 dated 22.10.2009 is also applicable in the case."*

……

"Since the claimed amount is so called sale promotion expenses and it has so only made for avoidance of taxation. The acts of the case a stated above establishes that the debited amount of Rs.28,40,000/- are just sharing of profit. As such the said amount is taxable in the hand of assessee company. Hence Rs.28,40,000/- is disallowed and added to the total income of the assessee."

On perusal of above, it is evident that observations of Ld. AO are quite ambiguous as on one hand, he sought to disallow the same as "Sale Promotion expenses" on the premise of non deduction of tax at source and on the other hand, he wish to treat the same as "Distribution of profit".

Ld. CIT(A), without appreciating the submissions made by assessee before him, has just confirmed the action of ld. AO by observing that as per explanation to section 9(2) inserted by Finance Act 2010 w.e.f.01.04.1976, income of NRI falling under clause (v) (Interest), (vi) (Royalty) or (vii)(Fees for Technical Services) of section 9(1) shall be deemed to accrue or arise in India whether or not such non-resident has any business connection in India or has rendered services in India. Also, ld. CIT(A) has mentioned the meaning of Fees for Technical services and has concluded that AO has rightly made disallowance.

With this background, following submission is made:

Payment made by assessee is not subject to deduction of tax at source: In this regard, at the outset, it is submitted that a particular sum is subject to deduction of tax at source, only if the same is covered by any of the

sections 192 to 196D. In the instant case, disallowance is made on allegation of non compliance of provisions of section 195. Section 195 is reproduced here for the sake of convenience:

195. [(1) 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 thereof in 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 :

It is thus clear that tax is deductible as per the provisions of this section only if such sum is chargeable under the provisions of this Act. At this juncture, kind attention of your honour's is invited to section 5 "Scope of Total Income", sub section 2 of which provides for taxability of non resident, which reads as under:

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Your honours would appreciate that it is undoubted fact that the payment is made by assessee to a company which is incorporated under the laws of Government of Hamriyah Free Zone, Sharjah, UAE and has no permanent establishment (PE) in India. A certificate in this regard was also filed before Ld. AO during assessment proceedings however, Ld. AO has not considered the same while arriving at conclusion nor has he passed any adverse comments in respect of the same.

It is also undisputed fact that tax is required to be deducted at source u/s 195 only if such payment is chargeable to tax in India, which is supported by CBDT Circular No. 3/2015 dated 12.02.2015, whereby the CBDT, supplementing its earlier Instruction No. 02/2014 on Section 195/201, has clarified that only sums which are chargeable to tax under the Act should be considered for purpose of disallowance u/s 40(a)(i) of the Act. A relevant extract of the said Circular is reproduced as under:

> *"4. As disallowance of amount under section 40(a)(i) of the Act in case of a deductor is interlinked with the sum chargeable under the Act as mentioned in section 195 of the Act for the purposes of tax deduction at source, the Central Board of Direct Taxes, in exercise of powers conferred u/s 119 of the Act, hereby clarified that for the purpose of making disallowance of 'other sum chargeable' u/s 40(a)(i) of the Act, the appropriate portion of the sum which is chargeable to tax under the Act shall form the basis of such disallowance and shall be the same as determined by the Assessing Officer having jurisdiction for the purpose of sub-section (1) of section 195 of the Act as per Instruction No. 2/2014 dated 26.02.2014 of CBDT. Further, where determination of 'other sum chargeable' has been made under sub-sections (2), (3) or (7) of*

section 195 of the Act, such a determination will form the basis of disallowance, if any, u/s 40(a)(i) of the Act."

In light of the language of section 195 and above Circular, it is submitted that the assessee was not required to deduct tax at source at the time of making payment as the payments made by the assessee do not give rise to any "sum chargeable to tax" in India in the hands of recipient. Hon'ble Supreme Court in the case of G. E. India technology Centre Pvt. Ltd. Vs CIT (2010) 327 ITR 456 has, categorically held that the tax deducted at source obligations u/s 195(1) of the Act arises, only if the payment is chargeable to tax in the hands of the non resident recipient. (Headnote reproduced) :

Deduction of tax at source — Mere remittance to non-resident — Duty to deduct tax at source — Does not arise unless remittance contains wholly or partly taxable income — Income-Tax Act, 1961, s. 195

Coming to the issue of determination of taxability of sum paid outside India in the hands of non resident, the same would arise if sum paid:

- Falls under clause (v) [Interest], (vi)[Royalty] or (vii)[Fees for technical services] or
- Non Resident recipient has permanent establishment in India. [Explanation 1 to Section 9(1)(i)]

As non resident recipient (Trans Coral) has no permanent establishment in India, sum received by him shall be chargeable to tax in India only if the same falls under clause (v)/(vi) or (vii) of Income Tax Act. Here, payment made by assessee is clearly outside purview of clause 9 (v)&(vi). So far as clause (vii) of section 9(1) is concerned, ld. CIT(A) simply referred definition of "Fees for Technical services", without explaining as to how

these Sales Promotion expenses paid by assessee constitute "Fees for Technical Services". At this juncture, Fees for Technical Services as has been defined under explanation 2, clause (vii) of section 9 of the Act, is reproduced for the sake of convenience:

Explanation [2].—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

It is submitted that payment of sales promotion expenses made by assesse can at best be categorized as "Commission", and is completely outside the purview of definition of "Fees for Technological services". It is further submitted that Section 195 of the Act has to be read alongwith the charging section 4, 5, and 9 of the Act. One should not read Section 195 of the Act to mean that the moment there is a remittance, the obligation to deduct tax automatically arises. Section 195 of the Act clearly provides that unless the income is chargeable to tax in India, there is no obligation to withhold tax. In order to determine whether income could be deemed to accrue or arise in India, section 9 of the Act is the basis. If remittance is for Commission to non resident agents for services rendered outside India, no tax is deductible as overseas agents operated in their own country and no part of their income had accrued in India. In support, reliance is placed on following decisions:

- M/s JLC Electromet Pvt. Ltd. Vs ACIT (ITA NO. 1494/JP/2018 and 23/JP/19 dated 04.09.2019).

- ACIT vs M & B Engineering Ltd. (ITA No. 370/Ahd. /2018. dated 22.10.2019)
- DCIT vs Shamrock Pharmachemi Pvt. Ltd (ITA No. 862 & 863/Mum/2018)
- DCIT (International Taxation), Ahmedabad vs. Welspun Corporation Ltd. (2017) 77 taxmann.com 16.
- CIT vs Kikani Exports Pvt. Ltd. (2014) 369 ITR 96 (Mad)
- CIT vs. Model Exims (2014) 363 ITR 66 (All.)
- CIT vs. EON Technology P. Ltd. 343 ITR 366 (Del.)

It is thus submitted that sum paid by assessee does not fall under any of the category mentioned above, and therefore is not taxable under 9(1)(vii). It is therefore submitted that there was no liability to deduct tax at source u/s 195 of the Income Tax Act.

Now coming to Ld. CIT(A) observation that in view of amendment in explanation below section 9(2) by Finance Act, 2010 w.r.e.f. 01.06.76, the case of assessee is covered in section 9(1)(vii), it is submitted that earlier explanation inserted by Finance Act, 2007 w.r.e.f. 01.06.76 was amended by Finance Act, 2010 again from retrospective effect i.e. 01.06.76.

It is submitted that by way of Finance Act, 2010 amendment in impugned explanation has introduced clause (ii), which talks to the effect that income of non-resident shall be deemed to accrue or arise in India whether or not :

i) Non resident has residence or place of business or business connection in India, or

ii) The non-resident has rendered services in India

The Hon'ble Supreme Court has interpreted Section 9(1)(vii) of the Act in GVK Industries Ltd. v. ITO 371 ITR 453. Explaining the interplay between Section 9(1)(vii) and the amendment made by Finance Act, 2007 and Finance Act, 2010 resulting in retrospective insertion of Explanation to Section 9(2) of the Act, the Court clarified that the exception provided in terms of clause (b) , to Section 9(1)(vii) was not overridden by insertion of Explanation to Section 9(2) of the Act and that for *"fees for technical services"* to be taxed a India, it is imperative that the payer is resident in India and that the services are utilized in India. As a sequitur, where the resident utilizes the services provided by the non-resident service provider for purpose of earning income from any source outside India, payment for such services is not deemed to accrue or arise in India and hence not taxable in India. The Supreme Court also dealt with the two principles, namely situs of residence and situs of source of income and pointed out that the "Source State Taxation" rule which confers primacy to right to tax a particular income or transaction to the State /Nation where the source of the said income is located, is accepted and applied in international taxation law. In the said judgment, it was observed that *"deduction of tax at source when made applicable, it has to be ensured that this principle is not violated."*

The Hon'ble Delhi High Court in the case of DIT vs M/s Lufthansa Cargo India, ITA No.95/2005 while confirming the order passed by ITAT has held as under:

"The sources from which the assessee has earned income are therefore outside India as the income earning activity is situated outside India. It is towards this income earning activity that the payments for repairs have been made outside India. The payments therefore fall within the purview of the exclusionary clause if Section 9(1)(vii)(b). Thus, even assuming that

the payments for which maintenance repairs were in the nature of fees for technical services, it would not be chargeable to tax."

In view of above, it is further submitted that any explanation introduced by legislation is for clarifying the main provisions contained in the said section, so the extent of ambiguity, if theme is same ambiguity. However meaning and intent of explanation cannot be extended or stretched to such a point so as to override the explicit language and meaning of the said section.

Ld. CIT(A) had erred in extending / stretching the meaning of explanation below section 9(2) to the extent that it has entirely overridden the main provision of section 9(1)(vii)(b) and has further erred in seeking to nullify the exception provided in section 9(1)(vii)(b), in which case of assessee is fully covered in relation to services provided by non-resident.

With regards to payment of Rs.28,40,000/- being treated by AO as "sharing of profit" and not an expense, it is submitted that Ld.AO has not brought on record any single evidence in support of his contention that assessee has shared profit with M/s Trans Coral Shipping FZE. Rather it is a slab provided for calculating the commission against the business provided by the commission agent. Further, observations of Ld. AO in this regard are recorded at page 8-9 of assessment order, have been dealt herewith in seriatim:

(i) The services have been taken only one company, i.e. from M/s Trans Coral Shipping FZE but the business has been made different ports of the world including India: In this regard, it is submitted that its upon assessee to decide that from whom he wishes to avail services. AO cannot

walk into the shoes of businessman to dictate the terms and methodology of business. Furthermore, when the service provider is located outside India and is able to provide all the services which the assessee is looking for, why would a businessman would contact other people, which would in turn increase his burden of coordination. Also, since M/s Trans Coral Shipping FZE was having contacts with various ship owners, Ship Charterers, Cargo owners, Freight forwarders etc. from all over the world, assessee availed services of single party by which time and cost is saved to a large extent.

(ii) The details of services have not been mentioned in the bill raised by M/s Trans Coral Shipping FZE(UAE). In the bill fixed amount one third of the freight commission has been shared in addition to sharing in the form of so called incentive of Rs.6,69,050/-(i.e. 10% of total commission receipt of Rs.66,90,497/-).:

In this regard, it is submitted that assessee has availed various services from M/s Trans Coral Shipping, as per agreement between them, which was submitted before Ld.AO during the course of assessment proceedings. Further, as submitted above, payment of sales promotion expenses has been made as per terms of agreement between the parties. In fact, when it was brought to the knowledge of the Ld. AO during assessment proceedings that additional payment of 10% as stated in the invoice is as per agreement , no further query was raised by Ld.AO.

Also, your goodself would appreciate that manner of determination of incentive is not the conclusive factor in determining the nature of transaction. In fact, in most of the cases Sales promotion expenses are decided on the basis of income earned by service recipient and that is fair

enough as a person would put extra effort if he is assured about additional incentives. It is thus submitted that such remarks of Ld. AO are solely with a view to make disallowance and have no basis.

(iii) An Agency agreement between M/s Prime Oceanic and M/s Trans Coral FZE (UAE) which has been prepared is a mutual understanding of both company. The agreement was not registered by any government agency or authority, so it is not treated as authentic. The agreement is the mutual understanding for making business:

In this regard, it is submitted that a written agreement between the parties is a mode to record their mutual understanding and registration thereof is not at all mandatory. However, parties to agreement may get it registered if they wish to and basically it helps them in the event of any disputes as they may enforce the other party to act as per terms of agreement. Your honours would appreciate that registration of an agreement/not does not impact its validity rather can at the most impact its enforceability. Further, no adverse comments whatsoever have been made by Ld.AO in respect of terms and conditions specified in the agreement, ld.AO has incorrectly observed that payment made by assessee is in the nature of "Sharing of profit" without any basis and without assigning any cogent reasons.

(iv) No any evidences of specific service provided by the M/s Trans Coral FZE(UAE) has been furnished by the assessee.:

In this regard, it is submitted that assessee has submitted copy of agreement between it and M/s Trans Coral Shipping FZE, which specifically provides nature of services availed by assessee from it, thus

the remark that no evidence has been provided by assessee regarding specific services is factually incorrect.

In view of above submission, it is submitted that various reasons given by Ld. AO for holding the payment made by ld.AO as "sharing of profit" have no substance and rather are based on very casual observations and deserves to be held bad in law and disallowance made on the basis of such observations deserves to deleted more particularly when the payment is made to a totally unrelated and foreign party having no business establishment in India.

The Hon'ble Supreme Court, in the case of CIT v Toshoku Ltd 125 ITR 525, considered a situation where an Indian exporter had appointed a non-resident sales agent for exports. The commission was credited in the books of the Indian exporter, and was subsequently paid. While holding that such credit did not constitute receipt of the commission in India, the Supreme Court also considered whether the commission accrued or arose in India. The Supreme Court observed as under:

"The second aspect of the same question is whether the commission amounts credited in the books of the statutory agent can be treated as incomes accrued, arisen, or deemed to have accrued or arisen in India to the non resident assessees during the relevant year. This takes us to section 9 of the Act. It is urged that the commission amounts should be treated as incomes deemed to have accrued or arisen in India as they, according to the department, had either accrued or arisen through and from the business connection in India that existed between the non-resident assessees and the statutory agent. This contention overlooks the effect of cl. (a) of the Explanation to cl. (i) of s/s (1) of section 9 of the

Act, which provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under that clause to accrue or in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. If all such operations are carried out in India, the entire income accruing therefrom shall be deemed to have accrued in India. If however, all the operations are not carried out in the taxable territories, the profits and gains of business deemed to accrue in India through and from business connection in India, shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in the taxable territories. If no operations of business are carried out in the taxable territories, it follows that the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India."

In view of above, it was submitted that sales promotion expenses of Rs.28,40,000/- deserve to be allowed and disallowance made deserve to be deleted."

7. Per contra, the ld DR relied on the findings of the lower authorities and as we have already taken note of the same, the same are not repeated for sake of brevity. It was further submitted that M/s Trans Coral Shipping FZE has an office in India and thus constitute a business connection and furnished a printout taken from the website of M/s Trans Coral Shipping FZE.

8. In his rejoinder, the ld AR submitted that such profile of M/s Trans Coral Shipping FZE is downloaded from its website now, i.e. in year 2021, whereas the year under appeal is F.Y. 2012-13 (i.e. 8-9 years back), thus even if Trans Coral has PE in India as of now, the same would not affect the taxability of income earned by Trans Coral in financial year relevant to A.Y. 2013-14. In support of such contention, assessee has already furnished Certificate during the course of assessment proceedings, which specifically mentions that they did not have any PE in India in F.Y. 2012-13. Further the lower authorities have never doubted this fact that the recipient company has no permanent/business establishment in India and ld. D/R after filing this profile as additional evidence has sought adjournments on two occasions for obtaining report from the Assessing officer but on the date of hearing when this fact is brought to the notice of the Hon'ble Bench by the undersigned, the ld. D/R stated that such report is not required and proceeded to argue the case which further supports the contention as stated above. It is therefore requested that no adverse inference be drawn in this regard.

9. It was further submitted that India has entered into Double Taxation Avoidance Agreement with UAE and Article 8 of the treaty contains provisions regarding taxability of Shipping activity which reads as under:

> "1. *Profits derived by an enterprise of a Contracting State from the operation by that enterprise of ships in international traffic shall be taxable only in that State.*

2. For the purposes of this Article, profits from the operation of ships in international traffic shall mean profits derived by an enterprise described in paragraph (1) from the transportation by sea of passengers, mail, livestock or goods and shall include :

(a) the charter or rental of ships incidental to such transportation;

(b) the rental of containers and related equipments used in connection with the operation of ships in international traffic ;

(c) the gains derived from the alienation of ships, containers and related equipments owned and operated by the enterprise in international traffic.

3. For the purposes of this Article, interest on funds connected with the operation of ships in international traffic shall be regarded as profits derived from the operation of such ships and the provisions of Article 11 shall not apply in relation to such interest.

4. The provisions of paragraphs (1), (2) and (3) shall apply to profits from the participation in a pool, a joint business or an international operating agency."

10. So far as present case is concerned, it was submitted that Trans Coral Shipping FZE itself was not providing Transportation services to assessee and was rather introducing overseas clients to the assessee for shipping Transportation related activities. In other words, Trans Coral was acting as mediator for assessee, who provided its services outside India to the increase the client base outside India for shipping the goods through the vessels with whom the appellant had contracts and is earning income. However, without prejudice to above, even if it is presumed that Trans Coral was providing the transportation services to clients of assessee, then

too, the same shall not attract tax liability in India in view of clause 1 of Article 8, which says that profits derived by enterprise of ships in international traffic shall be taxable only in the State to which the service providing enterprise belongs.

11. We have heard the rival contentions and purused the material available on record. Section 195(1) provides that any person responsible for paying to a non-resident, not being a company or to a foreign company, any interest or any other sum chargeable under the provisions of this Act shall deduct income tax thereon at the rates in force. Therefore, what needs to be examined in the instant case is whether the amount paid to M/s Trans Coral Shipping FZE is chargeable under the provisions of the Act. In explanation (2) to the said section, it has been clarified that the obligation to comply under sub-section (1) to make deduction applies to all person resident or non-resident whether or not the non-resident has a residence or place of business or business connection in India or any other presence in any manner whatsoever in India. We therefore find that the explanation (2) to section 195 talks about the person who is making/crediting the payment rather than the person who is receiving the payment as the obligation to comply with sub-section (1) is on the person who has to deduct tax at source while making or crediting the payment to the account of the payee. The explanation provides that the obligation to deduct tax at source applies to all persons but it doesn't and cannot take away the fundamental requirement under law which is that the sum has to be chargeable under the provisions of the Act and therefore, only in a scenario, the sum is chargeable under the Act, the obligation is cast on all persons to deduct tax at source irrespective of the residential status or business connection or presence in India.

12. Now coming to the provisions of section 40(a)(i) of the Act, the said section also provides that any interest, royalty, fees for technical services or other sum chargeable under this Act 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 section 139(1) of the Act shall be disallowed. We therefore find that both the provisions of section 195(1) as well as section 40(a)(i) of the Act talks about deduction of tax at source where the sum is chargeable under the Act.

13. As per provisions of Section 5(2) of the Act, the total income of non-resident includes all income from whatsoever source derived which is received or deemed to be received in India or accrues or arises or is deemed to accrue or arise to him in India during such year which has been further defined in terms of provisions of Section 9 of the Act.

14. In order to determine whether sum paid to M/s Trans Coral Shipping FZE is chargeable under the provisions of section 5 and section 9 of the Act, it is essential to examine the relationship between the two entities and the nature and characteristic of the amount so paid and credited to its account in the books of the assessee company.

15. In terms of agency agreement dated 11.02.2012 entered into between the two entities, it is noted that M/s Trans Coral Shipping FZE has been appointed as a sole service provider to promote the activities and services provided by the assessee company by contacting and reaching out

to companies based in UAE. The services of the assessee company which shall be promoted by M/s Trans Coral Shipping FZE are in nature of ship brokerage, cargo brokerage, heavy lift brokerage, semi-submersible brokerage, tug brokerage and ship agency brokerage. It further provides for the procedure to carry out such business development activities on behalf of the assessee company. Regarding fees for services provided by M/s Trans Coral Shipping FZE, the agency agreement provides that the service provider will get 1/3rd commission share on commission received by the Principal and where total commission earned by the Principal exceeds Rs 50 lacs, the service provider will get additional 10% of commission as an incentive. We therefore find that the assessee company which is engaged in ship brokerage services has engaged the services of M/s Trans Coral Shipping FZE to expand its brokerage services to shipping companies based in UAE and the relationship between the two companies is that of principal and agent, and cannot be termed as that of joint venture partners which carries entirely different attributes in terms of sharing responsibilities, risks and rewards. The fact that the commission receipt earned by the assessee company is paid to the agent and the same has been determined as 1/3rd of commission receipt plus incentive where the total receipts exceeds a pre-determined threshold cannot be sole determinative of a joint venture and is mere a mode of determination of fees as agreed between the two companies.

16. The nature of such payment is therefore clearly that of sales promotion expenditure for services rendered outside of India where the corresponding revenues have been offered to tax by the assessee company. The ld CIT(A) has also treated the same as sales promotion expenses and has recorded a similar finding and therefore, the nature of

payment is not in dispute. Such sales promotion expenditure paid and credited to the account of the non-resident entity for the services rendered outside India will not fall in the category of the income received or deemed to be received in India as well as accrues or arises or deemed to accrue or arise in India. Further, the provisions of section 9(1)(vii) are not attracted in the instant case as the assessee company has utilized the services of the non-resident service provider outside of India for the purposes of earning commission income from its customers/shipping companies outside of India. In other words, where the source of assessee's income for which the services are utilized is outside of India and the services are also rendered outside of India, the deeming provisions of section 9(1)(vii) are not attracted as also held by the Hon'ble Supreme Court in case of GVK Industries (supra) wherein it was held as under:-

> *"22.The principal provision is Clause (b) of Section 9(1)(vii) of the Act. The said provision carves out an exception. The exception carved out in the latter part of clause (b) applies to a situation when fee is payable in respect of services utilized for business or profession carried out by an Indian payer outside India or for the purpose of making or earning of income by the Indian assessee i.e. the payer, for the purpose of making or earning any income from a source outside India. On a studied scrutiny of the said Clause, it becomes clear that it lays down the principle what is basically known as the "source rule", that is, income of the recipient to be charged for chargeable in the country where the source of payment is located, to clarify, where the payer is located. The Clause further mandates and requires that the services should be utilized in India."*

17. Thus, the said amount paid to non-resident entity does not fall in the scope of total income of non-resident entity and consequently it is not chargeable to tax in India under the provisions of the Act. Even otherwise,

the said income in the hands of non-resident has to be considered in the light of the provisions of DTAA between India and the Country of the non-resident, i.e UAE. In the absence of Permanent Establishment of the non-resident in India during the financial year relevant to impugned assessment year and any income attributable to such Permanent Establishment, such business income is not chargeable to tax in India. Accordingly, in the facts and circumstances of the case when the amount paid by the assessee is not chargeable to tax in India then the assessee is not liable to deduct TDS u/s 195 and consequently the provisions of Section 40(a)(i) of the Act cannot be invoked for making the disallowance. In the facts and circumstances of the case, the disallowance so made by the AO U/s 40(a)(i) of the Act is hereby deleted and ground of appeal is allowed.

18. In ground of appeal No. 2, the asseesse has challenged the action of ld.CIT(A) in confirming the disallowance of Rs.1,60,000/- made by ld. AO out of various expenses debited to profit & loss account, i.e. vehicle, diesel & Petrol expenses, entertainment expenses, telephone & mobile expenses and travelling expenses.

19. In this regard, the ld AR submitted that disallowances were made by ld. AO on the presumption of personal use of facilities by directors, which were confirmed by ld. CIT(A) on the same reasoning. To begin with, details of expenses disallowed have been tabulated below:

S. No.	Nature of Expenses	Expenses debited to P/L/a/c	Disallowance made

1.	Vehicle/ Diesel & Petrol Expenses, depreciation on motor car	2,61,376/-	40,000/-
2.	Entertainment Expenses	51,000/-	10,000/-
3.	Mobile. Telephone Recharge	1,01,067/-	20,000/-
4.	Travelling Expenses	6,33,875/-	90,000/-
	Total	10,47,318/-	1,60,000/-

20. It was submitted that the appellant being a private limited company such disallowance for the personal use or for non business purposes cannot be made. Further during the course of assessment proceedings books of accounts were produced before Ld. AO who has not pointed out any specific defect and generalized the same by disallowing the expenses. The expenditures on vehicle, telephone, entertainment and travelling etc. were incurred wholly and exclusively for the purpose of business and under the business expediency and AO cannot walk into the shoe of the businessman to look into the necessity and purpose thus the expenditure being legitimate deserves to be allowed.

21. As regards to the disallowance out of depreciation on car for personal use, it was submitted that the depreciation is a statutory claim and no disallowance could be made for personal use. Further car was wholly and exclusively used for business purpose and no personal use was made by the assessee thus expenditure claimed on account of depreciation deserves to be allowed as claimed.

22. Per contra, the ld DR relied on the findings of the lower authorities.

23. We have heard the rival contentions and purused the material available on record. We find that the expenses have been disallowed for the reason that personal use of vehicles and incurrence of other expenditure for personal purposes of the directors of the company cannot be denied. The assessee being a corporate entity, there cannot be any personal expenditure and secondly, where the directors of the company are alleged to have benefitted from use of vehicle and incurrence of other expenditure, the same can be brought to tax in their individual hands by way of perquisites being provided by the company. However, as far as the assessee is concerned, where the expenses are incurred for the purposes of the business, the same cannot be disallowed. In the result, the disallowance so made is directed to be deleted and the ground of appeal is allowed.

In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 14/06/2021.

Sd/-	Sd/-
(संदीप गोसाई)	(विक्रम सिंह यादव)
(Sandeep Gosain)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 14/06/2021
*Ganesh Kr.
आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- M/s Prime Oceanic Pvt. Ltd., Alwar
2. प्रत्यर्थी/ The Respondent- The ITO, Ward-2(3), Alwar
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur.
6. गार्ड फाईल/ Guard File {ITA No. 652/JP/2019}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar