

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH

**Before: Shri S. S. Godara, Judicial Member
And Shri Amarjit Singh, Accountant Member**

**ITA Nos. 2451 & 2616/Ahd/2015
Assessment Year 2011-12**

Ferromatic Milacron India Pvt. Ltd., 53, Madhuban, Nr. Madalpur Underbridge, Ellisbridge, Ahmedabad-380006 PAN: AABCC0881D (Appellant/Respondent)	Vs	The DCIT, Circle-2(1)(1), Ahmedabad (Respondent/Appellant)
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**Revenue by: Shri V.K. Singh, Sr. D.R.
Assessee by: Shri S.N. Soparkar &
Shri Parin Shah, A.R.**

Date of hearing : 15-02-2018
Date of pronouncement : 19-04-2018

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This cross appeal filed by assessee and Revenue for A.Y. 2011-12, arises from order of the CIT(A)-2, Ahmedabad dated 12-06-2015, in proceedings under section 143(3) of the Income Tax Act, 1961; in short the Act

2. The assessee has raised following grounds of appeal:-

"1. Ld. CIT (A) erred in law and on facts in confirming disallowance made by AO to the extent of Rs. 18, 80, 876/- of commission paid to non-resident agents towards machines sold in India applying provisions of sec. 9(1)(i) of the Act. Ld. CIT (A) erred in not appreciating that no obligation to deduct tax from commission to non-resident agents is cast on the assessee so far as the services are rendered outside India even for the local sales. Ld. CIT (A) ought to have deleted disallowance made by AO in toto.

- 2. Ld. CIT (A) further erred in law and on facts in confirming disallowance of commission for activity of sale in India whereas commission is for activity of procuring orders to non-resident agents rendering services outside India without any permanent establishment in India. Ld. CIT (A) ought to have held commission to non-resident agents not exigible to tax at source for all sales so far as the services are rendered outside India.*
 - 3. Ld. CIT (A) erred in law and on facts in confirming addition made by AO of Rs. 1, 59, 43, 850/- towards alleged suppressed sales against legal principles. Ld. CIT (A) confirmed the addition simply following orders of his predecessors without appreciating various submissions, evidences and documents submitted by the Appellant. Ld. CIT (A) ought to have deleted addition of alleged suppression of sales made ignoring tenets of law.*
 - 4. Levy of Interest u/s 234A/234B/234C & 234D is not justified.*
 - 5. Initiation of penalty proceedings u/s 271(1)(c) of the Act is not justified.”*
3. Assessment u/s. 143(3) of the act was completed on 9th Feb, 2015. During the course of assessment proceedings, the assessing officer has noticed that assessee has paid commission of Rs. 1,20,72,972/- to non-resident out of total commission of Rs.1,49,64,769/- paid during the year. On scrutiny, the assessing officer noticed that assessee has not deducted TDS on commission payment made to non-resident. The assessee has responded that all the services were rendered outside India therefore as per provision of section 5 and section 9 of the income tax act, no part of commission income was received or deemed to be received in India. It has stated that being non-residents no income accrues or arises or is deemed to accrued or arises in India. It has also placed reliance on the decision of Supreme Court in the case of GE Technology Centre Pvt. Ltd. Vs. CIT (2010) 327 ITR 456 (SC). The assessee has also referred CBDT Circular no. 786 dated 7th Feb, 2000 pertaining to deduction of tax u/s. 195 of the act. It was stated that the circular has clarified that where the non-resident agent operates outside the country, no part of his income arose in India. The assessing officer has not accepted the explanation of the assessee by stating that in the case of the assessee the income accruing or arising directly or indirectly through or from any source of income in India shall be deemed to accrue or arise in India as per section 9(1)(i) of the act. The assessing officer observed that assessee company has made payment of export commission to the parties in Nigeria, Saudi Arab, UAE, Singapore etc and payment was for

realizing their services for procuring orders through the overseas company. Non-resident overseas agents are said to have offered their services to procure the export sale order. The assessing officer was of the view that assessee was under obligation to deduct tax at source as envisaged u/s. 195 of the act from the payment of commission made to non-resident agents towards services rendered by them. Consequently, the assessing officer has disallowed the commission payment made to non-resident u/s, 40(a)(i) to the amount of Rs. 1,20,72,972/- and added back to the total income of the assessee.

4. Aggrieved assessee filed appeal before the Id. CIT(A). The Id. CIT(A) has partly allowed the appeal of the assessee by observing as under:-

"2.3. Decision:

I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The AO has made a disallowance u/s. 40(a)(ia) by holding that the appellant was liable to deduct tax on the commission paid to non-resident agents. It has been held by the AO that Provisions of Section 195 were applicable in the case of the appellant. The appellant, on the other hand, has submitted that it was not liable to deduct any tax as the commission paid to all the nonresident agents was not liable to tax in India as it had neither accrued or arose in India. The services have been rendered outside India. The provisions of section 195 were not applicable in the case of the appellant.

On careful examination of the relevant facts, it is noted that the similar issue has been decided by me in the case of the appellant while deciding the appeal for A.Y 2009 - 10 vide Appeal No.CIT(A)-VIII/JCIT/R.4/141/12-13 order dated 31/12/2013. The facts of the present case are also identical to the earlier year. The commission has been paid \ to non-resident agents who have rendered the services abroad, the agents does not have any PE or any other establishment in India. For the sake of clarity the decision given by me in that appeal is reproduced as under: -

then he is not under any statutory obligation to deduct tax at source on any part of thereof. While deciding th"I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The AO has disallowed the commission paid to foreign agents by holding that the income arising on account of commission payable to overseas agents was deemed to accrue or arise in India and was accordingly taxable under the Provisions 5 (2) (b) read with section 9 (1)(i) of Income Tax Act. It has further by the AO that the appellant company had failed to \$ with the Provisions of section 195 (2).

The appellant on the other hand, in its detailed written submission, has claimed that the Provisions of Section 5 (2)(b) read with section 9 (1)(i) of Income Tax Act were not applicable in its case. The income has been earned abroad and is therefore, not taxable in India.

The issues which ore to be examined and decided are: -

1. Whether the commission paid to foreign agents is taxable in India by virtue of the provisions of sections5 (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.

4.3.1 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 activity of soliciting the clients and procuring the orders is in 'India. The goods are being delivered by the appellant company in the other country. The activities of procuring the payment on behalf of the appellant company are 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 proceedings to indicate that the services have been rendered in India.

The appellant has rightly relied on the judgement of honourable Supreme Court in the case of Toshoku supra wherein 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 agent is resident of foreign country, from where the procurement service has been provided for which the commission has been paid, and therefore, the issue is directly and squarely covered by the Apex Court decision.

"" Regarding the observation of the AO that the income is deemed to 'accrue or arise in India by applying the provisions of section 9 (1)(i) if 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 the correspondence which, has been placed before me indicate that they had no PE in India. Further the assessing officer has also not pointed out any such fact in its order which indicate that there were any such offices 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. The appellant has rightly placed reliance on the Judgement of honourable Supreme Court in the case of GE India Technology Centre Private Limited 327ITR 456.

Therefore, in view of the preceding discussion 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(1)(i) of Income Tax Act.

4.3.2 Regarding the issue of obtaining no deduction certificate under section 195 if it is seen that for the applicability of the provisions of this must be

chargeable under the provisions of the Income Section 195 provides for deduction of tax by the person responsible for paying to a non-resident any interest or any other sum chargeable under the Provisions of the Act. It is clear that the payment was not the interest. It has to be seen whether the payment is covered under the term "any other sum chargeable under the provision of this Act". It has been observed in the preceding discussion that income was not chargeable to tax as it has not been received in India nor it has accrued or arisen in India directly or indirectly. Therefore, once the income is not taxable there is no liability to deduct tax and therefore, it was not obligatory for the appellant to deduct tax in view of this there was no violation of the provisions of section 195 and the appellant also was not required to pay no deduction certificate from the AO.

The issue whether the payer has to apply for a certificate under section 195 if some payment has been made, has been considered by various courts. The Special Bench of Chennai /TAT in the case of Prasad Productions reported in 125ITD 263 has held in para-35 of the order that if the assessee has not applied to the Assessing Officer under section 195(2) for deduction of tax at a lower or nil rate of tax under a bona fide belief that no part of the payment made to the non-resident is chargeable to tax, the case the honourable bench has considered several cases which were relevant to the issue. In the present case the appellant did not deduct the tax or approached the AO for low/no deduction of tax certificate as there are several judicial pronouncements in support of the appellant which have been relied by it in the written submission. It has submitted that the commission paid to nonresident agent was not liable to tax under the provisions of the Act when the services were rendered outside India, services were used outside India, payments were made outside India and there was no permanent establishment or business connection in India. The submission given by the appellant clearly demonstrates its bona fide belief.

Therefore, considering the above discussion there was no liability on the part of the appellant to deduct tax under section 195 or approach the I.T. Authorities for a no deduction tax certificate.

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 Rajive Malhotra (2006) 284 ITR judgements are not applicable to the present facts as there are several other decisions 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 CIJ 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.

In view of the preceding discussion it is clear that the appellant was not liable to deduct tax on the commission paid foreign agents. Therefore, the disallowance of Rs. 1,20,22,460/- under section 40(a)(ia) made by the AO is directed to be **deleted**."

The fact of the present year are almost identical to the A. Y. 2009 -10 except for certain commission that has been paid to non-resident agents in respect of sales made in India. It has been submitted by the appellant that commission of Rs. 1880876 has been paid towards machines sold in India. It has been submitted that all services were rendered by non-resident entities outside India and the agents do not have any permanent establishment in India. It has therefore been submitted that the amount was not taxable. The submission of the appellant regarding commission paid in respect of machines sold in India is not acceptable as the activity of sale has taken place in India. The logic taken by the AO that there is a connection of the income earned by the agent in India is applicable here. The order has been executed in India as the machines have been supplied in India and therefore, income has accrued in India. The provisions of

section 9(1)(i) would therefore be applicable. Accordingly the disallowance of Rs. 1880876/-

Regarding the remaining amount of commission paid to foreign agents the facts are similar to the decision given by me in A.Y. 2009 - 10. Accordingly, the disallowance of the commissions paid to non-resident n agent made by the AO under section 40(a)(ia) directed to be deleted except the disallowance of Rs. 1880876 as discussed above. Reliance is also placed on the recent decision of Hyderabad ITAT in the case of IVAX Paper Chemicals Ltd 44 taxmann.com 173[2014] wherein similar issue has been decided in the manner indicated above.

*The ground of appeal is accordingly, **partly allowed.**"*

5. During the course of appellate proceedings before us, Id. counsel has submitted paper book, written submission made before the Id. CIT(A), circular no. 786 and circular no. 7 etc. He has also furnished additional evidences vide application dated 15.12.2018 as under:-

(i) Declaration from Ferroatik Milacron GmbH regarding tax resident in Germany having no permanent establishment (PE) in India.

(ii) Service provided and Non-competition Agreement.

He has placed reliance on the decision of the coordinate bench in the case of the assessee itself for the assessment year 2009 ĩ 10. The Ld. Counsel has also placed reliance on the decision of the coordinate bench in the case of Welspun Corporation Ltd. 77 taxman.com 165(Ahd.) On the other hand Id. DR has supported the order of assessing officer.

6. We have heard both the sides and perused the material on record carefully. We have noticed that the identical issue has been decided in the case of the assessee by the coordinate bench of the ITAT for the assessment year 2009- 10 in favour of the assessee. The relevant part of the decision is reproduced as under:-

"22. We have duly considered rival contentions and gone through the record carefully. As far as genuineness of the transactions is concerned, the AO has not raised any dispute. The details of commission payments were produced before the AO. He compiled all these details in Annexure-A attached with the assessment order. The dispute between the parties relates to whether the TDS was to be deducted on commission payment or not. The AO was of the view that income arisen on account of commission payable to overseas agents was deemed to accrue or arise in India, and is accordingly taxable under section 5(2)(b) r.w.s 9(1)(i) of the Income Tax Act. On the other hand, the Id.CIT(A) was of the view that income has been derived from the activities of soliciting sales on behalf of the assessee-company by the agent; they are non-residents, and do not have any establishment in India and no activities was carried out in India. This aspect has been examined

lucidly by the Tribunal in the case of Welspun Corporation Ltd. (supra), wherein one of us (Accountant Member) was author of the order. The discussion made by the Tribunal reads as under:

"7. We find that once the agreements and related invoices have been furnished by the assessee at the assessment as also at the appellate stage, and no specific defects have been pointed out in the same, it cannot be open to the revenue to contend that genuineness of commission payments is not established. The commission payments are made with regulatory approvals and through banking channels, and all the requisite documentation is furnished for perusal. In these circumstances, we are of the considered view that the CIT(A) was indeed justified in his well reasoned conclusions on this aspect of the matter. We approve the same. As regards the question as to whether the assessee had any obligations to deduct tax at source from these payments of commission to non resident agents, as learned representatives fairly agree, the issue is now covered, in favour of the assessee, by a coordinate bench decision in the case of **DCIT Vs Welspun Corporation Ltd [(2017) 77taxman.165 (Ahd)]**, speaking through one of us, has observed as follows:

31. The scheme of taxability in India, so far as the non residents, are concerned, is like this. Section 5 (2), which deals with the taxability of income in the hands of a non-resident, provides that **"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"**. There is no dispute that since no part of the operations of the recipient non-residents is carried out in India, no income accrues to these non-residents in India. The case of the revenue hinges on income which is "deemed to accrue or arise in India". Coming to the deeming provisions, which are set out in Section 9, we find that the following statutory provisions are relevant in this context:

Section 9- Incomes deemed to accrue or arise in India

(1) The following incomes will be deemed to accrue or arise in India:

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India,

Explanation: For the purpose of this clause [i.e. 9(1)(i)],

(a) in the case of a business of which all the operations 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 carried out in India;

(b) (c) (d)..... *

(vii) income by way of fees for technical services payable by-

(a) *

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c)*

Explanation 1-.....*

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".

* Not relevant for our purposes

32. So far as deeming fiction under section 9(1)(i) is concerned, it cannot be invoked in the present case since no part of the operations of the recipient's business, as commission agent, was carried out in India. Even though deeming fiction under section 9(1)(i) is triggered on the facts of this case, on account of commission agent's business connection in India, it has no impact on taxability in the hands of commission agent because admittedly no business operations were carried out in India, and, therefore Explanation 1 to Section 9(1)(i) comes into play.

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 Pvt Ltd [(2012) 343 ITR 385 (AAR)], we find that this decision merely follows the earlier ruling in the case of Rajiv Malhotra [(2006) 284 ITR 564] 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 ruling

..... Once we come to the conclusion that the income embedded in these payments did not have any tax implications in India, no fault can be found in not deducting tax at source from these payments or, for that purpose, even not approaching the Assessing Officer for order under section 195. In our considered view, the assessee, for the detailed reasons set out above, did not have tax withholding liability from these payments. As held by Hon'ble Supreme Court in the case of GE India Technology Centre Pvt Ltd Vs CIT [(2010) 327 ITR 456 (SC)], payer is bound to withhold tax from the foreign remittance only if the sum paid is assessable to tax in India. The assessee cannot, therefore, be faulted for not approaching the Assessing Officer under section 195 either. As regards the withdrawal of the CBDT circular holding that the commission payments to non resident agents are not taxable in India, nothing really turns on the circular, as de hors the aforesaid circular, we have adjudicated upon the taxability of the commission agent's income in India in terms of the provisions of the Income Tax Act as also the relevant tax treaty provisions.

8. Learned Departmental Representative nevertheless relies upon the stand of the Assessing Officer. For the detailed reasons set out above in these extracts from Welspun order (supra), his argument cannot be accepted. In any event, we see no reasons to take any other view of the matter than the view so taken by us above. Respectfully following the same, we uphold the relief granted by the CIT(A) and decline to interfere in the matter.

9. Ground no. 1 in revenue's appeal is thus dismissed."

Respectfully following the decision of coordinate bench, we allow the appeal of the assessee and appeal of the revenue is dismissed.

Ground No. 3

7. During the course of appellate proceedings, the assessing officer has noticed that assessee has shown sale of five machines on CIF basis for Rs.

4,21,26,084/- as machines in transit at closing stock value of Rs. 2,61,82,234/-. The assessing officer observed that as against sale value of Rs. 4,21,26,084/- inclusive of profit of Rs. 1,59,43,850/- the assessee had shown the value of machines in transit at Rs. 2,61,82,234/-. The assessing officer was of the view that assessee has not accounted income to the extent of Rs.1,59,43,850/- during the year under consideration. The assessee has responded that these machines were in transit for shipment as on 31st March, 2011 and machines were actually shipped in next year with bill of lading date ranging from 5th April, 2011 to 9th April, 2011 therefore, these machines were treated as part of closing stock as per value of Rs.2,61,82,234/- on 31st March, 2011. The assessee has further submitted that the assessee remained owner of the goods till sailing of ships. A bill of lading is issued on sailing of ships. Thus, the company remains owner of the goods till the date of issue of bill of lading. Therefore, these goods were treated as inventory and sale is recognized with bill of lading is issued by the shipping company. The assessing officer has not accepted the explanation of the assessee by stating that assessee has followed mercantile system of accounting as invoices were prepared and the machines were dispatched from the factory premises therefore, the assessee should have shown the same as sale . Consequently, the assessing officer has added Rs.1,59,43,850/- treating as suppression of sale. Aggrieved assessee filed appeal before the Id. CIT(A). The Id. CIT(A) has partly allowed the appeal of the assessee by observing as under:-

“3.3. Decision:

I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The AO has made an addition on account of suppressed sales. The appellant has issued the invoice for sale of the machines but the same was shown as pending shipment at the port. The AO considered it as the sales made and accordingly added the difference of the sale invoice value and the amount shown by the appellant in the closing stock for that machine. The appellant has submitted that it was the owner of the goods till sailing of the ship and till the bill of lading was issued. It accordingly treated these goods as inventory and the sale was recognised when the bill of lading was issued by the shipping company. The goods were treated as sold during the month of April 2011 as the bills of lading were issued on that date.

After considering the various details, it is noted that the similar addition is being made in the case of the appellant since A.Y 2004 - 05. Similar additions were made in

all subsequent years and my predecessors have upheld the addition made by the AO. The appellant has made appeal before ITAT Ahmedabad and the issue is sub-judice at that level. Since the issue is covered by the decisions of my predecessors in earlier years and the facts are also identical, it would be prudent to follow the decisions taken at first appellate level by my predecessors. In view of these facts and circumstances, the addition made by the AO on account of difference of sale bill issued and the value taken in the closing stock is upheld.

The appellant has also raised an alternative plea for the addition made on account of suppressed sales. It has submitted that in case the stand taken by the AO is upheld, the effect of suppress sales taken for A. Y. 2011 - 12 should be given in A. Y. 2012 - 13. It has been requested by the appellant that the sales treated as suppressed sales in present year should be deducted from the sales of the next year shown by the appellant otherwise, it would result in double taxation of income. The plea of the appellant is justified. An income can only be taxed in one year. Once certain items have been treated as part of the sales in earlier assessment year, the same cannot be treated as part of the same in Assessment Year 2012-13 and, therefore, the same should be excluded from the sales of the next assessment year. The AO is accordingly directed to exclude the sales which have been treated as suppressed sales in present assessment year from the sales shown by the appellant in A. Y. 2012 - 13.

The ground of appeal is accordingly, partly allowed."

The Id. counsel has furnished paper book containing invoices of sale goods along with bill of lading and meaning of various commercial terms as per guidelines of International Chamber of Commerce. On the other hand, the Id. departmental representative supported the order of Id. CIT(A).

8. We have heard both the sides and perused the material on record carefully. We have noticed that the identical issue has been decided by the coordinate bench of the ITAT in the case of assessee itself for the assessment year 2004-05 to A.Y.2010-11 and the decision vide ITA No. 337/Ahd/2008 for A.Y.2004-05 is reproduced as under:-

"14. We have heard both the sides and perused the material on record. We have perused the judgment of the Hon'ble Supreme Court wherein it was held that the goods remains the seller's property till those have been brought and loaded on board the ship and so the sales were exempted before tax under Art 286(1) of the Constitution.

We noticed that where the sales were made under FOB contracts the seller continued to be owner of the goods till those crossed the custom barrier and entered the export stream.

In the case of B.K.Wadeyar vs. M/s Daulatram Rameshwarlal

On 27th September, 1961: 1961 AIR 311, 1961 SCR (1) 924

It was stated as under:-

"We have therefore come to the conclusion that there is no circumstance which would justify a conclusion that the parties came to a special agreement that though the sales were on FOB contracts property in the goods would pass to the buyer at some point of time before shipment. We

think that the learned judges who heard the appeal in the Bombay High Court were right in their conclusion that the goods remained the sellers' property till the goods had been brought and loaded on board the ship and so the sales were exempted from tax under Art. 286(i)(b) of the Constitution."

15. We have perused this judgment In the case of Contship Container Lines Ltd. vs. D. K. Lall & Ors. on 16 March, 2010 Civil Appeal No.3245 of 2005, in which it was stated that the provisions of Sales of Goods Act 1930 relevant to the transfer of the property in goods to the purchaser specially in FOB transaction is transferred to the buyer at such time as the parties to contract intend it to be transferred. Section 26 of the Act provides that unless otherwise agreed, the goods remain at the seller risk. In case of FOB contracts the goods are delivered free on board the ship once the seller has placed the goods safely on board at his cost and thereby handed over the possession of the goods to the ship in transfer of the Bill of Landing or other document, the responsibility of the seller ceases on the delivery of the goods to the buyer is complete. After considering the above facts and legal findings we considered that sale was executed under FOB as per which the risk was transferred from the seller to the buyer when the goods put on ship or rail. In view of above, we are not inclined with the decision of the Ld. CIT(A) and we are of the view that when the sale was executed under FOB, CIF terms as per which the risk was transferred from the seller to the buyer when the goods put on ship or rail. Therefore, the appeal of the assessee is allowed on this issue."

Respectfully following the decision of the coordinate bench of the ITAT as supra, the appeal of the assessee is allowed. Accordingly, the appeal of the assessee is allowed.

ITA No. 2616/Ahd/2016

9. The revenue has raised following grounds of appeal:-

"1. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 11,01,41,584/- made on account of disallowance of commission on export I sale paid to Non-residents u/s. 40 (a) (ia) of the Act for failure to deduct 1 tax at source, without properly appreciating the facts of the case and the material brought on record.

2. The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 1,28,37,000/- made on account of disallowance of depreciation on non-compete fees, without properly appreciating the facts of the case and the material brought on record."

10. This ground no. 1 of appeal of the revenue has been adjudicated under the ground no. 1 and 2 of the appeal of assessee as supra in this order. Looking to the findings given in the ground no. 1 and 2 of the appeal of assessee the ground of appeal of the revenue stands dismissed.

Ground no. 2 regarding deletion of addition made of Rs. 1,28,37000/- on account of disallowance of depreciation.

11. The brief fact to the issue under appeal is that on scrutiny the assessing officer has noticed that assessee has entered into services provided and non-competition agreement on 28th August, 2010. As per agreement a non-compete fees of Rs. 10.96 crore was payable to M.N. Patel. The assessee has claimed depreciation of this non-compete fees by treating the same as intangible assets. The assessing officer was of the view that claim of depreciation on non-compete fees is not justified because the payment of non-compete fees did not merely facilitate conduct of business as it would be a capital expenditure by merely because of capital expenditure it would not be necessary that it is eligible for depreciation. The assessing officer has further stated that as per provision of section 32(1)(ii) depreciation can be claimed in respect of know-how, patents, copy right trade-marks, license, franchise or any other business, commerce rights of similar nature. So far as the nature of non-compete fees is concerned, it is clearly evident that it does not fall within the ambit of any of the above intangible assets or business or commercial rights of similar nature pertaining to the above intangible assets. Therefore, the clam of depreciation of the assessee by treating non-compete fees as intangible assets was rejected by the assessing officer.

12. Aggrieved assessee filed appeal before the Id. CIT(A). The Id. CIT(A) has allowed the appeal of the assessee by observing as under:-

"4.3. Decision:

I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The appellant has made payment of non-compete fee of Rs. 10.29 crores to Shri M. N. Patel to protect its business interest and ward off potential competition from him. It has been held by the AO that the claim of depreciation on non-compete fee was not justified because payment of the same did not merely facilitate the conduct of business but in fact ensured that the assessee's market position and the customer base was not threatened by the completion from the erstwhile partner. Therefore, the same should be taken as capital expenditure. The non-compete fee does not fall within the ambit of the assets mentioned in section 32(1)(ii) of the Act and accordingly, he disallowed the claim of depreciation.

The appellant on the other hand has submitted that Shri Patel is one of the founder of the company and is widely known in plastic industry. On termination of his association as promoter and shareholder the appellant company wanted to protect its business interest. Mr. Patel has agreed to various terms of the contract in which he has agreed to not do any activity which would harm the interest of the appellant company. He has agreed for non-competition, non-solicitation of business, non-solicitation of employees and non-disclosure clauses. Accordingly, the appellant has submitted that this would ultimately result in growth in business revenue and profit. The appellant has further placed reliance on certain decisions in which non-compete fee has been held to be an intangible asset and the depreciation has been allowed. The appellant has also raised an alternative plea in which it has been claimed that in case the claim of depreciation is not considered to be allowable the entire non-compete fee should be allowed as deduction under section 37(1) of the Act.

On a careful consideration of entire facts of the case, it is noted that the salient features of the agreement between the appellant and Shri Patel, to whom non-compete fee has been paid are as under: -

- a. He shall not, directly or indirectly seek or accept employment or other work, in any capacity (including, without limitation, as agent), with any person, entity or business similar to, or which directly or indirectly is competitive with FMIL's existing business within India, Africa or the Middle East, (the "Restricted Territory").
- b. He shall not conspire, plan or otherwise agree with any person, entity or business to organize or develop any business or entity that directly or indirectly is competitive with or engages in business similar to, the FMIL's existing business within the restricted territory.
- c. He shall not directly or indirectly own, manage, operate, control be employed by, or participate in the ownership, management, operation or control of any person, entity or business similar to, or which directly or indirectly is competitive with, FMIL's existing business within the restricted territory.
- d. He shall not divert or attempt to divert or seek to cause any party to refrain from doing any business with FMIL, within the Restricted Territory.
- e. He shall not during the term, directly or indirectly, solicit, seek business from, entice, persuade or induce any person or entity which has a business relationship with FMIL as to the existing business within the restricted territory to direct or transfer away any business, patronage or source of supply from FMIL.
- f. He shall not, during the term, hire, identify for solicitation or solicit, directly or indirectly, any employee of FMIL for employment by any person or entity other than FMIL (assessee) and
- g. He shall not disclose any confidential information. The confidential information means with respect to or concerning FMIL and the past, current or planned operation of the existing business: (i) any and all trade secrets (ii) customer lists, customer locations, current and anticipated customer requirements, customer preferences, pricing information, customer contacts, price lists, market studies, service records, business plans, marketing plans and advertising materials, (iii) any and all other confidential and/or proprietary information concerning the company (FMIL) and the existing business, including without limitation financial statements, financial projections, budgets and historical and projected sales and (iv) any and all notes, analysis, compilations, studies, summaries and other material prepared by or for FMIL in connection with the existing business.

It is further noted that the contract was for a period of three years and shall lapse after that period. It is clear from the terms and conditions of the contract that agreement is for preventing Shri Patel from doing similar nature of business or promoting similar nature of business in some other company.

Accordingly, this payment has rightly been claimed by the appellant as non-compete fee.

The question which is now to be decided is that whether this non-compete fee is a capital asset or revenue expenditure and in case it is treated as capital expenditure, whether the same can be treated as intangible asset and depreciation be allowed on it. The appellant has quoted number of case laws in support of its claim. A perusal of various judgments show that non-compete fee is a capital asset and same can be considered as an intangible asset and depreciation can be allowed on the same. In some cases, it has even been held that it was a revenue expenditure. The perusal of various judgments relied by the appellant clearly show that the rights which has been acquired by the appellant by restricting Shri Patel, directly or indirectly, participating in a business which are similar to that of appellant, from directly or indirectly soliciting or influencing clients, the customers and other similar activity which can create competition for the appellant in the business. The fee had been paid by the appellant to carry on the business without competition and indirectly confer a right to carry on business smoothly. This right is capital in nature and would also fall within the ambit of section 32(1)(ii) of the Act and consequently depreciation would be allowable. It is to be noted that agreement is only for three years.

The appellant has rightly placed reliance on the following judgements and the relevant extracts from those judgements are quoted as under: -

1. In case of **CIT Vs Ingersoll Rand International Ind. Ltd. 227 Taxmann 176** (Karnataka), it has been held by the honourable court that non-compete fee is an intangible asset entitled for depreciation. The head note of the judgement is reproduced hereunder. -

"Section 32, read with section 28(vaj, of the Income-tax Act., 1961] -Depreciation - Allowance/rate of (Intangible assets] - Assessment year 2006-07 - Whether right to carry on business without competition has an economic interest and money value - Held, yes - Whether whenever assessee makes payment for non-compete fee, commercial right comes into existence and, therefore, that right which assessee acquires on payment of non-compete fee confers in him a commercial or a business right which is held to be similar in nature to know-how, patents, copyrights, trade marks, licences, franchises - Held, yes - Whether commercial right so acquired by assessee unambiguously falls in category of an 'intangible asset' and, consequently, depreciation provided under section 32(1)(ii) is to be allowed - Held, yes"

While deciding the case honourable High Court referred to decision of the **Delhi High Court** in the case of **Areva T. & D. India Ltd. v. Dy. C/T [2012] 345 ITR 421/208 Taxman 252/20 taxmann.com 29** explaining the principles of *Ejusdem Generis* with reference to Section 32(1) (ii) of the Income Tax Act, 1961. In para 13 of the order the honourable Delhi High Court has held that -

"In the present case, applying the principle of *ejusdem generis*, which provides that where there are general words following particular and specific words, the meaning of the latter words shall be confined to things of the same kind, as specified for interpreting the expression "business or commercial rights of similar nature" specified in Section 32(1)(ii) of the Act. It is seen that such rights need not answer the description of "know-how, patents, trademarks, licences or franchises" but must be of similar nature as the specified assets. On a perusal of the meaning of the categories of specific intangible assets referred to in section 32(1)(ii) of the Act preceding the term "business, 'or commercial rights of similar nature", it is seen that the aforesaid intangible assets are not of the same kind and are clearly distinct from one another. The fact that after the specified intangible assets the words "business or commercial rights of similar nature" have been additionally used, clearly demonstrates that the Legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets, which were neither feasible nor

possible to exhaustively enumerate. **In the circumstances, the nature of "business or commercial rights" cannot be restricted to only the aforesaid six categories of assets, viz., know-how, patents, trade-marks, copyrights, licences & franchises. The nature of "business or commercial rights" can be of the same genus in which all the aforesaid six assets fall. All the above fall in the genus of intangible assets that form part of the tool of trade of an assessee facilitating smooth carrying on of the business.** In the circumstances, it is observed that in the case of the assessee, intangible assets, viz., business claims; business information; business records; contracts; employees; and know-how, are all assets, which are invaluable and result in carrying on the transmission and distribution business by the assessee, which was hitherto being carried out by the transferor, without any interruption. The aforesaid intangible assets are, therefore, comparable to a licence to carry out the existing transmission and distribution business of the transferor. In the absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee got an up and running business. This view is fortified by the ratio of the decision of the Supreme Court in Techno Shares and Stocks Ltd. 12010} 327/TR 323 ISO wherein it was held that intangible assets owned by the assessee and used for the business purpose which enables the assessee to access the market and has an economic and money value is a "licence" or "akin to a licence" which is one of the items falling in Section 32(1) (ii) of the Act.'

The High Court has further held that:-

"A non-compete right encompasses a right under which one person is prohibited from competing in business with another for a \ stipulated period. It would be the right of the person to carry on a business in competition but for such agreement of non-compete. Therefore the right acquired under a non-compete agreement is a right for which a valuable consideration is paid. This right is acquired so as to ensure that the recipient of the non-compete fee does not compete in any manner with the business in which he was earlier associated. The object of acquiring a know-how, patents, copyrights, trade marks, licences, franchises is to carry on business against rivals in the same business in a more efficient manner or to put it differently in a best possible manner. The object of entering into a non-compete agreement is also the same ie., to carry on business in a more efficient manner by avoiding competition, atleast for a limited period of time. On payment of non-compete, the payer acquires a bundle of rights such as restricting receiver directly or indirectly participating in a business which is similar to the business being acquired, from directly or indirectly soliciting or influencing clients or customers of the existing business or any other person either not to do business with the person who has acquired the business and paid the non-compete fee or to do business with the person receiving the non-compete fee to do business with a person who is directly or indirectly in competition with the business which is being acquired. The right is acquired for carrying on the business and therefore it is a business right." Therefore that right which the assessee acquires on payment of non-compete fee confers in him a commercial or a business right which is held to be similar in nature to know-how, patents, copyrights, trade marks, licences, franchises. Therefore the commercial right thus acquired by the assessee unambiguously falls in the category of an 'intangible asset'. Their right to carry on business without competition has an economic interest and money value. The term 'or any other business or commercial rights of similar nature' has to be interpreted in such a way that it would have some similarities as other assets mentioned in Cl.(b) of Expln.3. Here the doctrine of ejusdem generis would come into operation and therefore the

non-compete fee vests a right in the assessee to carry on business without competition which in turn confers a commercial right to carry on business smoothly. When once the expenditure incurred for acquiring the said right is held to be capital in nature, consequently the depreciation provided under Sec.32(1)(ii) is attracted and the assessee would be entitled to the deduction as provided in the said provision".

2. In the case of **ACIT Vs Real Image Tech (P) Ltd. 120 TTJ 0983**, Hon'ble Chennai ITAT, noted that:-

"When a bus/ness man pays money to another business man for restraining the other business man from competing with the Assessee, he gets a vested right which can be enforced under law and without that the other business man can compete with the first business man. When by payment of non-compete fee, the business man gets his right what he is practically getting is kind of monopoly to run his business without bothering about the competition. It is just like separating big plant from other plants affecting the growth of the big I plant. Generally, non-compete fee is paid for a definite period which in this case is five years. The idea is that by that time, the business would stand firmly on its own footing and can sustain later on. This clearly shows that the commercial right comes into existence whenever the Assessee makes payment for non-compete fee." The Hon'ble Tribunal has further observed that-

"Now, the second question is whether such right can be termed as "or any other business of commercial rights of similar nature for construing the same as intangible asset". Here, the doctrine of ejusdem generis would come into operation. The term "or any other business of commercial rights of similar nature" has to be interpreted in such a way that it would have same similarities as other assets mentioned in clause (b) of Explanation 3. The other assets mentioned are know-how, patents, copyrights, trade marks, licences, franchises, licence etc. In all these cases no physical asset comes into possession of the assessee. What comes in is only a right to carry on the business smoothly and successfully, and in our view even the right obtained by way of non-compete fee would also be covered by the term "or any other business of commercial rights of similar nature" because after obtaining non-compete right, the assessee can develop and run his business without bothering about the competition"

The Hon'ble Tribunal has further mentioned that :-

"in the case of Radaaj Media Works India Ltd., we had also referred to the decision of the Mumbai Bench of the Tribunal in the case of Techno Shares & Stocks Ltd. v. ITO [2006] 101 TTJ 349A whereby stock exchange card was held to be intangible asset. If a stock exchange card is construed as intangible asset, we are of the view that the right acquired by payment of non-compete fee is definitely intangible asset. Moreover, this right (asset) will evaporate over a period of time of five years in this case because after that the protection of non-competition will not be available to the Assessee. This means, this right is subject to wear and tear by the passage of time, in the sense, that after the lapse of a definite period of five years, this asset will not be available to the assessee and, therefore, this asset must be held to be subject to depreciation."

3. In case of **ITO Vs Medicorp Technologies India Ltd. 122 TTJ 0394**, Hon'ble Chennai ITAT has observed that

"if the business/commercial right of a patent, copyright trade mark, l/cense, and franchise, fulfils the conditions of 'being intangible asset', then surely the impugned business/commercial right acquired by the assessee also fulfils that condition, by way of a logical corollary". The ITAJ has held that "the impugned 'non-compete right' acquired by the assessee-company, was eligible for depreciation under clause (ii) of section 32(1) of the Act."

4. In case of Bunge Agri Business (India) P. Ltd. Vs DCIT 132 ITD 0549, Hon'ble Mumbai ITAT has held that

"We have considered the rival submissions carefully and find that in the case of Real Image Tech (?) Ltd. [supra], after analyzing the provisions of sec.32(1)(ii) it was held that non compete fee would constitute capital asset and depreciation was ultimately held to be allowable. However, we find that the AO vide para-8 of his order has observed that non compete fee was not mentioned in the agreement as a separate payment. Therefore, he should find out the amount of non compete fee determined by the assessee and accordingly allow depreciation in view of the decision the Chennai Tribunal in the case of Real Image Tech (P) Ltd."

5. In case of Serum Institute of India Ltd. Vs ACIT 147 TTJ 594 (Pune), 135 ITD 69, Hon'ble Pune ITAT has held that:-

"it is if is evident so long as the 'non Compete fee' in question is a 'capital expenditure, the same is entitled for depreciation as held by the Apex Court in the case of Techno Shares & Stock Ltd. v. C/T [2010] 193 Taxman 248." The /TAT further observed that "the limited disputed for adjudication before us relates to if the capital expenditure by way of 'non compete fee' in question is an 'intangible asset and if the same is depreciable asset for the benefits u/s 32 of the Act. There is no dispute on the capital nature of the impugned 'non compete fee' in view of the reported judgment of the Supreme Court in case of Guffic Chem (P) Ltd. v. CIT [2011] 332 ITR 602 / 198 Taxman 781 10 faxmann.com 105, which is adopted in the judgment in the case of /-far/ Shankar Bhartia v. CIT (2011] 203 Taxman 6 (Mag.)/ 15 taxmann.com 113 (Cal.)." If further held that "the, by payment of non compete fee to another person to reduce the business or commercial competition for a period, the assessee acquires a right and it is a capital asset, which is a business or a commercial right..." and further held that it is a settled issue that the non compete fee is intangible and depreciable asset as held by the cited supreme court's judgments".

6. In case of Pentasoft Technologies Ltd. Vs Dy.CIT 264 CTR 187, Hon'ble Madras High Court observed that :-

"The only issue is whether non-compete agreement/arrangement would fall within the ambit of clause (ii) of Section 32(1) of the Act". It further observed that "Learned counsel for the assessee contended that the non-compete is in effect an indirect licence. However, we are not inclined to agree with the said submission since non compete, at best could be a commercial right because that right is relatable to the transfer of trade mark, copy rights and patents and further held that the earlier transfer of the trade mark, patents and other rights in favour of the assessee was undoubtedly the transfer of intangible assets, which in terms of section 32(1)(ii) of the Act would be a capital asset entitled to depreciation.

7. In case of DCIT Vs Weizmann Forex Ltd. 51 SOT 0525, Hon'ble Mumjpai ITAT noted that -

"The Id DR has submitted that the entire consideration for acquiring the network also includes the payment for non-compete fee. However, the assessee has not shown any bifurcation of the consideration paid for non-compete fee to AFL" The ITAT further observed that "The Hon'ble Delhi High Court in the case of Hindustan Coca Cola Beverages (P.) Ltd. (supra) has held in para 24 as under: "25.It is worth noting that the meaning of business or commercial rights of similar nature has to be understood in the backdrop of section 32(1)(ii) of the Act. Commercial rights are such rights which are obtained for effectively carrying on the business and commerce, and commerce, as is understood, is a wider term which encompasses in its fold many a facet. Studied in this background, any right which is obtained for carrying on the business with effectiveness is likely to fall or come within the sweep of meaning of intangible asset." The dictionary clause

clearly stipulates that business or commercial rights should be of similar nature as know-how, patents, copyrights, trademarks, licences, franchises, etc. and all these assets which are not manufactured or produced overnight but are brought into existence by experience and reputation. They gain significance in the commercial world as they represent a particular benefit or advantage or reputation built over a certain span of time and the customers associate with such assets and held that "assessee's claim of depreciation is allowable."

8. In the case of ACIT Vs GE Plastics India Ltd. 137 ITD 309, the ITAT (Ahmedabad) has also held that the depreciation of non - compete fee paid by the assessee was allowable.

In view of the above discussion, various judgments mentioned above and preponderant judicial opinion, I am of the considered opinion that the non-compete fee paid by the appellant to Mr. Patel is a capital expenditure and the appellant has acquired an intangible right which is depreciable and depreciation claimed is allowable under section 32(1)(ii) of the Act. The asset is depreciable as the contract is enforceable only for three years and it is not forever. The disallowance made by the AO is therefore, directed to be deleted.

*The ground of appeal is accordingly **allowed.**"*

13. We have heard the rival contention on this issue and perused the material on record. After considering the facts and the detailed findings along with various judicial pronouncements elaborated in the order of the Ld. CIT(A), we consider that the non-compete fee paid by the assessee to Mr. Patel is a capital expenditure and the assessee has acquired an intangible right which is depreciable and depreciation claimed is allowable under section 32(1)(ii) of the Act. Therefore, we do not find any reason to interfere in the decision of the Ld. CIT(A). Accordingly, the appeal of the revenue is dismissed.

14. In the result, the grounds of appeal 1 to 3 of the assessee are allowed and ground of appeal 1 to 2 of the revenue are dismissed. The grounds of appeal no. 3 to 5 of the revenue are general which do not require any adjudication.

Order pronounced in the open court on 19-04-2018

Sd/-
(S.S. GODARA)
JUDICIAL MEMBER

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Ahmedabad : Dated 19/04/2018

आदेश क त ल प अ षत / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपील य अ धकरण,
अहमदाबाद