आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'सी' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
" C " BENCH, AHMEDABAD

स्वश्री वसीम अहमद, लेखा सदस्य एवं महावीर प्रसाद, न्यायिक सदस्य के समक्ष।

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And SHRI MAHAVIR PRASAD, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.2503/Ahd/2016
(**निर्धारण वर्ष** / Assessment Year : 2013-14)

DCIT, Cir – 2(1)(1), Ahmedabad.	**बनाम**/ Vs.	M/s. Gujarat Microwax Pvt. Ltd., 401 & 02, Sarthik Square, Sarkhej Gandhinagar Highway, Bodakdev, Ahmedabad – 380 054
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACG 5593 P		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Appellant by** :	Dr. Jayant Jhveri, Sr.D.R.
प्रत्यर्थी की ओर से/**Respondent by**:	Shri G.C. Pipara, C.A.

सुनवाई की तारीख / **Date of Hearing**	09/05/2018
घोषणा की तारीख /**Date of Pronouncement**	24/05/2018

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Revenue against the appellate order of the Commissioner of Income Tax(Appeals)-2, Ahmedabad [CIT(A) in short] vide appeal no.CIT(A)-2/424/DC.Cir.2(1)(1)/2015-16 dated 14/07/2016 arising in the assessment order passed under s.143(3) of the Income Tax

Act, 1961 (hereinafter referred to as "the Act") dated 18/03/2016 relevant to Assessment Year (AY) 2013-14.

2. The Revenue has raised the following grounds of appeal :

> *"1. The Ld. CIT(A) has erred in law and on facts in deleting the disallowance made by the AO on account of export commission of Rs.54,06,265/- paid to overseas agents u/s. 40(a)(i) of the Act without properly appreciating the facts of the case and the material brought on record.*
> *2. On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.*
> *3. It is, therefore, prayed that the order of the Ld.CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent."*

3. The only issue raised by the Revenue is that Ld. CIT(A) erred in deleting the disallowance made by the AO on account of non-deduction of TDS u/s 195 r.w.s 40(a)(i) of the Act.

4. Briefly stated facts are that the assessee in the present case is a Private Ltd. Company and engaged in the manufacturing business of Microcrystalline Cellulose Powder, Crosscarmellose Sodium, Sodium Starch Glycolate, Dl Calcium Phosphate etc.

5. The assessee, in the year under consideration has claimed commission expenses of Rs.54,06,265/- for the services rendered by the foreign commission agents in connection with its business. The details of the parties, commission amount and volume of the business referred by the commission agents are reproduced as under:

Sr. No	**Name of the Commission Agent**	**Country of Residence**	**Amount of commission Paid/provided (in Rs.)**	**Amount of Sales made by Commission Agent (in Rs.)**
1.	Ariel Levin	Argentina	1,55,032	32,36,942
2.	Biesterfield international	Germany	6,03,732	2,65,48,305
3.	Hector Norberto Levin	Argentina	1,96,934	1,48,34,303
4.	Pharma Trade	Bangladesh	34,414	8,20,799
5.	Sevex Pharma	Bulgaria	25,01,419	1,20,29,252
6.	Shine Resources Ltd.	Vietnam	1,64,680	99,27,484
7.	Trans Continental Agencies	Pakistan	13,25,399	4,21,34,979
8.	Varunesh Tuli	Barazil	4,24,655	2,50,06,395
	Total		**54,06,265**	**13,45,38,459**

The AO, during the assessment proceedings requires the assessee to furnish the details of the parties of the foreign commission agent, evidences of services rendered by them along with copies of the agreement. The AO was also of the view that the payment of commission to the foreign agents is subject to TDS u/s 195 of the Act. Accordingly, the AO sought an explanation from the assessee.

In compliance thereto the assessee submitted that the amount of commission expense has been incurred in connection with the business and therefore, no disallowance for the same can be made.

6. The assessee also submitted that the commission paid to the foreign agents is not chargeable to tax in India. Therefore, there was no liability to deduct the TDS u/s 195 of the Act.

7. However, the AO disregarded the contention of the assessee and concluded that the commission income to the foreign parties/agents has accrued in India, therefore, the assessee was under the obligation to deduct TDS u/s 195 of the Act. Hence, the AO disallowed the same and added to the total income of the assessee.

8. Accordingly, assessee preferred an appeal to Ld. CIT(A). The assessee before the Ld. CIT(A) submitted that the foreign agents do not have permanent establishment in India. Therefore, it can be concluded that the commission income has not accrued and arose in India and accordingly the same is not chargeable to tax in India. Accordingly, there is no liability on the part of the assessee to deduct TDS under section 195 of the Act. Ld. CIT(A) after considering the submission of the assessee deleted the addition made by the AO by observing as under:

> *"2.9 Having considered the facts and submissions, the issues which are to be examined and decided are as under:-*
>
> 1. *Whether the commission paid to foreign agents is taxable in India by virtue of the provisions of section 5(2)(b) read with section 9(1)(i) of Income Tax Act.*
> 2. *Whether the provisions of section 195(2) were applicable on the appellant and he should have deducted tax and in case of no deduction he should have obtained a no deduction certificate from the AO. And*
> 3. *Whether the commission paid was genuine and the services have been rendered.*

2.10. Regarding the first issue it is noted from the evidences given by the appellant as well as noted by the AO in his order that the services have been rendered by the foreign agents outside India. The sales were booked by them in their country or for the country for which they have been appointed as commission agents. None of the activities soliciting the clients and procuring the orders has taken place in India. The goods were being delivered by the appellant company in the other country. The activities of procuring the payment on behalf of the appellant company were also done abroad. The AO was, therefore, incorrect to hold that the source of income lies in India as the sales have been made from India. The provisions of Income Tax Act clearly provide that the tax would be deducted on the income which is taxable in India. The activity of earning the income is not the sale but soliciting the sales by commission agents. Though this activity is linked to the sales of the company but it cannot be said that the income has been derived from sales which has been made from India. The income has been derived from the activity of soliciting the sales on behalf of the appellant company. The agents have carried out all the activity on the foreign soil and none of their activity is in India therefore, it cannot be said that the income has accrued or arisen in India and the source of income was in India. There is no fact brought out by the AO in the order as well as observed by me during the course of appellate proceedings to indicate that the services have been rendered in India.

2.11. The appellant has also submitted that during the year it has paid the commission to 8 foreign commission agents which included 2 new parties and 6 old commission agents to whom commission was paid in the preceding years also. Further submitted that the disallowance of foreign commission payments have also been made by the A.O. in the A.Yrs. 2012-13 and 2011-12 and after having examined the facts and submissions the same have been deleted by the CIT(A) in the appellate order passed in those years. For ready reference the details of the commission payments to the agents in the year under consideration and in the preceding years is noted as under:-

Consolidated chart showing details of Export Sales Commission paid during F. Y. 2008-09 (A.Y. 2009-10) to F. Y. 2012-13 (A. Y. 2013-14)								
Sr. No.	*Name of Commission Agent*	*Country of Commission Agent*	*A.Y.2013-14*	*A.Y.2012-13*	*A.Y.2011-12*	*A.Y.2010-11*	*A.Y.2009-10*	*Total*
1	*A Bril Y. Copania Limitada AV*	*Chile*	*--*	*--*	*65,002*	*2,07,784*	*--*	*2,72,786*
2	*Archem Ltd.*	*Isreal*	*--*	*7,442*	*--*	*--*	*--*	*7,442*
3	*Ariel Levin*		*1,55,032*	*--*	*--*	*--*	*--*	*1,55,032*
4	*Besterfield International*	*Germany*	*6,03,732*	*7,35.241*	*2,96,456*	*1,175.931*	*3,87,212*	*3,198,572*
5	*Chemphar*	*Hongkong*	*--*	*--*	*--*	*75,851*	*1,09,770*	*1,85,621*
6	*Amoli Enterprise Ltd.*	*Hongkong*			*--*		*1,80,413*	*1,80,413*
7	*Hakimsons Pvt. Ltd.*	*Pakistan*	*--*	*--*	*--*	*44,223*		*44,223*
8	*Hector Norberto Levin*	*Argentina*	*1,96,934*	*77.398*	*--*	*2,75,215*	*92,785*	*6,42,332*
9 To	*Kemimac (Coom)*	*Singapore*	*--*	*--*	*--*	*--*	*20,930*	*20,930*
	M.A.J. Enterprise	*Pakistan*	*--*	*--*	*--*	*--*	*88,920*	*88,920*
ii	*P.T.Signa Husada*	*Indonesia*	*--*	*3,13,042*	*--*	*--*	*--*	*3,13,042*
12	*Pharmo Trade*	*Dhaka*	*34,414*		*--*	*--*	*--*	*34,414*
13	*S B R and Co., Pakistan P. Ltd.*	*Pakistan*	*--*	*47,810*	*--*	*--*	*--*	*47,810*
14	*Sevex Pharma*	*Belgaria*	*2,501,419*	*--*	*7,96,572*	*--*	*--*	*3,297,991*
15	*Shine Resources Ltd. - Vietnam*	*Vietnam*	*1.64,680*	*8,12.220*	*7,60.564*	*2,00,645*	*44,504*	*19,82,613*
16	*Tentra Chemie P. Ltd.*		*--*	*--*	*--*	*--*	*11,836*	*11,836*
17	*Trans Continental Agencies Inc.*	*Pakistan*	*13,25,399*	*9,30,795*	*4,28,574*	*3,08,468*	*1,83,733*	*31,76,969*

18	*Trans – Pharm (Hong Kong) Ltd.*	*Hongkong*	*--*	*22,334*	*65,597*	*78,630*	*1,83,733*	*31,76,969*
19	*Varunesh Tuli*	*Brasil*	*4,24,645*	*4,83,099*	*--*	*--*	*1,45,686*	*10,53,440*
A	*Export commission to foreign agent (wherein no TDS has been made)*		*54,06,265*	*34,29,381*	*24,12,765*	*23,66,747*	*12,84,816*	*1,48,99,974*

2.12. The appellant has relied upon various judgements of Hon'ble Courts and on the identical facts it was held that no TDS u/s.195 is warranted when the commission income has not arisen in India and the foreign agents did not have any business connection/permanent establishment in India. Some of such judgements are briefly discussed in the subsequent paras.

2.13. The judgment of honourable ***Supreme Court in the case of CIT vs. Toshoku Limited [125 ITR 525 (SC)]*** *is important on the issue, whereby it has been held that commission earned by the non-resident for acting as the selling agent for the Indian exporter, wherein such non-resident was rendering services from outside India does not accrue in India. In the present case before me also, the foreign selling commission agents are resident of foreign country, from where the procurement service had been provided for which the commission has been paid, and therefore, the issue is directly and squarely covered by the Apex Court decision.*

2.14. Regarding the observation of the AO that the income is deemed to accrue or arise in India by applying the provisions of section 9 (l)(i), it is seen that there is no fact on record to indicate that any of the agents had any permanent establishment in India. All the agents had their offices on the foreign soil and nothing on record that they had PE in India. Further the assessing officer has also not pointed out any such fact in its order which indicate that there was any such office of the overseas agents in India which attract the deeming provisions. Further the observation that the source of income was in India is also not proper as it has clearly been discussed in the preceding paragraphs that none of the services have been rendered in India and source of income cannot be said to be in India as the source

of income is the services rendered and not the sales. There is no business connection in India from which the income has been earned, there is no property through or from which the income has been earned. Therefore, the provisions of section 9(1)(i) also cannot be applied.

2.15. Reliance is placed on the judgement of honourable Supreme Court in the case of GE India ***Technology Centre*** *Private* ***Limited 327 ITR 456*** *and the judgement of honourable 1TAT Mumbai in the case of our* ***Ardesi B Cursetjee 8. Sons Ltd.*** *115 TTJ 916.*

2.16. With regard to AO's observation about obtaining the certificate of Nil deduction of tax by the appellant from the I.T. authorities, there was no necessity to obtain the same for the reason that the payments to nonresident agents was made upon which no TDS was liable to be made. Therefore the observations of the A.O. in this regard were not relevant.

2.17. Therefore, in view of the discussion in preceding paras, the AO was not justified to hold that the commission payable to the overseas agents was deemed to accrue or arise in India and is taxable under the Act in view of the specific provisions of sections 5 (2)(b) read with section 9 [l)[ij of Income Tax Act.

2.18. The last issue which is to be adjudicated is that whether the commission payment was genuine and the services were rendered. The AO has briefly dealt with the issue in para - 4 of assessment order. It has placed on record several documents which indicate that the agents have rendered services. It is further observed that the payments have been made through banking channel and are duly documented. The appellant has given satisfactory evidences in respect of all commission payments, and therefore, considering the overall facts and circumstances the payment made to the agents is taken as genuine. Even the AO in para No.4.5 of the assessment order himself has observed ***"no doubt the agents must have rendered services abroad and have solicited orders therefrom but the right to receive the commission arises in India when the order is***

executed by the assessee in India and therefore the income accrued sourced in India." *It is apparnret from the above observation of the AO that the services have been rendered by the Agents outside India by obtaining the orders for the appellant. The disallowance made for the reason that the commission has been arised in India due to the execution of the orders in India. But this finding is not correct for the reason that the commission payments has been made on soliciting the orders by the agents in foreign countries and therefore the commission has arisen there only.*

Accordingly, in my considered opinion the appellant has given satisfactory evidences regarding the services rendered by the agents and the genuineness of payment of commission.

2.19. The AO has also placed reliance on the decision of Hon'ble Authority of Advance Rulings in the case of SKF Boilers and Driers [P.) Ltd. (2012) 18 Taxmann 325 and Rajiv Malhotra (2006) 284 ITR 564 (Delhi). The judgements are not applicable to the present facts as there are several other decisions of Hon'ble ITAT, Mumbai in the case of ACIT (International Taxation) Vs. Star Cruise India Travel Services Pvt. Ltd. [14 ITR (T) 282 (Mum)], CLSA Limited Vs. ITO (International Taxation] [56 SOT 254], which hold that such kind of commission is not taxable in India and accordingly no liability to deduct tax was there. Further the decision of honourable Supreme Court of India in the case of ***Hon'ble Supreme Court in the case of CIT vs. Toshoku Limited 125 ITR 525,*** *still prevails as on date and is the law of the land as regards applicability of TDS provisions to commission paid to overseas/non-resident agents by Indian Exporters.*

2.20. Further, reliance is placed on the following decisions/judgments:-

- ***ACIT Vs. Modern Insulators Ltd. [56 DTR 362 (Jaipur Trib.)]***
- ***Ishikawajama - Harima Heavy Industries Ltd. Vs. Director of Income Tax [207 CTR 361]***

* ***Dy. Commissioner of Income Tax Vs. Divi's Laboratories Ltd. [(2011) 60 DTR (Hyd) (Trib) 210]***
* ***ITO, International Taxation, Chennai Vs. Prasad Production Ltd. [(2010) 125 ITD 263 Chennai) (SB)***
* ***ACIT, Circle-16(3)(Hyderabad-Trib) vs. Priyadarshim Spinning Mills (P.) Ltd. (2012) ITA No. 1776 (2011)***
* ***ACIT (International Taxation) vs. Star Cruise India Travel Services Pvt. Ltd. [14 ITR (T) 282 (Mum.)***
* ***CLSA Limited vs. ITO (International Taxation) [56 SOT 254 (Mum.)***
* ***ACIT Vs. Moderal Insulators Ltd. [56 DTR 362 (ITAT, Jaipur)]***
* ***Ishikawajama - Harima Heavy Industries Ltd. Vs. Director of Income Tax [207 CTR 361]***
* ***DCIT Vs. Eon Technology Pvt. Ltd. [46 SOT 323 (Delhi ITAT)***
* ***Sukani Enterprises Vs. ACIT [ITA No. 1330/Mum/2011] (ITAT, Mumbai)***
* ***ITO Vs. Pipavav Shipyard Limited [(2014) 42 Taxmann.com 159]***
* ***ACIT 17(2), Mumbai Vs. Vilas N. Tamhankar (2015) [55 Taxmann.com 413]***
* ***CIT V. Vinayak Exports 82 CCH 0032 (Guj) (2012)***
* ***CIT Vs. Fluidtherm Technology (P.) Ltd. (2015) 57 taxmann.com 87 (Madras)***
* ***CIT Vs. Orient Express (2015) 56 taxmann.com 331 Madras)***
* ***Asst. CIT v. India Shoes Exports (P.) Ltd. (2015) 57 taxmann.com 303 (Chennal - Trib)***
* ***Indo Industries Ltd. v. 1TO (2015) 53 taxmann.com 458 Mumbai -Trib.)***
* ***Khimji Visram & Sons v. Addl. CIT (2014) 52 taxmann.com 485 (ITAT, Mumbai)***
* ***Commissioner of Income-tax, Chennai v. Faizan Shoes (P.) Ltd. [2014] 48 Taxman.com 48 (Mad.)***

* ***Assistant Commissioner of Income-tax, Co. Circle - 1(3) v. Comex Exports (P) Ltd. [2014] 45 taxmann.com 406 (Chennai -Trib.)***
* ***Assistant Commissioner of Income-tax, Company Circle 111 (2), Chennai v. T. Abdul Wahid Tanneries (P.) Ltd. [2014] 47 taxmann.com 133 (Chennai Tri.)***
* ***Ajit Impex vs. DCIT 46 taxmann.com 163 [2014]***
* ***Pankaj A. Shah vs. ITO, Ward - 1, Baroda [47 taxmann.com 205(2014)]***
* ***Zanav Home Collection Vs. JCIT, Range - 10, Bangalore [2015] 55 Taxman.com 200 (Bangalore Trib.)***
* ***ACIT Vs. Karishma Global Minerals Pvt. Ltd. [2015] 56 Taxman.com 265 (Panaji Trib.)***
* ***ACIT Vs. Shiva Texyarn Ltd. [2015] 53 Taxman.com 495 (Chennai Trib.)***

2.21. In view of the above discussion and the submission of the appellant, besides the judgments / decisions of various courts, it is hold that the appellant was not liable to deduct tax on the commission paid to foreign agents. On going through the material on record, there were the uncontroverted facts that the agents were non - residents and they were acting outside India and providing the services in lieu of commission from abroad only. The agents did not have any permanent establishment for business connection or business place in India, Thus, in absence of any activity being carried out in India by a non - resident commission agent, the commission does not accrue or arise in India, and hence, not taxable in India. Therefore, the disallowance of Rs. 54,06,265/- under section 40(a)(ia) made by the AO is directed to be deleted."

9. Being aggrieved by the order of Ld. CIT(A) Revenue is in second appeal before us. Both the parties before us relied on the order of authorities below as favorable to them.

10. We have heard the rival contentions of both the parties and perused the material available on record. In the instant case, assessee has made payment to various agents as commission based in foreign countries on account of export made to the parties referred by them. The AO disallowed the same on two grounds, firstly, the identification of the parties, details of payment & services rendered by them were not furnished, secondly no TDS was deducted under section 195 of the Act by the assessee on such payment. The view take by the AO was subsequently reversed by the ld. CIT-A. However the issue before us arises with regard to the non-deduction of TDS by the assessee under section 195 of the Act. In this regard we find important and relevant to reproduce the provision of Section 195 of the Act which reads as under :-

> ***"Other sums.***
>
> [71]***195.*** [72]*[(1)* [73]*Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest* [74]*[***] or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries"* [75]*[***]) 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 :"*

A plain look at the above statutory provision makes it clear that the assessee is liable to deduct TDS on the payment to Non Residents on any sum chargeable under the provision of this Act. Now, the question arose whether payment made to the foreign agent is chargeable to tax in India. For this purpose, we need to refer the provision of Sec. 5(2) of the Act which reads as under:-

Scope of total income.

*[47]**5.** [48]*(1) Subject to[49] the provisions of this Act, the total income[49] of any previous year of a person who is a resident includes all income from whatever source derived which—*

XXXXXXXXXXXXXX

(2) Subject to[49] the provisions of this Act, the total income[49] of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received[50] or is deemed to be received[50] in India in such year by or on behalf of such person ; or

(b) accrues[50] or arises[50] or is deemed to accrue or arise to him in India during such year.

It is beyond doubt that the payment for the commission was not received by the foreign agents in India. Therefore, the same cannot be taxed in India as per clause (a) of sub-section (2) of section 5 of the Act. Similarly, we further note that the income was received by the foreign agents on account of services rendered by them in their respective countries. Therefore, we conclude that such income has not accrued or arisen in India and consequential not chargeable to tax in India.

Now coming to the fact that whether such commission income by the foreign agents were deemed to accrue or arise in India in terms of provision of Section 9 of the Act, which reads as under:-

"Income deemed to accrue or arise in India.

*[65]**9.** [66]*(1) The following incomes shall be deemed[67] to accrue or arise in India :—*

[68](i) all income accruing or arising, whether directly or indirectly, through or from any business connection[69] in India, or through or from any property[69] in India, or through or from any asset or source of income in India, [70][* *] or through the transfer of a capital asset situate in India.*

[71][Explanation 1].—For the purposes of this clause—

(a) in the case of a business of which all the operations[72] are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations[72] carried out in India ;

(b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export ;

[73][* *]*

[74][(c) in the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India ;]"

From the above proposition, we find that income shall be deemed to accrue or arise in India if it fulfills any of the conditions :-

i) Business connection in India; or
ii) From any property in India; or
iii) From any asset or source of income in India or
iv) Transfer of capital asset situated in India

From the above, we note that the case of assessee is not falling in any of the category as discussed above.

Similarly, we also note that it is not the case of Revenue that payment was made by assessee on account of technical services rendered by the foreign agents. Therefore, in our considered view, assessee was not liable to deduct TDS u/s 195 of the Act. In holding so, we find support and guidance from the judgment of Hon'ble Madras High

Court in the case of *CIT vs. Farida Leather Co.* reported in 66 taxman.com 321 (Mad) wherein it was held as under:-

> ***"9.2** The underlying principle is that, the tax withholding liability of the payer is inherently a vicarious liability on behalf of the recipient and therefore, when the recipient / foreign agent does not have the primary liability to be taxed in respect of income embedded in the receipt, the vicarious liability of the payer to deduct tax does not arise. This vicarious tax withholding liability cannot be invoked, unless primary tax liability of the recipient / foreign agent is established. In this case, the primary tax liability of the foreign agent is not established. Therefore, the vicarious liability on the part of the assessee to deduct the tax at source does not exist."*

We also find support and guidance from the order of ITAT Ahmedabad Bench in the case of *DCIT (International Taxation) vs. Welspun Corporation Ltd.,* reported in 77 taxmann.com 165 (Ahd), wherein it was held as under;-

> ***"33.** There are a couple of rulings by the Authority for Advance Ruling, which support taxability of commission paid to non-residents under section 9(1)(i), but, neither these rulings are binding precedents for us nor are we persuaded by the line of reasoning adopted in these rulings. As for the AAR ruling in the case of SKF Boilers & Driers (P.) Ltd. In re [2012] 343 ITR 385/206 Taxman 19/18 taxmann.com 325 (AAR - New Delhi), we find that this decision merely follows the earlier ruling in the case of Rajiv Malhotra, In re [2006] 284 ITR 564/155 Taxman 101 (AAR - New Delhi) which, in our considered view, does not take into account the impact of Explanation 1 to Section 9(1)(i) properly. That was a case in which the non-resident commission agent worked for procuring participation by other non-resident entities in a food and wine show in India, and the claim of the assessee was that since the agent has not carried out any business operations in India, the commission agent was not chargeable to tax in India, and, accordingly, the assessee had no obligation to deduct tax at source from such*

commission payments to the non-resident agent. On these facts, the Authority for Advance Ruling, inter alia, opined that "no doubt the agent renders services abroad and pursues and solicits exhibitors there in the territory allotted to him, but the right to receive the commission arises in India only when exhibitor participates in the India International Food & Wine Show (to be held in India), and makes full and final payment to the applicant in India" and that "the commission income would, therefore, be taxable under section 5(2)(b) read with section 9(1)(i) of the Act". The Authority for Advance Ruling also held that "the fact that the agent renders services abroad in the form of pursuing and soliciting participants and that the commission is remitted to him abroad are wholly irrelevant for the purpose of determining situs of his income". We do not consider this approach to be correct. When no operations of the business of commission agent is carried on in India, the Explanation 1 to Section 9(1)(i) takes the entire commission income from outside the ambit of deeming fiction under section 9(1)(i), and, in effect, outside the ambit of income 'deemed to accrue or arise in India' for the purpose of Section 5(2)(b). The point of time when commission agent's right to receive the commission fructifies is irrelevant to decide the scope of Explanation 1 to Section 9(1)(i), which is what is material in the context of the situation that we are in seisin of. The revenue's case before us hinges on the applicability of Section 9(1)(i) and, it is, therefore. important to ascertain as to what extent would the rigour of Section 9(1)(i) be relaxed by Explanation 1 to Section 9(1)(i). When we examine things from this perspective, the inevitable conclusion is that since no part of the operations of the business of the commission agent is carried out in India, no part of the income of the commission agent can be brought to tax in India. In this view of the matter, views expressed by the Hon'ble AAR, which do not fetter our independent opinion anyway in view of its limited binding force under s. 245S of the Act, do not impress us, and we decline to be guided by the same. The stand of the revenue, however, is that these rulings, being from such a high quasi-judicial forum, even if not binding, cannot simply be brushed aside either, and that these rulings at least have persuasive value. We have no quarrel with this proposition. We have, with utmost care and deepest respect, perused the above rulings rendered

by the Hon'ble Authority for Advance Ruling. With greatest respect, but without slightest hesitation, we humbly come to the conclusion that we are not persuaded by these rulings."

Similarly we also find support & guidance from the judgment of Hon'ble Gujarat High Court in the case of PR CIT Vs. MGM Exports in R/Tax Appeal No. 309 of 2018 vide order dated April 11, 2018. The relevant extract of the order is reproduced below :

"7. In the recent order in Tax Appeal No. 290 of 2018, we had dealt with similar situation making following observations:

"It can thus be seen that while confirming the order of CIT [A], the Tribunal relied on judgment of the Supreme Court in the case of G.E India Technology Centre P. Limited vs. Commissioner of Income-Tax & Anr., reported in [2010] 327 ITR 456 (SC) = 2010-TII-07-SC-INTL

In such Judgment, It was held and observed that the most important expression in Section 195[1] of the Act consists of the words, "chargeable under the provisions of the Act". It was observed that, "..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 Act," Counsel for the Revenue, however, drew our attention to the Explanation 2 to sub-section [1] of Section 195 of the Act which was inserted by the Finance Act of 2012 with retrospective effect from 1st April 1962. Such explanation reads as under:-

Explanation 2 - For the removal of doubts, it is hereby clarified that the obligation to comply with subsection (1) and to make deduction thereunder 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. is indisputably true that such explanation inserted with retrospective effect provides that obligation to comply with subsection [1] of Section 195 would extend to any person resident or non-resident, whether or not non-resident person has a residence or place of business or business connections in India or any other persons in any manner whatsoever in India. This expression which Is added for removal of doubt is clear from the plain language thereof, may have a bearing while ascertaining whether certain payment made to a non-resident was taxable under the Act or not. However, once the conclusion is arrived that such payment did not entail tax liability of the payee under the Act, as held by the Supreme Court in the case of GE India Technology Centre P. Limited [Supra], sub-section [1] of Section 195 of the Act would not apply. The fundamental principle of deducting tax at source in connection with payment only, where the sum is chargeable to tax under the Act, still continues to hold the field. In the present case, the Revenue has not seven seriously contended that the payment to foreign commission agent was not taxable in India.

Tax Appeal Is therefore dismissed."

The principles laid down in the above cited judgments are squarely applicable to the instant facts of the case. Thus, it can be safely concluded that the Commission income in the hands of foreign agent is not chargeable to tax in India in the given facts & circumstances. Once an income is not chargeable to tax in India then the question of deducting TDS under the provision of section 195 of the Act does not arise. Accordingly, we do not find any reason to interfere in the order

of ld. CIT-A. Hence the ground of appeal raised by the revenue is hereby dismissed.

11. **In the result, Revenue's appeal stands dismissed.**

This Order pronounced in Open Court on	**24/05/2018**

Sd/-
(महावीर प्रसाद)
न्यायिक सदस्य
(MAHAVIR PRASAD)
JUDICIAL MEMBER

Sd/-
(वसीम अहमद)
लेखा सदस्य
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 24/05/2018
Priti Yadav, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-2, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad