IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA BENCH: AGRA

BEFORE SHRI A. D. JAIN, JUDICIAL MEMBER AND
DR. MITHA LAL MEENA, ACCOUNTANT MEMBER

I.T.A Nos. 434 & 446/Agra/2015
(ASSESSMENT YEARs.-2010-11 & 2011-12)

ACIT, Circle-1, Agra. **(Revenue)**	**Vs.**	M/s Manufax (India) S.B. Compound Kailash Road, Agra. PANNo.AAGFM8875K **(Assessee)**

Revenue by	**Shri Waseem Arshad, Sr.DR.**
Assessee by	**Shri Manoj Khurana, CA.**

Date of Hearing	**27.02.2018**
Date of Pronouncement	**11.04.2018**

ORDER

PER, A. D. JAIN, JUDICIAL MEMBER:

I.T.A No. 446/Agra/2015

This is Department's appeal for assessment year 2010-11. The effective grounds are as follows:

> *"1. That the Ld. CIT(A)-1, Agra has erred in law and on facts in deleting the addition of Rs.36,30,862/- made u/s40(a)(i) on account of non-deduction of tax on payments of commission to non-resident/foreign commission agents ignoring the facts that commission paid foreign commission agents is deemed to accrue or*

arise in India, which required deduction of tax as per section 195 of the I.T.Act..

2. *That the Ld. CIT(A)-1 ,Agra has erred in law and facts in deleting the addition of Rs.36,30,862/- by ignoring the law as laid down as per section 9(1)(i) which clearly comes in the nature of payment by the assessee to non-residents."*

2. The facts are that the assessee, who is engaged in trading, manufacturing and export of shoes, had filed its return of income for the year under consideration at income of Rs. 1,64,73,630/-. During the assessment proceedings, the AO had made an addition of Rs 70,54,210/- in respect of commission paid by the assessee to foreign agents. While making the said additions, the AO was of the view that the CBDT has issued Circular No.7 dated 22.10.2009, by which, earlier Circulars No.23 dated 23 July 1969, Circular No.163 dated 29th May 1975 and Circular No. 786 dated 7th February 2000, which were based on Circular No.23, have been withdrawn. According to the AO Circular No.23 was issued in the context of Section 9 of the Income Tax Act, which deems certain income to accrue or arise in India for non-residents. Thus, according to the AO, in view of this, assessee should have deducted tax at source. The AO further held that post withdrawal of Circular No.786, the income arising to foreign agents on account of export commission falls u/s 5(2) (b) of the Income-tax Act, as the income had accrued in India when the right to receive the income became vested. The AO also held that the position has

entirely changed after the withdrawal of Circular No. 786 by the CBDT and other relevant Circulars by the CBDT. To further strengthen his view, the AO referred to a ruling by the Authority for Advance Rulings in the case of 'S.K.F Boilers & Driers (P) Limited', in which case, it was held that withholding of tax is mandatory u/s 195 of the I.T Act on export commission paid to a non resident agent, since commission is deemed to accrue or arise in India. The AO thus held that the provisions of section 195 are applicable in respect of payments of Commission w.e.f 12.10.2009 to 31.03.2010, on which basis, amount of Rs.70,54,210/- was disallowed u/s 40(a)(i) of the I.T. Act and added to the income of the assessee.

3. The ld. CIT(A) allowed the assessee's appeal and deleted the disallowance.

4. The ld. DR contends that the ld. CIT(A)-1, Agra has erred in deleting the addition of Rs.36,30,862/- made u/s40(a)(i) on account of non-deduction of tax on payments of commission to non-resident/ foreign commission agents, ignoring the facts that the commission paid to foreign commission agents is deemed to accrue or arise in India, which required deduction of tax as per section 195 of the I.T.Act; and that the ld. CIT(A)-1 ,Agra has erred in deleting the addition of Rs.36,30,862/- by ignoring the provisions of section 9(1)(i), which clearly comes in the nature of payment by the assessee to non-residents.

5. The ld. Counsel for the assessee has placed strong reliance on the impugned order. It has been stated that the addition was specifically made u/s 9(1)(i) of the IT Act.

6. Heard. The ld. CIT(A), while allowing the assessee's appeal, has held as follows:

> *"11. Thus from a perusal of the facts of this appeal, submissions as made coupled with the judicial pronouncements that has been relied upon by the ld. AR, it is thus the appellant's contention that the withdrawal of the circular should not per se change or alter the provisions of relevant sections as these exist on the statute. Once the provisions of section 5(2) and section 9(1)(i) are considered in the light of the fact that these agents do not have any business connection or permanent establishment in India, therefore there could be no occasion to question the assessee's action in not deducting the tax at source as the provision of section 195 were not attracted. As observed from AO's action , it may be mentioned here that the AO has subjected the payment of commission to TDS provisions only after the cut off date of 22.09.2009, the date on which the Circular no. 7 of 2009 got operational, meaning thereby he has disallowed payments of commission for the period 22.09.2009 to 32.03.2010, and for the period prior to it he has allowed the appellant's claim in respect of payments made before the said date and has thus accepted appellant's claim of such payments considering the same to be complying to the section 5(2) or section 9 of the Act. Therefore, while considering so, I find that*

the issue as emerging and. requiring adjudication therefore is whether the appellant is liable to deduct tax at source (TDS) on the payments made to non resident agent(s) in a situation which is subsequent to the withdrawal of the said circular and whether the disallowance made in respect of the payment made to foreign commission agents amounting to Rs. 70,54,210/- u/s 40(a)(i) in view of provisions of section 195 of the Act is called for or not. Further, two important aspects that need further elucidation in the appellant's case i.e. whether there exists any business connection of the agents or whether such agents do maintain any permanent establishment in India or not. These are important questions for consideration as the AO has invoked the provisions of section 5(2) and section 9(1)(i) of the Act, however he has not dwelt beyond merely mentioning the said sections and without bringing anything on record about business connection or permanent establishment of such agents in India. As per the facts of the case, the appellant is undoubtedly engaged in the business of manufacture and export of footwear to outside India and has incurred expenditure by way of payment of commission to foreign commission agents in respect of the export orders procured from them for the sale of footwear manufactured by it. The AO in his order has also not disputed this fact the foreign agents are located outside India and have no permanent establishment in India. In the given circumstance, the AO while invoking provisions of section 40(a)(i) of the Act and disallowing the payment of commission to foreign commission agent has taken a view that the assessee

was under obligation to withhold tax under section 195 of the Act.

12. As regards the issue of the withdrawal of the circulars on the basis of which the AO proceeded to make the impugned disallowance by taking a cutoff date of 22.09.2009, it is relevant to refer here to a decision of the Hon'ble ITAT, Hyderabad Bench in the case of DCIT vs. Divi's Laboratories Ltd., 131 ITD 271 (Hyd.), wherein the Hon'ble ITAT Hyderabad while considering the impact of said circular no. 7 of 2009, has held as under: -

"8. We have considered the submissions of both the parties and perused the relevant material available on record. The moot question that arises out of these appeals is whether the payment of commission made to the overseas agents without deduction of tax is attracted disallowance under section 40a(ia) of the Act or not. Whether the payment in dispute made by way of cheque or demand draft by posting the same in India would amount to payment in India and consequently whether mere payment would be said to arise or accrue in India or not?. First we will take up the issue whether the payment of commission to overseas agents without deduction of tax is attracted disallowance under section 40a (ia) of the Act or not. We find that the CBDT by its recent Circular No. 7 dated 22nd October, 2009 withdrawn its earlier Circulars Nos. 23 dated 23-7-2009, 163 dated 29th May, 1975 and 786 dated 7-2-2000. The earlier circulars issued by the CBDT have clearly demonstrated the illustrations to explain that such commission payments can be

paid without deduction of tax. Thus, the main thrust in such a situation is whether the commission made to overseas agents, who are nonresident entities, and who render services only at such particular place, is assessable to tax. Section 195 of the Act very clearly speaks that unless the income is liable to be taxed in India, there is no obligation to deduct tax. Now, in order to determine whether the income could be deemed to be accrued or arisen in India, section 9 of the Act is the basis. This section, in our opinion, does not provide scope for taxing such payment because the basic criteria provided in the section is about genesis or accruing or arising in India, by virtue of connection with the property in India, control and management vested in India, which are not satisfied in the present cases. Under these circumstances, withdrawal of earlier circulars issued by the CBDT has no assistance to the department, in any way, in disallowing such expenditure. It appears that an overseas agent of Indian exporter operates in his own country and no part of his income arises in India and his commission is usually remitted directly to him by way of TT or posting of cheques/demand drafts in India and therefore the same is not received by him or on his behalf in India and such an overseas agent is not liable to income-tax in India on these commission payments. This view is fortified by the judgment of Apex Court in the case ofCIT vs. Toshoku Limited reported in 125 ITR 525.

9. It is pertinent to note that the section 195 of the Act has to be read along with the charging sections 4, 5 and 9 of the Act. One should not read section 195 to mean that the moment there is a remittance; the obligation to deduct TDS automatically arises.

If we were to accept such contention, it would mean that on mere payment in India, income would be said to arise or accrue in India. These are the observations made in the judgment of Apex Court in the case of GE India vs. CIT reported in 327 ITR 456, relied on by the learned counsel for the assessee, for the proposition that provisions relating to deduction of tax applies only to those sums which are chargeable to tax under the Income-tax Act. If the contentions of the department, are to be taken as correct, that any person making payment to a non resident is necessarily required to deduct tax, then the consequence would be that the department would be entitled to appropriate the monies deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the Income-tax Act by which a payer can obtain refund. As per section 237 read with section 199 of the Act implies that only the recipient of the sum i.e., payee would seek a refund. In view of the above, hence, no tax is deductible under section 195 of the Act on commission payments and consequently the expenditure on export commission payable to non-resident for services rendered outside India becomes allowable expenditure and the same is outside rigors of the section 40a(ia) of the Act."

13. From the afore cited decision of the Hon'ble ITAT Hyderabad wherein the Hon'ble ITAT has duly interpreted the import and impact of the withdrawal of the circular, it is therefore observed that the said decision is squarely covering the issue in the present appeal, and on the basis of the same it is further observed that in the period post withdrawal of the

CBDT Circular, the provisions of section 5(2) and section 9 has not undergone any change.

14. However, before proceeding further, it may be worthwhile to refer to the provisions of sec 9 (1) (i) of the Act, and to see that commission payments could be subject to tax by the AO or not. The AO in order to bring said commission payments within the ambit of TDS provisions has invoked Section 9(1)(i) of the Act. The relevant extract of section 9(1)(i) is reproduced as under:

"9. (1) the following incomes shall 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, or through the transfer of a capital asset situate in India.

[Explanation 1], For the purposes of this clause -

1. 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;

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

[****]

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

[(d) in the case of a non-resident, being—

(1) an individual who is not a citizen of India; or

(2) a firm which does not have any partner who is a citizen of India or who is resident in India; or

(3) a company which does not have any share holder who is a citizen of India or who is resident in India,

no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations which are confined to the shooting of any cinematograph film in.lndia;]

[Explanation 2. — For the removal of doubts, it is hereby declared that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident,-

(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident; or

(b) has no such authority, but habitually maintains in India a stock of cjoods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or

(c) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident:

Provided that such business connection shall not include any business activity carried out through a broker, general commission agent or any -other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business:

Provided further that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident (hereafter in this proviso referred to as the principal non-resident) or on behalf of such nonresident and other non-residents which are controlled by the principal nonresident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or an agent of ah independent status".

15. As regards the import of section 9 (1)(i) of the Act in terms of business connection, the Hon'ble Delhi High Court in the case of CIT v. EON Technology (P) Ltd, reported at 343 ITR

366 while dealing with payment of commission by the said assessee company to its parent company i.e. ETUK of UK which was located outside India has held that the commission payment to its British parent/holding company ETUK could not said to have been accrued to ETUK in India and therefore, the assessee was not liable to deduct tax at source from payment of commission to ETUK. The head note of order is reproduced hereunder:

"Section 9 of the Income-tax Act, 1961 - Income - Deemed to accrue or arise in India Assessment year 2007 -08 - Assessee-company was engaged in business of development and export of software - During relevant assessment year, it had paid commission to jts British parent/holding company ETUK on sales and amounts realized on export contracts procured by ETUK for assessee -Assessing Officer held that commission income earned by ETUK had accrued in India or was deemed to accrue in India and, therefore, assessee was liable to deduct tax at source there from and as there was failure, said expenditure should be disallowed under section 40(a)(ia) - Whether 7 ITA. 909 /Mds/13 when ETUK was not rendering any service or performing any activity in India itself, commission income could be said to have accrued, arisen to or received by ETUK in India merely because it was recorded in books of assessee in India or was paid by assessee situated in India - Held, no - Whether for applying section 9 Assessing Officer was required to examine whether said commission income was accruing or arising directly or indirectly from any business connection in

India - Held, yes - Whether since facts found by Assessing Officer did not make out a case of business connection as stipulated in section 9(1)(i),' commission income could not be said to have accrued to ETUK in India and, therefore, assessee was not liable to deduct tax at source from payment of commission to ETUK - Held, yes [In favour of assessee]."

16. In any case, there is no dispute that the agents being located outside India and not resident of India were canvassing sales for the assessee for customers abroad. It is an admitted position by the AO himself that the agents are neither resident in India nor do they have any permanent establishment in India. Therefore it is not a case where the non-resident agents are carrying on any business activity in India. Rather, it is the appellant who has engaged the services of non-resident agents outside India on pure commercial considerations for its sales outside India and also to pursue the payments to be made by the purchasers as located abroad. Further, as observed from the AO's order , the AO has not been able to dwell upon beyond just mentioning and invoking the provisions of section 9(1)(i) for establishing as to how the vital ingredients like permanent establishment or business connection exist in respect of such agents in India.

17. The judicial decisions that have evolved has further clarified the issue in its correct perspective, notable mention out of which may be made of the decision of the Hon'ble Apex Court as rendered in the case of C.l.T. vs. Toshoku Limited, reported at 125 ITR 525 (SC), wherein the Hon'ble Apex Court

while dealing with the twin aspects of the situation in the case of the assessee before it, as to what was the effect of the entries in the books of accounts of the Indian assessee which had resulted in debit and credit entries on account of commission and secondly, whether procurement of export orders by the foreign companies for the Indian company had resulted in a business connection, has opined as under:

"It cannot be said that the making of the book entries in the books of the statutory agent amounted to receipt by the assessees who were non-residents as the amounts so credited in their favour were not at their disposal or control: It is not possible to hold that the non-resident assessees in this case either received or can be deemed to have received the sums in question when their accounts with the statutory agent were credited, since a credit balance, without more, only represents a debt and a mere book entry in the debtor's own books does not constitute payment which will secure discharge from the debt. They cannot, therefore, be charged to tax on the basis of receipt of income actual or constructive in the taxable territories during the relevant accounting period. X XX In the instant case, the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by cl. (a) of the Explanation to s. 9(1)(i) of the Act. The commission amounts which were earned by the nonresident assessees for

services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the department. ”

18. Further, subsequent to and on the lines of the aforesaid decision of the Hon’ble Apex Court, the issue of the appellant is also covered by the decision of the Hon'ble Madras High Court in the case of Faizan Shoes (P.) Ltd. (supra) wherein also there was involved a similar issue of export commission being paid by a shoe manufacturer outside the India without deducting TDS thereon. The Hon’ble High Court has held as under:

“10. While dealing with Section 9(1) of the Act, the Supreme Court in CIT v. Toshoku Ltd. [19801 125 ITR 525 (SC), on considering a transaction where tobacco was exported to Japan and France and sold through non-resident assessees who were paid commission, held as under:

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

to cl. (i) of sub-s. (1) of s. 9 of the Act which provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under that clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. If all such operations are carried out in India, the entire income accruing there from shall be deemed to have accrued in India. If however, all the operations are not carried out in the taxable territories, the profits and gains of business deemed to accrue in India through and from business connection in India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in the taxable territories. If no operations of business are carried out in the taxable territories, it follows that the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India (See CIT v. R. D. Aggarwal & Co. [19651 56 ITR 20 (SC) and Carborandum Co. v. CIT [19771 108 ITR 335 (SC) which are decided on the basis of s. 42 of the Indian I. T. Act, 1922, which corresponds to s. 9(1)(i) of the Act).

In the instant case, the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by cl. (a) of the Explanation to s. 9(1)(i) of the Act. The commission amounts which were earned by the nonresident assessees for

services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the department.

11. The facts of the present case are akin to the facts of the decision in Toshoku Limited case, referred supra. In the instant case also the assessee engaged the services of non-resident agent to procure export orders and paid commission. That apart, the Commissioner of Income (Appeals) as well as the Tribunal has correctly applied the principle laid down in GE India Technology Cen. (P) Ltd. case, referred supra to hold that the assessee is not liable to deduct tax at source when the non-resident agent provides services outside India on payment of commission".

19. Respectfully following the above decisions, I agree with the Ld. AR that post withdrawal of the CBDT Circular, the provisions of section 5(2) and section 9- has not undergone any change. There is nothing on record to establish that the non-resident commission agents have rendered services or performed any activity in India, merely because the commission is recorded in the books of the assessee appellant in India or paid by the appellant situated in India, does not make a case of business connection as stipulated in section 9(1)(i) of the Income Tax Act. Therefore, in view of the foregoing, it is thus found that the provision of section 9(1) (i) are not applicable in the appellant's case.

20. As mentioned earlier though , the Ld. AR of the appellant while making its submissions against the impugned addition, has also referred to the existing DTAAs as entered into by India with Spain, UK, Germany and France, on the basis of which it is asserted that while passing on commission payments to its agents resident in such countries with which it has entered into DTAAs, the assessee was under no obligation to deduct tax at source on such payments of commission when the foreign commission agents provide services from outside India. It may be relevant here to refer to a decision of the Hon'ble Supreme Court of India as rendered in the case of GE India Technology Center (P.) Ltd. v. CIT (2010) 327 ITR 456 (SC), wherein it has held as under -

Where the income is not chargeable to tax, there is no question of deducting tax at source. In the instant case, the commission paid by the assessee (appellant) to his agent is not chargeable to tax in India. Therefore, the assessee was not liable to deduct tax at source on the said payments. Since, the income of foreign agents is outside the purview of section 9, consequently section 195 of the Act will not come into play.

In view of the foregoing it is thus evident that it is not the case of the AO that the foreign agent as such is carrying on any business activity in India. Rather, on the contrary, it is the appellant who has engaged the services of the non-resident agent outside India on pure commercial and business terms to propagate and co-ordinate its sales outside Indian Territory.

Thus, it is unambiguously evident that the provisions of clause (i) of section 9(1) or section 195 are not attracted in this case.

21. It is pertinent to note that as regards the said claim of payments towards commission as made to the foreign agents by the appellant, the AO has accepted such claim in the appellant's own case in AY 2012-13.

22. As far as the AO's reliance in the AAR's decision in SKF Boilers is concerned, with respect to the decision of the Hon'ble AAR it is observed that the same is not found to be applicable as the said ruling was in respect of an entity based in Pakistan with which India did not have any treaty or DTAA. Whereas in the present appeal where the appellant has made its submission with regard to the treat provisions as existing vide the DTAAs entered into by India with the countries i.e. Italy, USA and UK wherein the commission agents reside, I find that while the essential feature of the commission payments being made on commercial or business terms, therefore, per force of the relevant covenant / Articles of such treaties, no adverse inference can be drawn so as to deny the appellant's claim under the treaty provisions. More so there is another ruling given by the Hon'ble AAR in Spahi Projects Pvt. Ltd dated 29.07.2009 in AAR No. 802 of 2009 which has not been considered by the AO, and the same is directly on the issue of commission payments to foreign agents and is found to be squarely applicable to the facts of the present appeal.

23. In view of the above and after discussing the position of law, it is an undisputed position in this case that the foreign

commission agents to whom the appellant has made payments for commission on sales, do not have a business connection or permanent establishment in India. It is also observed that the AO has not made out any case that subsequent to the withdrawal of the earlier circular by new circle no. 7 of 2009 by CBDT whether the position of law as embodied in the provisions of section 5(2) or section 9(1)(i) has undergone any change. Further, as observed earlier, the AO has not dwelt upon this issue in details for showing as to how these section were being invoked. The AO has not adverted to the admitted position that there exists no business connection or permanent establishment of such agents in India. Therefore, in my view, the withdrawal of the circular will not make any difference as to bringing the commission payments withig the ambit of tax. Rather, per the force of judicial decisions and relying upon the same, notably as rendered by the Hon'ble Apex Court in Toshoku Limited (supra) and the Hon'ble Madras High Court's decision in the case of Faizan Shoes and Hon'ble ITAT Hyderabad's decision in the case of Divi's Laboratories Ltd (supra), wherein it is duly shown that without the existence of business connection or permanent establishment, and/or with the withdrawal of circular, the provision of section 9(1)(i) or section 5(2) have not undergone any change, as a result of which the commission income of these agents does not get taxable in India. Therefore, due to the non-existence of any permanent establishment or any business connection which is indeed a pre-requisite for holding that the income does accrue or arise in India, and on that basis without correctly invoking

the provisions of section 5(2) or 9(1)(i) of the Act, the appellant cannot be asked to deduct tax at source either under the Income-tax Act or the treaty provisions as per the existing DTAAs entered into by India with Spain, France, Germany and UK. Therefore in view of the above, I find that the appellant is correct in its approach in not deducting tax at source on the payment of commission made to foreign commission agents. While finding that the appellant was not liable to deduct tax at source on the payments of commission made to foreign commission agents u/s 195 of the Act, therefore, there is no justification that disallowance under section 40(a)(i) of the Act could be made by the AO. In view of the same, therefore, the addition of Rs. 70,54,210/- as made by the AO on account of disallowance made u/s 40(a)(i) of the Act, is hereby deleted."

7. A perusal of the impunged order shows that the ld. CIT(A) has duly taken into consideration all the attending facts and circumstances. The ld. CIT(A) has, while passing the order under appeal, inter alia, taken into consideration and referred to 'CIT vs. EON Technology (P) Ltd.', 343 ITR 366 (Del), 'CIT vs. Toshoku Ltd.', 125 ITR 525 (SC), 'Faizan Shoes Private Ltd.', 34 Taxman.com 79 (Chennai), 'DCIT vs. Divi's Laboratories Ltd.', 131 ITD 271 (Hyd), 'ITO vs. Trident Export', 44 Taxman.com 297 (Chennai) (Trib), 'DCIT vs. Angelique International Ltd.', rendered by the ITAT, Delhi Bench and 'GE India Technology Center (P.) Ltd. Vs. CIT', 327 ITR 456 (SC) and the decision of the Authority for Advance Rulings in the case of 'SKF boilers and driers P. Ltd'.

8. The matter it is seen, is exactly similar to the one involved in 'ACIT, Circle-1, Agra vs. M/s Virola International', Agra, ITA No.112/Agr/2017, for A.Y 2012-13, ordered dated 25.01.2018 and 'ACIT Circle-1,Agra vs. M/s Nuova Shoes', Agra, ITA No.435/Agr/2015 for A.Y. 2010-11, order dated 28.09.2017, both cases decided by this Bench. In 'Virola International' (supra), following 'Nuova Shoes', it has been held as follows:

> *"9. Having heard the parties, with reference to the material placed on record, we find the matter at hand to be squarely covered by our decision dated 28.09.2017, in a similar case of 'M/s Nuova Shoes, Agra', wherein a similar appeal of the department was dismissed in ITA No. 435/Agr/2015, for AY 2010-11. Therein, (M/s Nuova Shoes order Para 16 to 41) we have observed as under:*
>
> *"16. It remains undisputed that in respect of payment made to non resident agents, no TDS has been deducted as these agents have procured export orders for the assessee firm and assisted in the timely realization of the payments; that the commission is declared in the GR issued by the assessee for the purpose of export of goods; that the same is within the limits prescribed by Reserve Bank of India and all remittances have been made through proper banking channels; that the non-resident agent has carried out all his activities outside India, did not render any service in India and did not have Permanent Establishment (PE) in India; that residing in the foreign countries with whom India has entered into a DTAA and under the Article 7 of the said DTAA, the income received is being taxed in their hands in their country; that the assessee has remitted payments to them outside India through proper banking channels; that these*

agents have carried out business activity of procurement of export orders and timely realization of payments for the assessee outside India; that as the income received by these agents is business income, the same cannot be taxed under the Income-tax Act 1961 in the absence of business connection and permanent establishment in India; that these non resident commission agents offer to tax the income received on account of the transactions with the assessee as their business income in their country of residence; and that the role and responsibilities of these agents are as under –

(i) to procure orders from buyers

(ii) to negotiate price and other terms and intimate the same to the assessee

(iii) to re-negotiate the terms/price if necessary, based on the instructions of the assessee

(iv) follow up in getting purchase orders from customers and forward the same to the assessee

(v) follow up regarding LC opening, shipment and payment .

17. Against the aforesaid services rendered, these agents raise a debit note / invoice for commission at the agreed rate and the amount is remitted through proper banking channels to their bank account in their country of residence.

18. The AO has invoked the provisions of section 5(2) and Section 9(1)(i) of the Act, however he has not dwelt beyond merely mentioning these circular without bringing anything on record about business connection or permanent establishment of such agents in India. The AO in his order has also not disputed the fact that the foreign agents are located outside India and have no permanent establishment in India. Therefore it is not a case where the non-resident agents are carrying on any business activity in India. Rather, it is the appellant who has engaged the services of foreign agents outside India on pure commercial and business terms for its sales outside India and also to pursue the payments to be made by the purchasers as located abroad.

19. As per section 9(1) of the Act –

The following incomes shall 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, or through the transfer of a capital asset situate in India.

Explanation 1. For the purposes of this clause –

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

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

(d) in the case of a non-resident, being—

(1) an individual who is not a citizen of India; or

(2) a firm which does not have any partner who is a citizen of India or who is resident in India; or

(3) a company which does not have any shareholder who is a citizen of India or who is resident in India, no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations which are confined to the shooting of any cinematograph film in India,

Explanation 2. — For the removal of doubts, it is hereby declared that "business connection" shall include any business activity carried out through a person who, acting on behalf of the non-resident,-

(a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are

limited to the purchase of goods or merchandise for the non-resident; or

(c) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or

(d) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident:

Provided *that such business connection shall not include any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status is acting in the ordinary course of his business :*

Provided further *that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non-resident (hereafter in this proviso referred to as the principal non-resident) or on behalf of such non-resident and other non-residents which are controlled by the principal non-resident or have a controlling interest in the principal non-resident or are subject to the same common control as the principal non-resident, he shall not be deemed to be a broker, general commission agent or an agent of an independent status.*

20. In "CIT vs. EON Technology (P) Ltd." (supra), while dealing with payment of commission by the said assessee company to its parent company i.e ETUK of UK which was located outside India, Hon'ble Delhi High Court has held that "the commission payment to its British parent/holding company ETUK could not said to have been accrued to ETUK in India and therefore, the assessee was not liable to deduct tax at source from payment of commission to ETUK. The head note of the order is reproduced hereunder:

"Section 9 of the Income-tax Act, 1961 - Income - Deemed to accrue or arise in India Assessment year 2007-08 - Assessee-company was engaged in business of development and export of software - During relevant assessment year, it had paid commission to its British parent/holding company ETUK on sales and amounts realized on export contracts procured by ETUK for assessee - Assessing Officer held that commission

income earned by ETUK had accrued in India or was deemed to accrue in India and, therefore, assessee was liable to deduct tax at source there from and as there was failure, said expenditure should be disallowed under section 40(a)(ia) - Whether when ETUK was not rendering any service or performing any activity in India itself, commission income could be said to have accrued, arisen to or received by ETUK in India merely because it was recorded in books of assessee in India or was paid by assessee situated in India - Held, no - Whether for applying section 9 Assessing Officer was required to examine whether said commission income was accruing or arising directly or indirectly from any business connection in India - Held, yes - Whether since facts found by Assessing Officer did not make out a case of business connection as stipulated in section 9(1)(0, commission income could not be said to have accrued to ETUK in India and, therefore, assessee was not liable to deduct tax at source from payment of commission to ETUK - Held, yes [In favour of assessee]."

21. In " CIT vs. Toshoku Limited", 125 ITR 525 (SC), the Hon'ble Apex Court while dealing with the twin aspects of the situation in the case of the assessee before it, as to what was the effect of the entries in the books of accounts of the Indian assessee which had resulted in debit and credit entries on account of commission and secondly, whether procurement of export orders by the foreign companies for the Indian company had resulted in a business connection, has opined as under :

"It cannot be said that the making of the book entries in the books of the statutory agent amounted to receipt by the assessees who were non-residents as the amounts so credited in their favour were not at their disposal or control. It is not possible to hold that the non-resident assessees in this case either received or can be deemed to have received the sums in question when their accounts with the statutory agent were credited, since a credit balance, without more, only represents a debt and a mere book entry in the debtor's own books does not constitute payment which will secure discharge from the debt. They cannot, therefore, be charged to tax on the basis of receipt of income actual or constructive in the taxable territories during the relevant accounting period. X XX

In the instant case, the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by cl. (a) of the Explanation to s. 9(1)(i) of the Act. The commission amounts which were earned by the non-resident assessees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the department."

22. In "DCIT vs. Divi's Laboratories Ltd.", 12 taxmann.com 103 (Hyd), it was held that the CBDT by its Circular No. 7 dated 22.10.2009 had withdrawn its earlier Circular Nos. 23 dated 23.07.2009, 163 dated 29.05.1975 and 786 dated 07.02.2000; that the earlier Circulars issued had clearly demonstrated the illustration to explain that such commission should be paid without deduction of tax; that thus, the main thrust, in such situation, is whether the commissioner paid to overseas agents, who are non-resident entities and who render services only at such particular place, is assessable to tax; that section 195 very clearly speaks that unless the income is liable to be taxed in India, there is no obligation to deduct tax; that in order to determine whether the income can be deemed to be accrued or arisen in India, section 9 is the basis; that this section does not provide scope for taxing such payment because the basic criteria provided in the section is about genesis or accruing or arising in India, by virtue of connection with the property in India, control and management vested in India, which were not satisfied in the instant cases; that under these circumstances, withdrawal of earlier circulars issued by the CBDT had no assistance to the department, in any way, in disallowing such expenditure; that it appeared that an overseas agent of Indian exporter operated in his own country and no part of his income arises in India and his commission is usually remitted directly to him by way of TT or posting of cheques/demand drafts in India and, therefore, the same is not received by him or on his behalf in India and such an overseas agent is not liable to income-tax in India on those commission

payments; that section 195 has to be read along with the charging sections 4, 5 and 9; that one should not read section 195 to mean that the moment there is a remittance, the obligation to deduct TDS automatically arises; that if such contention was to be accepted, it would mean that on mere payment in India, income would be said to arise or accrued in India; that if the contentions of the department were to be taken as correct that any person, making payment to a non-resident, was necessarily required to deduct tax, then the consequence would be that the department would be entitled to appropriate the monies deposited by the payer, even if the sum paid is not chargeable to tax because there is no provision in the Act, by which, a payer can obtain refund; that as per section 237 read with section 199, it implies that only the recipient of the sum i.e., payee would seek a refund; that in view of the above, hence, no tax is deductible under section 195 on commission payments and, consequently, the expenditure on export commission payable to non-resident for services rendered outside India becomes allowable expenditure and the same is outside rigors of section 40(a)(ia); that in the instant case, the ld. CIT(A) observed that the Assessing Officer had not been able to establish that there was specific intention of the payee to receive the payment within the territory of India, therefore, the ld. CIT(A) rightly did not agree with the view taken by the Assessing Officer with regard to the addition made on this issue and the ld. CIT(A) was justified in directing the Assessing Officer to delete the said addition; and that after considering the totality of facts and the circumstances of the case, the order of the ld. CIT(A) on this issue was not to be interfered with and, accordingly, the same was to be upheld.

23. In "Faizan Shoes (P.) Ltd." (supra), wherein also there was a similar issue of export commission being paid by a shoe manufacturer outside the India without deducting TDS thereon, the Hon'ble High Court has held as under :

"10. While dealing with Section 9(1) of the Act, the Supreme Court in CIT v. Toshoku Ltd. [1980] 125 ITR 525 (SC), on considering a transaction where tobacco was exported to Japan and France and sold through non-resident assessees who were paid commission, held as under:

The second aspect of the same question is whether the commission amounts credited in the books of the statutory agent can be treated as incomes accrued, arisen, or deemed to have accrued or arisen in India to the non-resident assessees during the relevant year. This takes us to s. 9 of the Act. It is urged that the commission amounts should be treated as incomes deemed to have accrued or arisen in India as they, according to the department, had either accrued or arisen through and from the business connection in India that existed between the non-resident assessees and the statutory agent. This contention overlooks the effect of cl. (a) of the Explanation to cl. (i) of sub-s. (1) of s. 9 of the Act which provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under that clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. If all such operations are carried out in India, the entire income accruing therefrom shall be deemed to have accrued in India. If however, all the operations are not carried out in the taxable territories, the profits and gains of business deemed to accrue in India through and from business connection in India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in the taxable territories. If no operations of business are carried out in the taxable territories, it follows that the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India (See CIT v. R. D. Aggarwal & Co. [1965] 56 ITR 20 (SC) and Carborandum Co. v. CIT [1977] 108 ITR 335 (SC) which are decided on the basis of s. 42 of the Indian I.T. Act, 1922, which corresponds to s. 9(1)(i) of the Act).

In the instant case, the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by cl. (a) of the Explanation to s. 9(1)(i) of the Act. The commission amounts which were earned by the non-resident assessees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The

High Court was, therefore, right in answering the question against the department.

11. The facts of the present case are akin to the facts of the decision in Toshoku Limited case, referred supra. In the instant case also the assessee engaged the services of non-resident agent to procure export orders and paid commission. That apart, the Commissioner of Income (Appeals) as well as the Tribunal have correctly applied the principle laid down in GE India Technology Cen. (P) Ltd. case, referred supra, to hold that the assessee is not liable to deduct tax at source when the non-resident agent provides services outside India on payment of commission".

24. Regarding AO's reliance on "SKF Boilers", it is observed that the same is not found to be applicable as the said ruling was in respect of an entity based in Pakistan with which India did not have any treaty or DTAA, whereas in the present appeal, the assessee has made its submission with regard to the treat provisions as existing vide the DTAAs entered into by India with the countries i.e Italy, USA and UK wherein the commission agents reside.

25. The decision of the Authority for Advance Rulings in the case of SKF Boilers & Driers Pvt. Ltd. (Supra) has considered its earlier decision in the case of Rajiv Malhotra dated 03.07.2006 in AAR No. 671 of 2005 and the decision in the case of Spahi Projects Pvt. Ltd. (Supra) dated 29.07.2009 in AAR No. 802 of 2009 has not been considered and hence the reliance on the decision of AAR in the case of SKF Boilers & Driers Pvt. Ltd. by the learned Assessing Officer does not take into account the factual and legal matrix, in which the AAR has held that "in the instant case, the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by cl.(a) of the Explanation to s.9(1)(i) of the Act".

26. The AO completed assessments under section 143(3) for the assessment year 2011-12 and 2012-13 wherein the learned Assessing Officer has not made any disallowance in respect of

the payment of commission to the foreign agents residing in the country, with which India has entered into DTAA.

27. Apropos AO's contention that the CBDT, vide circular No. 7 dated 22.10.2009, had withdrawn its Circulars Nos. 23 dt. 23.07.69, 163 dt. 29.05.1975 nd 786 dt. 07.02.2000, which were based on Circular No. 23; that the Circular No. 23 was issued in the context of section 9 of the Act which deems certain incomes to accrue or arise in India for non-residents; and that in view of this, the assessee should have deducted tax at source u/s. 195 of the Act on payments of commission made to non-residents agents w.e.f. 22.10.2009, we find that the AO has not made out any case that whether the issue of circular no. 7 of 2009 by CBDT by which the earlier circulars were withdrawn, will make any difference as to bringing the commission payments within the ambit of tax as he has not adverted to the admitted position that there exists no business connection or permanent establishment of such agents in India.

28. It is not disputed that that the withdrawal of the circulars No. 23 and 786 has been made on 22.10.2009 vide CBDT Circular No. 7 of 2009 and mere withdrawal of the circular does not negate the principles of income deemed to accrue or arise in India or outside India. The CBDT has not stated that any part of the circulars is contrary to law or that the circulars were wrongly issued or that the law has undergone changes holding their withdrawal. Thus, in respect of cases, which directly follow with the situations covered by the circulars, the liability to tax should continue to be in accordance with section 9 of the Act and its intent. The relevant sections, namely section 5(2) and section 9 of the Income-tax Act, 1961 not having undergone any change in this regard, the clarification in Circular No. 23 still prevails even after the withdrawal. No tax is therefore deductible under section 195 and consequently, the expenditure on export commission payable to a non-resident for services rendered outside India is not liable for withholding tax.

29. It is seen that the ld. CIT(A) has duly taken into consideration the above facts and circumstances besides the case laws.

30. Then, also for A.Y. 2011-12, a similar disallowance was made, which was deleted (APB 76-86) by the CIT(A) and the department did not file any appeal against the CIT(A)'s order.

31. Apropos, Circulars of CBDT, in "Kerala Finance Corporation vs. CIT (1994) 75 Taxman 573(SC), the Apex Court has stated that the circular issued by CBDT under section 119 of the Act cannot override or detract the provisions of the Act. Thus, the withdrawal of circular does not affect the settled position that export commission is not taxable in India as services are rendered outside India.

32. Moreover, post withdrawals of the circulars, in "ITO vs. Trident Exports" (2014) 44 Taxman.com 297 (Chennai-Trib), it has been held as under :

8. We have heard both the parties and carefully perused the materials available on record. From the facts of the case, it is evident that the assessee has made payments to commission agents located in foreign countries. These foreign agents have rendered services in their respective countries and had received the commission. It is also evident that the foreign agents did not have any PE in India and there was nothing brought on record to show that the agreements between the assessee & commission agents were entered in India. In these circumstances the decision rendered in the case of Toshuku Ltd. (supra) is squarely applicable considering the acts of the case before us. In this case the Hon'ble Apex Court held that the commission agents, who are engaged in the service executed outside India, cannot be considered to carry on any business operations in India and therefore, the provisions of section 9(1)(i) of the Act and Explanation 1A will not be applicable. Similarly, the Hon'ble Apex Court, in the case of GE India Technology Cen. (P) Ltd (supra) has held that the expression "chargeable under the provisions of the Act in section 195(1)" shows that the remittance has to be of trading receipt, the whole or part of which, is liable to tax India. If tax is not so assessable, there is no question of tax at source being deducted. Considering the facts and circumstances of the case and the decisions rendered by the Hon'ble Apex Court, we are of the considered view that the Ld. CIT(A) had decided the issue in

accordance with law. Therefore, we hereby confirm the order of the Ld. CIT(A).

33. In "DCIT vs. Farida Prime Tannery (P) Ltd." (2014) 45 Taxman.com 174 (Chennai- Trib), it has been held -

"5. Heard both sides, perused orders of lower authorities and the case laws relied on. In all these appeals, Assessing Officer disallowed agency/sales commission paid by the assessee to the non resident agents on the ground that assessee has not deducted TDS under section 195 of the Act and therefore sales commission paid by the assessee is not allowable expenditure under section 40(a)(i) of the Act. The Commissioner of Income Tax (Appeals) elaborately considered this issue and held that sales commission paid by assessee is not chargeable to tax in India as the services were rendered outside India b non residents and therefore, provisions of section 195 have no application so as to disallow commission payments under section 40(a)(i) of the Act. While holding so, the Commissioner of Income Tax (Appeals) considered various decisions on the issue including the decision of Hon'ble Supreme Court in the case of GE India Technology Centre (P) Ltd. (supra). The Commissioner of Income Tax (Appeals) in one of the case before us in K.H. Arind Pvt. Ltd. following the decision of the co-ordinate Bench of this Tribunal in the case of Farida Shoes (P) Ltd. (supra) deleted the disallowance observing as under:-

****

6. Similar issue has been considered by this Tribunal in the case of ITO vs. Faizan Shoes (P) Ltd. (2013) 34 taxman.com 79 (Chennai) wherein the co-ordinate bench of this Tribunal, to which one of us is a party, after considering the decision of the Hon'ble Supreme Court in the case of GE Technology Centre P. Ltd (supra) held that sales commission paid by the assessees to non residents are not chargeable to tax in India, therefore provisions of section 195 are not applicable. On going through the above order of the Commissioner of Income Tax (Appeals), we find that in all these cases assessees paid sales commission to its non resident agents for the services rendered by them outside India and the sales commission is not chargeable to tax in India so as to deduct TDS in such payments under section 195 of the Act. Therefore, respectfully, following the decision of

the Hon'ble Supreme Court in the case of GE India Technology Centre (P) Ltd (supra) and the above cited decision of the co-ordinate bench of this Tribunal, we sustain the order of the Commissioner of Income Tax (Appeals) in deleting the disallowance made under section 40(a)(i) of the Act.

In assesse's case also these facts are comparable with the decision of the Apex Court and other decisions cited above. The commission amounts which were earned by the non-resident assessees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The said decision of Supreme Court takes into consideration the principles of income deemed to accrue or arise in India and outside India."

34. In "CIT vs. Model Exims, (2014) 42 taxmann.com 446 (All.), it has been held to the effect that the fact situation contemplated or clarified in the Explanation added by the Finance Act, 2010 is not applicable to the present case, as in the present case the agents appointed by the assessee had their offices situated in a foreign country and that they did not provide any managerial services to the assessee; that section 9(1)(vii) deals with technical services and has to be read in that context; that the agreement of procuring orders would not involve any managerial services; that that the agreement did not show the applicability or requirement of any technical expertise as functioning as selling agent, designer or any other technical services; and that therefore, therefore, the Tribunal has rightly deleted the disallowance.

35. Coming to the case laws relied on by the department in the following cases, it has been held that the payment made to the non-resident was to be treated as fees for technical services covered under the provisions of section 9(1)(vii) :

(i). ACIT vs. Evolv Clothing Co. (P) Ltd., (2013) 33 taxmann.com 309(Chennai-Trib).

(ii). Ashapura Minichem Ltd. Vs. ADIT, (2010) 40 SOT 229(Mum)

(iii). Authority for Advance Rulings – Rajiv Malhotra (2006) 155 Taxman 101 (AAR)

(iv). GVK Industries Ltd. Vs. ITO (2015) 54 Taxmann.com 347 (SC)

(v). GVK Industries Ltd. Vs. ITO (1998) 96 Taxman 179 (AP)

(vi). Authority for Advance Rulings –Shell India Markets (P) Ltd. (2012) 18 Taxmann.com 46 (AAR-New Delhi)

(vii). ONGC Videsh Ltd. Vs. ITO (2013) 31 Taxmann.com 119 (Delhi-Trib)

(viii). Pr. CIT vs. Madhyanchal Vidyut Vitran Nigam Ltd., ITA No. 86 of 2015 (All. HC)

(ix). Bosch Ltd. Vs. ITO, (2012) 28 Taxmann.com 228 (Bangalore-Trib.)

(x). Syntex Industries Ltd. Vs. ADIT (2013) 30 taxmann.com 290 (Ahmedabad-Trib.)

36. In the assessee's case, however, as seen hereinabove, the relevant provisions sought to be attracted by the AO is section 9(1)(i). That being the case, none of these cases, is applicable to the present one.

37. In "Palam Gas Service vs. CIT" 81 taxmann.com 43 (SC), overruling "CIT vs. Vector Shipping Services Pvt. Ltd.", 38 taxmann.com 77 (All), the Hon'ble Supreme Court has upheld the disallowance made u/s. 40(a)(ia) of the Act for TDS default on freight payment. It has been held that the plea of the assessee company that no disallowance can be made u/s. 40(a)(ia), as the word "payable" occurring in section 40(a)(ia) refers to only those cases, where the amount is yet to be paid and does not cover the cases where the amount is actually paid, is not acceptable as section 40(a)(ia) covers not only those cases wh3ere the amount is payable, but also when it is paid. The applicability of this decision to the facts of the present case, has not been made out.

38. In "Performing Right Society", 1976 AIR 1973 (SC), the issue related to payment of royalty, which falls u/s. 9(1)(vi) of the Income-tax Act and on this single score, this decision is not applicable to the facts of the present case, since the question herein is with regard to applicability of section 9(1)(i) of the Act. Further, the question raised before the Hon'ble Supreme Court in that case was that since the agreement was executed in England and the royalty was payable in England, no income accrued or arose in India. In the present case, on the other hand, it remained undisputed by the authorities below, that the recipient of the commission paid by the assessee had rendered their services for the procurement of export orders and the realization of the payments for the assessee outside India. It is nowhere the case of the authority below or of the department before us, that these agents have any Permanent Establishment in India or any business connection in India. Therefore, "Performing Right Society" (supra) is also not applicable to the facts of the present case.

39. Otherwise too, it is seen that the decisions relied on by the ld. DR pertain to clauses (vi) and (vii) of section 9(1) of the Act. In this regard, it is seen that an Explanation was inserted in Section 9(2) of the Act, by substitution, with retrospective effect from 01.06.1976. This Explanation reads as follows:

"Explanation. - For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,-
(i) The non-resident has a residence or place of business or business connection in India; or
(ii) the non-resident has rendered services in India."

40. In the case of the assessee, the applied section is Section 9(1)(i) of the Act. Therefore, the above Explanation to section 9(2) is not applicable, since it does not talk of clause (i) of sub-section (1) of section 9 of the Act. Therefore, the decisions rendered in cases relevant to clauses other than clause (i) of Sub-section (1) of section 9 of the Act are not relevant to the present case. Otherwise too, as considered hereinabove, it has

been held that the non-resident did not have any business connection in India and there was no liability to withhold tax u/s 195 of the Act. Moreover, the Assessing Officer has himself accepted that payments made prior to withdrawal of the Circular do not call for any disallowance u/s 40(a)(i) of the Act.

41. In view of the above, the order of the ld. CIT(A) is found to be well reasoned. The department has not been able to dislodge the detailed well reasoned findings recorded therein. Therefore, the grievance sought to be raised by the department by way of grounds Nos. 1 & 2 is found to be shorn of merit and it is rejected as such. The finings of the ld. CIT(A) are confirmed."

9. Apropos the case laws relied on by the Department in the present case, they are dealt with as under:

1. 'ADIT vs. Ess Vee Intellectual Property', 7 SOT 38 (Mum-Tribunal).

As per the facts of that case, the assessee therein was in the business of consultancy in respect of registration and enforcement of intellectual property rights. The services rendered by the assessee also included registration and enforcement of intellectual property rights abroad as well and for that purpose, the assessee had availed services of the entities based abroad. The assessee did not deduct any tax from the payments made to such foreign entities and contended that since the payments were made for the professional services, the same could not be covered by the connotations of the expression 'fees for technical services' under section 9(1)(vii). In the case of the assessee, the commission agents have not provided any

consultancy and as such, on facts, 'Ess Vee Intellectual Property' (Supra), is not applicable.

2. *'Maharashtra State Electricity Board vs. DCIT', (2004) 90 ITD 793 (Mum.).*

In the facts of that case, the position of the law has been settled by the decision of the Hon'ble Supreme Court in the case of 'G.E. India Technology Centre (P) Ltd. vs. CIT' (2010) 193 Taxman 234 (SC), wherein it has been held that section 195 casts an obligation on the payer to deduct tax at source from payment made to non-residents, which payments are chargeable to tax. Therefore, where the sum paid or credited by the payer is not chargeable to tax, no obligation to deduct any tax would arise. Then, the CBDT, by way of Instruction No. 2/2014, vide F.No. 500/33/2013-FTD-1, dated 26.02.2014, has clarified that withholding tax liability of a payer is with reference to the sum chargeable to tax under the provisions of the Act. Accordingly, a payer cannot be treated as an assessee in default for non-withholding from payments which are not chargeable to tax under the Act.

3. *'ITO vs. Device Driven (India) (P) Ltd.', (2014) 29 ITR(T) 263 (Cochin-Trib.).*

As per the facts of that case, where the assessee-company, engaged in development and sale of software, paid export commission to its non-

resident director, in view of the fact that the said director had to assist the assessee-company in all respects and, moreover, he had to ensure that necessary modifications were carried out in software to make it suitable to the requirements of the customers, the payment made to 'B' constituted 'independent personal services' taxable in India under article 14 of the India - Switzerland DTAA an, thus, the assessee was liable to deduct tax at source while making the said payments. These facts are not applicable in the case of the present assessee.

4. *'GVK Industries Ltd. vs. ITO, (1997) 228 ITR 564 (AP) & (2015) 371 ITR 453 (SC).*

This case relates to the applicability of section 9(1)(vii) of the Act and so, it is not applicable in the case of the assessee.

5. *'Performing Rights Society Ltd. vs. CIT', 1976 AIR 1973 (SC).*

As per the facts of that case, the non-resident commission agents were procuring export orders and assisted in the timely realization of the export proceeds. It was an accepted fact that they did not have any permanent establishment / business connection in India. The question that the agreements had been executed in India or outside India was held to be of no relevance.

10. The following decisions relate to Section 9(1)(vii) of the Act and so they are not applicable to the present case:

1. *'Metro & Metro vs. Add. CIT'. in ITA No. 393/Agra/2012 (ITAT-Agra).*
2. *'ACIT vs. Evolve Clothing Co. (P) Ltd.' in ITA No.2100/Mds/2012 (Chennai-Trib).*
3. *'Ashapura Minichem Ltd. vs. ADIT' in ITA No. 2508/Mum/08 (Mumbai-Trib.)*
4. *'ONGC Videsh Ltd. vs. ITO', (2013) 141 ITD 556 (Delhi).*

11. 'Shell India Markets (P) Ltd. vs. CIT', order dated 17.01.2012, passed by the Authority for Advance Ruling, New Delhi, in AAR No.833 of 2009 (Copy placed on record) relates to applicability of Section 9(1)(vi). Again, this decision too is not applicable in the facts of the present case.

12. In view of the above, following our aforesaid decision in the case of 'M/s Nuova Shoes, Agra', the grievance sought to be made out by the Department is rejected as without merit and the well reasoned order of the ld. CIT(A) is confirmed."

13. The Grounds in the present case, but for the amount involved, are exactly same. The CIT(A)'s order herein, too, is, mutatis mutandis, verbatim the same. Therefore, 'M/s Nuova Shoes' (supra) and 'Virola International' (supra), are squarely applicable. In view thereof, the case laws relied on by the Department are

of no help to it. Thus, following 'M/s Nuova Shoes' (supra) and 'Virola International' (supra), the grounds raised by the Department are rejected. The Department has not been able to controvert the well reasoned findings of the ld. CIT(A). The order under appeal is, accordingly, confirmed.

I.T.A No. 434 /Agra/2015

14. The issue involved in this appeal by the Department for A.Y. 2011-12 is exactly the same as that in ITA No.446/Agra/2015 (supra). Our observations made while deciding that appeal are, as such, squarely applicable to this year also. Hence, the grievance of the Department in the present appeal is also rejected and the well reasoned order passed by the ld. CIT(A) is confirmed.

15. In the result, both the appeals are dismissed.

Order pronounced in the open court on 11/04/2018.

Sd/-	Sd/-
(DR. MITHA LAL MEENA)	**(A.D. JAIN)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated 11 /04/2018

AKV
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR