

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

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 784/JP/2019
निर्धारण वर्ष / Assessment Year : 2015-16

M/s Maharaja Shree Umaid Mills Ltd. Khaitan Bhawan, M.I. Road, Jaipur.	बनाम Vs.	The DCIT, Circle-6, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCM1849 B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by: Shri P.C.Parwal (C.A.)
राजस्व की ओर से / Revenue by : Smt. Runi Pal (JCIT)

सुनवाई की तारीख / Date of Hearing : 13/03/2020
उद्घोषणा की तारीख / Date of Pronouncement: 28/04/2020

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of the Id. CIT(A), Ajmer dated 01.04.2019 for the assessment year 2015-16 wherein the assessee has taken the following grounds of appeals:-

- "1. The Ld. CIT(A) has erred on facts and in law in confirming the disallowance of Rs.2,44,530/- u/s 14A read with Rule 8D.*
- 2. The Ld. CIT(A) has erred on facts and in law in confirming the disallowance of depreciation of Rs.46,630/- on windmill by treating the civil work & foundation as building on which depreciation is allowed @ 10% and electrical items/ components as plant & machinery on which depreciation is allowed @ 15% instead of applicable rate of 80% claimed by the assessee.*
- 3. The Ld. CIT(A) has erred on facts and in law in confirming the disallowance of additional depreciation of Rs.2,02,91,277/- claimed u/s 32(1)(iia) of IT Act, 1961*

4. The Ld. CIT(A) has erred on facts and in law in confirming the disallowance of commission of Rs.19,56,000/- paid to non residents u/s 40(a)(ia) of IT Act, 1961.

2. In ground no. 1, the assessee has challenged the confirmation of the disallowance of Rs.2,44,530/- u/s 14A read with Rule 8D.

3. The Id AR submitted that during the year, the assessee has shown total investment of Rs.242.03 lacs on which dividend of Rs.27,225/- was earned which was claimed exempt u/s 10 of the Act. The assessee explained that it has not incurred any expenditure in earning the dividend income, thus, no disallowance is called for. The AO observed that assessee has debited interest expense of Rs.1213.31 lacs in its profit & loss account. There is a nexus between expenditure incurred and investment made by the assessee. Additionally, managerial/ administrative cost for making the investment cannot be denied. Accordingly, by invoking the provision of section 14A r.w. rule 8D of the IT Rules, he made disallowance of Rs.2,44,530/-, being 1% of the average investment of Rs.2,44,53,000/-.

4. It was further submitted that on appeal, the Ld. CIT(A) confirmed the disallowance by holding that assessee has not furnished any fund flow statement to substantiate the contention made in the written submission. The AO has computed the disallowance strictly in accordance with section 14A read with Rule 8D.

5. It was submitted that on perusal of Rule 8D, it is evident that the AO can apply Rule 8D(2) only when he is not satisfied with the claim made by the assessee that no expenditure has been incurred in relation to the income not includible in the total income. In the present case, assessee has not incurred any expenditure in earning the dividend income. The investment in shares were made in earlier years out of interest free funds available with the assessee and no borrowed funds were utilized. This is evident from the fact

that as on 31.03.2015, the share capital and reserve & surplus stood at Rs.17,152.52 lacs as against investment of Rs.242.03 lacs and thus, own funds were 70.86 times of the investment. On such investment, assessee received dividend income of Rs.27,225/- during the year which was directly credited in the bank account. No expenditure by way of interest, staff, conveyance, telephone, etc. has been incurred in earning such dividend income during the year. The AO has not specified as to how the claim of the applicant that it has not incurred any expenditure for earning the dividend income is not correct. In these circumstances disallowance computed by the AO u/r 8D is unjustified.

6. It was further submitted that the Ld. AO has disallowed 1% of average value of the investment in view of Notification No.43/2016 dated 02/06/2016 stating the same to be clarificatory notification. It is a settled law that any notification which increases the tax burden can't be said to be clarificatory so as to have retrospective effect. Hon'ble Supreme Court in case of CIT Vs. Essar Teleholdings Limited 162 DTR 225 with reference to Rule 8D inserted w.e.f. 24.03.2008, after considering Rule 8D amended from 02.06.2016 held that the same has prospective applicability. In view of the same, disallowance made by AO under the amended Rule 8D effective from 2.06.2016 is bad in law.

7. It was further submitted that it may also be noted that the dividend earned on shares claimed exempt is only Rs.27,225/- whereas AO has disallowed the expenditure at Rs.2,44,530/-. This is illogical and irrational. Even if the amount of Rs.27,225/- is taxed, the burden of tax would be lower than that imposed by the AO by disallowing the expenditure of Rs.2,44,530/-.

8. Per contra, the Id. DR is heard who has relied on the order of the lower authorities.

9. We have considered the rival contentions and perused the material available on record. We find that the disallowance of expenditure u/s 14A exceeds the dividend income claimed as exempt by the assessee. Therefore, disallowance on account of administrative expenses under Rule 8D(iii) is hereby restricted to the extent of exempt income so claimed by the assessee. In the result, the ground of appeal is partly allowed.

10. In ground no. 2, the assessee has challenged the disallowance of depreciation of Rs.46,630/- on windmill by treating the civil work & foundation as building on which depreciation is allowed @ 10% and electrical items/components as plant & machinery on which depreciation is allowed @ 15% instead of rate of 80% claimed by the assessee.

11. It was submitted that during the year, assessee has claimed depreciation of Rs. 28,55,49,555/- in the P & L a/c. This includes depreciation of Rs.17,17,062/- claimed @80% on the windmill which comprised of the civil work carried out for their installation and the electricity work including cabling & electricity lines. The AO observed that the civil work and the electrical work are the ancillary items connected with the installation of the windmill. These items should have been provided depreciation under the head building @ 10% and plant & machinery @ 15%. Accordingly, he made disallowance of Rs.46,630/-. On appeal, the Ld. CIT(A) confirmed the disallowance by holding that AO has allowed depreciation strictly in accordance with the rate of depreciation provided in new Appendix-1 of Income tax Rules.

12. In this regard, the Id. AR submitted that the civil construction is in the nature of foundation and allied work without which the tower of the wind power plant cannot be installed. Whether a civil structure is a part of the plant or part of the building is to be examined with reference to the functional test of such structure. If without such structure the plant cannot function, then the cost of structure is part of the plant. Similarly, erection and installation of

electric items are part & parcel of the windmill and without these items windmill cannot run. In present case also, without the expenditure on civil construction incurred by way of foundation of the plant, internal lines and the allied work the plant could not function and therefore, the expenditure incurred on all these item is a part of wind plant. Thus, the assessee has correctly claimed depreciation @80%. Similar issue has been decided by the Hon'ble Rajasthan High Court & ITAT, Jaipur Bench in favour of the assessee as under:-

- CIT vs. K.K. Enterprises (2014) 108 DTR 109 (Raj)
- CIT vs Mehru Electricals & Mechanical Engineers Pvt. Ltd (2016) 141 DTR 342 (Raj)
- ACIT vs. M/s Vijay Solvex Ltd. (ITA No.377/JP/12 order dt. 03.04.2018 (Jaipur) (Trib)

In view of above, disallowance of depreciation of Rs.46,630/- confirmed by Ld. CIT(A) is uncalled for and same be directed to be deleted.

13. Per contra, the Id. DR is heard who has relied on the lower authorities.

14. We have considered the rival contentions and perused the material available on record. We find that the matter is no more *res integra* and is covered by the decision of the Hon'ble Rajasthan High Court in case of K.K. Enterprises and Mehru Electricals (supra) and we fail to understand that where the said decisions were brought to the notice of Id CIT(A), what stopped him in following the same, being the decision of the Hon'ble Jurisdictional High Court. In the result, the ground of appeal is allowed.

15. In Ground no. 3, the assessee has challenged the disallowance of additional depreciation of Rs.2,02,91,277/- claimed u/s 32(1)(ia) of IT Act, 1961.

16. In this regard, the Id AR submitted that the assessee claimed additional depreciation of Rs.2,02,91,277/- on those plant & machinery which were used for less than 180 days in the Previous Year 2013-14. The AO observed that additional depreciation claim pertains to plant & machinery installed and put to use in AY 2014-15, therefore, same is not allowable in current AY 2015-16. Section 32(1)(ii)(a) allows additional depreciation @ 20% of the cost of new plant & machinery which has been acquired and installed. There is no provision in the law which allows the assessee's claim for carry forward of additional depreciation. Accordingly, he disallowed the claim of additional depreciation. The Ld. CIT(A) held that the amendment in clause (iia) of sub-section 1 of section 32 was inserted w.e.f. 01.04.2013 to include "or in the business of generation or generation and distribution of power". Before the amendment inserted by the Finance Act, 2012, additional depreciation was not admissible on any plant or machinery acquired or installed by an assessee engaged in the business of generation and distribution of power. Therefore, disallowance of additional depreciation of Rs.2,02,91,277/- was confirmed. Against the said findings, the assessee is in appeal before the Tribunal.

17. At the outset, the Id AR submitted that finding of Ld. CIT(A) in disallowing the claim of additional depreciation is factually and legally incorrect. The assessee has not claimed additional depreciation with reference to plant & machinery installed in the business of generation of power. He has claimed additional depreciation on other plant & machinery which were acquired and installed in AY 2014-15 but since they were used for less than 180 days, additional depreciation was claimed at 10% and the balance 10% is claimed in the year under consideration. Hence, the reasons for disallowing the claim of additional depreciation by Ld. CIT(A) is misplaced.

18. It was submitted that the Parliament in Finance Bill, 2015 w.e.f. AY 2016-17 has introduced third proviso to section 32(1)(ii) providing for carry forward of the balance 50% of the additional depreciation in the immediately succeeding previous year in which the plant & machinery is acquired and installed. In the memorandum, it is explained that to encourage investment in plant or machinery by the manufacturing and power sector, additional depreciation of 20% of the cost of new plant or machinery acquired and installed is allowed under the existing provisions of section 32(1)(iia) of the Act over and above the general depreciation allowance. On the lines of allowability of general depreciation allowance, the second proviso to section 32(1) inter alia provides that the additional depreciation would be restricted to 50% when the new plant or machinery acquired and installed by the assessee is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in the previous year. Non-availability of full 100% of additional depreciation for acquisition and installation of new plant or machinery in the second half of the year may motivate the assessee to defer such investment to the next year for availing full 100% of additional depreciation in the next year. To remove the discrimination in the matter of allowing additional depreciation on plant or machinery used for less than 180 days and used for 180 days or more, it is proposed to provide that the balance 50% of the additional depreciation on new plant or machinery acquired and used for less than 180 days which has not been allowed in the year of acquisition and installation of such plant or machinery, shall be allowed in the immediately succeeding previous year. The amendment being a beneficial amendment, only to remove ambiguity and hardship has retrospective effect as held in the following cases:-

CIT Vs. Shri T.P. Textiles (P.) Ltd. (2017) 246 Taxman 324 (Mad.) (HC):

In view of section 32(1)(iia), there is no limitation placed on assessee in claiming balance additional depreciation in assessment year which follows assessment year in which machinery has been bought and used for less than 180 days. As a matter of fact, with effect from 01.04.2016, the ambiguity if any, in this regard in the mind of the AO stands removed by virtue of the Legislature incorporating in the Statute, the necessary clarificatory amendment. Perusal of extract of Memorandum relied upon would show that legislature recognised fact that manner in which Revenue chose to interpret provision, as it stood prior to its amendment would lead to discrimination, in respect of plant and machinery which was used for less than 180 days as against that which was used for 180 days or more. Amendment is clarificatory in nature and not prospective. The Memorandum only clarifies as to how the unamended provision had to be read all along.

CIT vs. Rittal India (P) Ltd. (2016) 380 ITR 428 (Kar) (HC):

The return of income was filed for the assessment year 2010-11 declaring the total income of Rs.4,26,76,850/-. In the draft assessment order under Section 143(3) read with Section 144C dated 14.3.2014, the Assessing Officer has determined the total income at Rs.7,84,12,208/- as there was a disallowance under Section 32 (1) (iia) of Rs.3,53,65,893/- being additional depreciation and an addition of Rs.3,69,463/- due to transfer pricing adjustments. The Assessing Officer disallowed the same since the additional depreciation under Section 32(1)(iia) was allowable only in the first year of purchase. The Dispute Resolution Panel held that the claim of additional depreciation on assets installed during the period 1.10.2008 was allowable and directed allowance of additional depreciation claimed by the assessee under Section 32(1) (iia) of the Act. The Tribunal allowed the claim based on its own decision in assessee's own case for assessment year

2008-09. The Tribunal also relied on the decision of the Coordinate Benches of the Tribunal in the case of M/s. Cosmo Films Ltd wherein, it is held that the additional depreciation allowed under section 31(l)(iia) is a one time benefit to encourage industrialization and the relevant provisions has been construed reasonably and purposive. Hon'ble High Court following the judgment of the Division Bench of this Court dated 24th November 2015 in ITA No. 268/2014 (The Commissioner of Income Tax and another Vs. M/s. Rittal India Pvt. Ltd.) and for the reasons stated therein, held that no interference is called for in the order of the Tribunal or that any question of law arises in this appeal for consideration by this Court.

In view of above, disallowance of additional depreciation of Rs.2,02,91,277/- confirmed by Ld. CIT(A) is uncalled for and same be directed to be deleted.

19. Per contra, the Id. DR is heard who has relied on the lower authorities.

20. We have considered the rival contentions and perused the material available on record. There is no dispute that the assessee is eligible for additional depreciation on new plant and machinery as per the provisions of section 32(1)(iia) of the Act. The case of the Revenue is that such additional depreciation can be claimed only in the first year in which the asset is acquired and installed, and cannot be carried forward to be claimed in the subsequent year. The case of the assessee is that since new plant and machinery was used for less than 180 days in the first year and thus, it has claimed half of the additional depreciation, it is eligible for carried forward of unclaimed remaining half of additional depreciation and the same should be allowed in the second year and in support has relied on the amendment brought in by the Finance Act, 2015 whereby third proviso to section 32(1)(ii) has been inserted with effect from 1.4.2016 which reads as under:

"Provided also that where an asset referred to in clause (iia) or the first proviso to clause (iia), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business for a period of less than one hundred and eighty days in that previous year, and the deduction under this sub-section in respect of such asset is restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (iia) for that previous year, then, the deduction for the balance fifty per cent of the amount calculated at the percentage prescribed for such asset under clause (iia) shall be allowed under this sub-section in the immediately succeeding previous year in respect of such asset."

21. The aforesaid provisions thus statutorily provides for carry forward of the balance 50% of the additional depreciation in the immediately succeeding previous year in which the plant & machinery is acquired and installed and though the said provisions have been introduced with effect from 1.4.2016, the Courts in case of Shri T.P Textiles and Rittal India (supra) have held the same to be clarificatory in nature and thus have a retrospective application. Therefore, respectfully following the said decisions, the claim of remaining additional depreciation is hereby allowed and the matter is decided in favour of the assessee and against the Revenue. In the result, the ground of appeal is allowed.

22. In Ground no. 4, the assessee has challenged the disallowance of commission of Rs.19,56,000/- paid to non residents u/s 40(a)(ia) of IT Act, 1961.

23. It was submitted by the Id AR that during the year, assessee paid commission of Rs.19,56,000/- to the following foreign agents for securing the export orders on which no deduction of tax at source was made:-

Name of Party	Commission paid (Rs in lakhs)
A.S. Lakshmi, Canada	3.32
AartiImpex, Canada	11.07
Albatex Textile Raw Materials, Israel	3.64
Romina Melwani Drayanani, Chile	1.53
Total	19.56

24. The AO observed that non deduction of tax on payment to non residents results in non compliance of sec. 195 of the Act and thus, by referring Explanation 2 to sec. 195, he disallowed commission payment of Rs.19,56,000/- u/s 40(a)(ia) of IT Act. The Ld. CIT(A) confirmed the order of AO stating that as per Explanation 2 to section 195, assessee is required to deduct tax at source on payment made to non-residents whether or not he has a residence or place of business or business connection or any other presence in any manner whatsoever in India. Further, assessee has not brought any evidence on record to show that the sum received by the non-resident in form of selling commission was not chargeable to tax under the Income tax Act.

25. The Id. AR submitted that Section 195 casts an obligation on any person responsible for paying to a non-resident any sum chargeable under the provisions of this Act to deduct tax at source thereon at the rates enforce. Explanation 2 to this section further clarifies that obligation to deduct tax at source is there irrespective of whether or not the non-resident has a residence or place of business or business connection in India or any other presence in

any manner whatsoever in India. Thus, the obligation to deduct tax at source arises only when the payment made to the non-resident is chargeable to tax under the provisions of the Act. Section 9 deals with chargeability of income deemed to accrue or arise in India in case of non-resident. As per section 9(1)(i), all income accruing or arising, whether directly or indirectly, through or from any business connection in India shall be deemed to accrue or arise in India. Section 9(1)(ii) to 9(1)(vii) deals with the taxability of the salary income, dividend income, interest income, royalty income and income by way of fees for technical services. An explanation similar to that provided in section 195 is also introduced in section 9 with retrospective effect from 01.06.1976 but same is applicable only with reference to payment of interest, royalty and fees for technical services to a non-resident. Thus, explanation to section 9 is not applicable to section 9(1)(i).

26. It was further submitted that in the present case, none of the non-residents to whom payment of commission is made had any place of business in India. The payment of commission made to them is not attributable to any operation carried by them in India. Thus, these non residents have no business connection in India. Apart from this all the non residents are from the country with whom there is a double taxation avoidance agreement with India. As per these agreements, income of non-residents would be chargeable to tax in India if they have a permanent establishment in India. None of the person to whom the payment is made has any PE in India and therefore, the income on account of sales commission does not accrue or arises in India. Hence, section 195 is not applicable on such payment. The Ld. CIT(A) has observed that assessee has not brought any evidence on record to show that payment paid to non-resident is not chargeable to tax under the Income tax Act but he has not brought any material on record that these non residents have any PE or business connection in India. The Hon'ble Supreme Court in case of Janki Ram Bahadur Ram Vs. CIT 57 ITR 21 has held that it is for the

revenue to establish that profit earned in a transaction is within the taxing provision and is on that account liable to be taxed as income. Therefore, without bringing any material on record that these persons have any PE/ business connection in India, it cannot be assumed that income has accrued or arisen to the non-resident in India. Hence, the payment of commission to foreign agents is not liable for deduction of tax u/s 195 of the Act. Reliance was placed on the following decisions:-

- PCIT Vs. Nova Technocast Pvt. Ltd.(2018) 166 DTR 0426 (Guj.) (HC)
- M/s JLC Electromet Pvt. Ltd. Vs. ACIT ITA No.1494/JP/18 order dt. 04.09.2019 (Jaipur)
- Satyam Polyplast vs. DCIT ITA No.158/JP/19 order dt. 14.05.2019 (Jaipur)
- DCIT vs. Mc Fills Enterprise (P.) Ltd. (2019) 174 ITD 667 (Ahd)
- Evolv Clothing Co. (P) Ltd. vs. ACIT (2018) 168 DTR 1 (Mad)

In view of above, disallowance of commission expenses of Rs.19,56,000/- confirmed by Ld. CIT(A) is uncalled for and same be directed to be deleted.

27. Per contra, the Id. DR submitted that the A.O. has given a finding that the payments made by the assessee are in the nature of fee for technical services and therefore, as per the provisions of Section 9(1)(vii) of the Act, the said payments are chargeable to tax in India and consequently the assessee was under obligation to deduct tax at source failing which the said payment was not allowable as deduction as per the provisions of Section 40(a)(i) of the Act. Thus, the Id DR has submitted that once the payment in question is held to be fee for technical services, then the same is liable for TDS. He has relied upon and supported the orders of the authorities below.

28. We have considered the rival contentions and perused the material available on record. The A.O. noted that the assessee has paid an amount of

Rs 19,56,000/- as commission to foreign agents and no TDS was done on such commission payments. Accordingly, the A.O. asked the assessee to explain the reasons for non-deduction. In response, the assessee filed its reply and contended that the payments was not liable to TDS as the same was paid to foreign agents who were non residents whose income was not taxable in India. The A.O. did not accept this contention of the assessee and treated these payments as fee for technical services and consequently made the disallowance U/s 40(a)(i) of the Act and relevant findings of the AO in para 6.6 to 6.8 reads as under:

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

"Income deemed to accrue or arise in India.

*9.(1) The following incomes shall be deemed to accrue or arise in India
:--*

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

(a) the Government; or

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

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".]

As noted above, Section 9(1)(vii) would classify and cover all incomes as accruing and arising in India which partake the character of payment on account of 'fee for technical services', which in turn, has been defined to include any payment for rendering of any managerial or consultancy services rendered by the non-resident agent. In the instant case, since the assessee was not able to sell his goods on his own offshore, he has to engage the managerial acumen and expertise of the non-resident in lieu of a consideration, termed as 'Commission'. This is to say that the payment by the resident assessee in connection with his business in India to a person outside India making use of his expertise in sale of similar goods in a particular country is nothing but a fee which has been paid by the resident assessee to the non-resident for the technical services rendered by him.

6.7 This being the stated position and the factum of the case, the payment made by the assessee to a non-resident is squarely covered by the provisions of Section 195 of the Income Tax Act, 1961 which call for deduction of tax at appropriate rate at the time of payment to a non-resident. In view of these provisions which find place in the statute, the provisions of Section 40(a)(ia) are also attracted wherever TDS on payment of commission to a non-resident has not been made at appropriate rates. These provisions bar deduction of any payment on account of commission [fee for technical services] made to a non-resident, without TDS.

6.8 In these circumstances, there is absolutely no basis to conclude that income (which is commission in our case) is not taxable under Income Tax Act, 1961. The assessee in these circumstances is liable to deduct tax at the time of credit of such income to the account of payee or at the time of payment whichever is earlier. Alternatively, the assessee has to obtain certificate for no deduction or lower deduction of tax on the payments as required u/s 195(2) of the Act. The foreign agents can also obtain certificates for non-deduction or lower deduction of tax on amount receivable/received as prescribed u/s 195(3) of Act. Since, these conditions have not been certified payments have been made to non-residents without deduction of tax as required u/s 195 of the Act. Consequently, the expenditure on export commission and other related charges payable to a non- resident for services rendered outside India is not allowable expenditure and they deserve to be disallowed u/s 40(a)(ia) of the Act. Therefore, an amount of Rs. 19,56,000/- is disallowed and added to the total income of the assessee."

29. The A.O. after holding the payments as fee for technical services has invoked provisions of Section 40(a)(i) of the Act and disallowed the same. On appeal, the Id. CIT(A) has confirmed the disallowance made by the A.O. in para 7.3 which reads as under:

"7.3 I have gone through the assessment order, statement of facts, grounds of appeal and written submission carefully. It is seen that the AO after discussing the provisions of Section 195, including the Explanation 2, has concluded that the appellant was required to deduct the tax at source while making the payment of above referred expenses even, to the non- resident persons, whether or not the non-resident person had a residence or place of business or business connection in India or any other presence in any manner whatsoever in India. The Explanation 2 has been inserted by the Finance Act of 2012 with

retrospective effect from 01.04.1962. I am of the considered view that the argument of the appellant that since the nonresident persons whom the payments were made did not have place of business or business connection in India, therefore, the appellant was not required to deduct tax at source on the above referred payments, is not correct. Regarding the second argument of the appellant that the income of the recipients of the above referred expenses was not "sum chargeable under the provisions of Income Tax Act, 1961 therefore the provisions of section 195(1) are not applicable to these payments", the A/R of the appellant was specifically requested to clarify whether any ruling was obtained from the Authority for Advance Ruling u/s 245R(2), regarding non taxability of the income of the recipient in India under the Income Tax Act. The A/R submitted that no such ruling was obtained from AAR by the recipients of the above referred expenses. There is no other evidence on record to show that the sum received by the non-residents in the form of selling commission (Rs. 19,56,000) was not chargeable to tax under the Income Tax Act. There is no order or finding by any Income Tax Authority that the above referred sum of Rs. 19,56,000/- was not chargeable to tax under I.T. Act, 1961. Therefore, I am of the considered view that the appellant was required to deduct tax at source while making payment of selling commission (Rs. 19,56,000/-) to non-resident, whether or not the non-residents had a residence or place of business or business connection in India. The decision relied upon by the appellant are applicable only when there is evidence on record to show that the sum paid by the assessee was not chargeable to tax under the Income Tax Act. Therefore, disallowance of Rs. 19,56,000/- made by the AO is hereby confirmed."

30. The Id. CIT(A) has upheld the disallowance by relying on the explanation to Section 195 of the Act without going into the issue whether the

payment in question is chargeable to tax in India in the hands of the non-resident recipients or not. Before us, the Id AR has vehemently contended that in absence of PE of the recipient, the payment is not chargeable to tax in India and consequently no TDS was required to be deducted on such payment. We note that neither the A.O. nor the Id. CIT(A) has examined the actual nature of services rendered by the agents so as to bring them in the ambit of the fee for technical services. Even where the claim of the assessee as sales commission is to be considered, the actual nature of payment is required to be examined. The assessee has even not claimed the benefit under any DTAA if any between the India and the country of recipient of these payments. Since neither the A.O. nor the Id. CIT(A) have examined this issue by considering the relevant facts as well as the respective DTAA's if any between the India and the country of the recipient/non-resident, therefore, in our considered opinion, this issue requires a proper verification and examination. Accordingly, we set aside this issue to the record of the Id. CIT(A) for adjudication of the same afresh. Needless to say that if the payment made by the assessee is not chargeable to tax in the hands of the recipient then the same is not liable for TDS merely because of the explanation to Section 195 of the Act as it is a prerequisite contention for invoking provisions of Section 195 of the Act that the payment is chargeable to tax in India in the hands of the recipient. Needless to say, the assessee be afforded an opportunity of hearing before deciding the issue. In the result, the ground of appeal is allowed for statistical purposes.

In the result, the appeal filed by the assessee is disposed off in light of aforesaid directions.

Order pronounced on 28 /04/2020.

Sd/-

(विजय पाल राव)

Sd/-

(विक्रम सिंह यादव)

(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 28/04/2020.

*Santosh.

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

1. अपीलार्थी / The Appellant- M/s Maharaja Shree Umaid Mills Ltd., Jaipur.
2. प्रत्यर्थी / The Respondent- DCIT, Circle-6, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 784/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar