

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, AHMEDABAD**

**BEFORE: SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
Ms. SUCHITRA KAMBLE, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No. 578/Ahd/2025

(निर्धारण वर्ष / Assessment Year : 2017-18)

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| Kloeckner Desma Machinery Pvt. Ltd. Plot No.10, Road No.1, Kathwada GIDC, B/h. Torrent Power Sub-station, Gujarat – 382430 | बनाम/ Vs. | Dy.CIT Circle 2(1)(2), Ahmedabad |
| Öथयी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACK8768N | | |
| (Appellant) | .. | (Respondent) |

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|---------------------------------|--------------------------------|
| अपीलाथक ओर से /Appellant by : | Shri Vivek Chavda, AR |
| निर्धारण ओर से /Respondent by : | Shri Prathvi Raj Meena, CIT.DR |

| | |
|------------------------------|------------|
| Date of Hearing | 08/10/2025 |
| Date of Pronouncement | 05/01/2026 |

(आदेश)/ORDER

PER ANNAPURNA GUPTA, AM:

The present appeal has been filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals), ADDL/JCIT (A)-6, Kolkata (hereinafter referred to as “CIT(A)”), dated 08.01.2025 passed under Section 250 of the Income Tax Act, 1961 (hereinafter referred to as the “Act”) and relates to Assessment Year (A.Y.) 2017-18.

2. The grounds of appeal raised by the assessee are as under:

- 1 . 1 The order passed u/ s 250 dated 08 .01 . 2025 for A. Y. 2017 - 18 by the CIT(A), Ahmedabad- 2 , upholding the disallowance of Rs. 25 , 12 , 447 made by the AO is wholly i l legal, unlawful, and contrary to the facts and circumstances of the case.*
- 1 . 2 The Ld. CIT(A) has grievously erred in law and on facts in not carrying out any inquiry with regard to the applicability of the provisions of Income tax Act and thereby violated the principle of natural justice. Therefore, the appellant shall be granted opportunity to produce additional evidences.*
- 21 The Ld. CIT(A) has grievously erred in law and on facts in upholding the disallowance of Rs. 25 , 12 , 447 made by the AO by invoking the provisions of Section 40 (a)(ia) of the Income Tax Act, 1961 , without appreciating that the appellant was not l iable to withhold any taxes while making commission payments to non-resident foreign agents.*
- 22 The Ld. CITIA) has failed to appreciate that as per Section 9 (1)(i) of the Income Tax Act, 1961 , and the established judicial principles, commission payments to non- resident agents for services rendered entirely outside India cannot be deemed to accrue or arise in India, and therefore, the appellant was not required to deduct tax at source under Section 195 of the Act.*
- 23 The Ld. CIT(A) has failed to appreciate the Explanation 1 to Section 9 (1)(i) of the Act, which states that in the case of a business of which all operations are not carried out in India, only such part of the income as is reasonably attributable to operations carried out in India shall be deemed to accrue or arise in India. Since the non-resident agents did not carry out any operations in India, no part of their income can be deemed to accrue or arise in India.*
- 24 The Ld. CIT(A) has erroneously upheld the disallowance while ignoring favorable rulings in appellant' s own case for A. Y. 2011- 12 through 2014 - 15 . In these previous years, the CIT(A) had consistently deleted identical disallowances with no change in facts or law to justify the current contrary decision.*
- 25 The Ld. CIT(A) has failed to appreciate that even i f such commission payments were deemed to accrue or arise in India under the domestic tax law, they would be exempt from tax under the respective Double Taxation Avoidance Agreements (DTAAS) between India and the countries in which the non- resident agents are based.*

- 31 *The Ld. CIT(A) has grievously erred in law and or on facts in not granting opportunity of being heard conferencing.*
- 32 *The Ld. CIT(A) has failed to appreciate that granting opportunity of being heard via video conferencing facility is mandatory in the new regime of Faceless appeal process.*
- 33 *The Ld. CIT(A) ought to have granted opportunity of being heard via videoconferencing.*
- 41 *The Appellant craves leave to add, alter, amend any of the grounds of appeal at the time of hearing.”*

3. The solitary issue in the present appeal is the disallowance of commission expenses paid by the assessee to non-residents, on account of tax not deducted at source thereon. The disallowance having been made by invoking Section 40(a)(ia) of the Act [sic 40(a)(i)]. The AO disallowed 30% of the commission expenses so incurred as provided in the said Section.

4. The contention of the Ld. Counsel for the assessee before us is that in preceding years identical payment made to the same parties as in the impugned year & disallowed by the AO in assessment, was subsequently allowed either by the Ld. CIT(A) or was directed by the DRP to be not disallowed. That even the ITAT had deleted the disallowance so made in the case of the assessee. He contended that this fact was brought to the notice of the Ld. CIT(A) who still went on to confirm the disallowance in total disregard to the orders of the appellate authorities in the preceding years in the case of the assessee itself.

5. The facts relating to the case are that the assessee was noted to have made payment of export commission amounting to Rs.83,74,823/- to four parties listed in a table at page no.2 of the assessment order as under without deducting tax at source:

| Sr. No. | Name of the Party | Country of residence | Amount in Rs. |
|---------|--|----------------------|---------------|
| 1 | Kloeckner Desma Elastomertechnik GmbH ('KDE Germany) | Germany | 54,92,777 |
| 2 | Pack All Plastic Co. Ltd. | Thailand | 9,89,880 |
| 3 | Halle System Company | Iran | 14,89,310 |
| 4 | Parabor Colombia SAS | USA | 4,02,856 |
| Total | | | 83,74,823 |

6. The fact that these are non-resident parties/ foreign agent is not disputed and even the AO treated them as non-residents and finding no tax deducted at source thereon he referred to the provisions of Section 195 of the Act for tax deduction at source on payments made to non-resident and thereafter invoked Section 40(a)(ia) of the Act and disallowed 30% of the expenses. It is to be noted that the disallowance on account of payments made to non-resident without deducting tax at source attracts the provision of Section 40(a)(i) of the act and not 40(a)(ia) of the Act which relates to disallowance of expenses incurred in relation to domestic parties without deducting tax at source. Further, in terms of the provisions of Section 40(a)(i) of the Act, the entire expense is disallowed while Section 40(a)(ia) of the Act attracts disallowance of 30% of the expenses. The AO appears to be confused with the provision of law applicable to the facts of the

present case and has applied the incorrect Section while making disallowance in the facts of the present case. Be that so, we shall now proceed to adjudicate the issue before us.

7. Ld. Counsel for the assessee pointed out that identical disallowance was made in the case of the assessee in A.Y. 2001-02 and 2002-03 and 2006-07, which was deleted by the ITAT in its order passed in ITA No.1605 & 1647/Ahd/2007, dated 01.04.2010 and in ITA No.2984/Ahd/2009 dated 12.08.2011; respectively. He further pointed out that in A.Y. 2012-13 and 2013-14 identical disallowance proposed by the AO in his draft order passed was objected by the assessee before the DRP who accepted the assessee's contention and directed no disallowance to be made in this regard. Our attention was drawn to the DRP order dated 14.08.2017 for A.Y. 2013-14 and the DRP order dated 29.11.2016 for A.Y. 2012-13. Thereafter, he pointed out that in A.Y. 2014-15 also the matter had travelled to the Ld. CIT(A) who adjudicated the issue in favour of the assessee vide order dated 21.12.2017. Copies of all orders were placed before us in paper book. Ld. Counsel for the assessee drew our attention to the order of the Ld. CIT(A) in A.Y. 2014-15 pointing out of parity of facts in the said case and also draw our attention to the facts of the said case at page no.21 of the order. He pointed out that the parties to whom commission was paid in A.Y. 2014-15 were identical to that in the impugned year. He, thereafter, drew our attention to the decisions of the Ld. CIT(A) at para 2.29 of his order, wherein he pointed out

that the Ld. CIT(A) had referred to the decision of the Hon'ble Apex Court in the case of CIT vs. Toshoku Limited, [1980] 125 ITR 525 (SC) for the proposition that if operations of non-resident agents are not carried out in the taxable territory, no income can be deemed to be accrued or arise in India. He pointed out that the Ld. CIT(A) noted that as per the said decision of Hon'ble Apex Court payments to non-resident agents who had no permanent establishment in India is not chargeable to tax under the Act and noting the fact that the non-resident agents in the case before him did not have any permanent establishment in India, there was no liability on the assessee to deduct tax at source u/s.195 of the Act while making payment to such non-resident agents and no occasion, therefore, to disallow any expenses on account of payments made to such non-resident for non-deduction of tax at source thereon. He further pointed out that the Ld. CIT(A) took note of the fact that in the assessee's own case for A.Y. 2013-14 the DRP had given direction to the AO to delete the disallowance and similar direction was also given in A.Y. 2011-12. He pointed out from the direction of the DRP in A.Y. 2011-12 reproduced in the order at para 2.11, that the DRP had noted that the AO had referred to the decision of the authority of advance rule in the case of SKF Boilers and Driers (P.) Ltd., [2012] 18 taxmann.com 325 (AAR-New Delhi) and Rajiv Malhotra, [2006] 284 ITR 564 (AAR) while making disallowance. He pointed out that the DRP had held the said judgments not applicable considering various decisions of the ITAT and further the decision of the Hon'ble Apex Court in

the case of Toshoku Limited (supra). Ld. Counsel for the assessee, thereafter, pointed out that in the facts in the present case the parties were identical. The reasoning of the AO also was identical who had relied on the decision of the AAR in the case of SKF Boilers and Driers (P.) Ltd. (supra) and Rajiv Malhotra (supra). He pointed out these facts from para 3.8 of the order of the AO. He further pointed out that the AO had noted as a matter of fact in the said para that the agents had rendered services abroad and solicited orders abroad. He contended, therefore, that the facts of the present case were identical to that in the case of the assessee for A.Y. 2014-15, wherein the Ld. CIT(A) had directed the deletion of disallowance following the decision of the Hon'ble Apex Court in the case of Toshoku Limited (supra) and he contended that the authorities below erred in ignoring the order of the Ld. CIT(A) in the preceding year.

8. Ld. DR was unable to controvert the facts as pointed out by the Ld. Counsel for the assessee before us. He was unable to controvert the fact that the parties in the impugned year were identical to that in A.Y. 2014-15 in the case of the assessee. He was unable to controvert the fact that the reasoning of the AO in the impugned year was identical to that in A.Y. 2014-15. He was unable to controvert the fact that the Ld. CIT(A) had rejected the reasoning of the AO in A.Y. 2014-15 stating that the issue stood covered by the decision of Hon'ble Apex Court in the case of Toshoku Limited (supra) in favour of the assessee. He was also

unable to controvert the fact that the AO had recorded as a matter of fact that services were rendered by the agents outside India. Further, the Ld. DR was unable to point out as to how the decision of the Hon'ble Apex Court in the case of Toshoku Limited (supra) was not applicable in the facts of the present case.

9. In the light of the above, we hold that the disallowance made of commission expenses paid to non-resident was wrongly made and the same is, therefore, directed to be deleted.

10. In the result, appeal filed by the assessee is allowed.

This Order pronounced on 05/01/2026

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Ahmedabad; Dated 05/01/2026

S. K. SINHA

True Copy

आदेश का प्रतिलिपि अर्पित/Copy of the Order forwarded to :

1. अपीलार्थ ~~द्वारा~~The Appellant
2. ~~प्रति~~ ~~द्वारा~~The Respondent.
3. संबंधित आयकर आयुN / Concerned CIT
4. आयकर आयुN(अपील) / The CIT(A)-
5. स्वभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

आदेशानुसार/ BY ORDER,

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