आयकर अपीलीय अधिकरण, **'बी'** न्यायपीठ**,** चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH: CHENNAI

श्री वी. दुर्गा राव**, माननीय न्यायिक सदस्य** एवं
श्री **जी. मंजूनाथा, माननीय** लेखा सदस्य **के समक्ष**
BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.1175, 1495 & 1496/Chny/2017**
निर्धारण वर्ष **/Assessment Years: 2008-09, 2009-10 & 2010-11**

M/s.Rane Engine Valves Ltd., "Maithri" No.132, Cathedral Road, Chennai-600 086. [**PAN:** AAACT 1279 M] **(**अपीलार्थी**/Appellant)**	**v.**	The Dy. Commissioner- of Income Tax, Corporate Circle-5(3), Chennai. **(**प्रत्यर्थी**/Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Mr.Vikram Vijayaraghavan, Adv.
प्रत्यर्थी की ओर से /Respondent by	:	Mr.P.V.Pradeep Kumar, CIT
सुनवाई की तारीख/Date of Hearing	:	03.03.2022
घोषणा की तारीख /Date of Pronouncement	:	09.03.2022

आदेश **/ O R D E R**

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

These three appeals filed by the assessee are directed against separate, but identical orders of the Commissioner of Income Tax (Appeals)-3, Chennai, dated 31.01.2017 & 28.02.2017 and pertains to assessment years 2008-09, 2009-10 & 2010-11 respectively. Since, facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are being disposed off, by this consolidated order.

2. The assessee has more or less raised common grounds of appeal for all the assessment years. Therefore, for the sake of brevity, grounds of appeal in ITA No.1175/Chny/2017 for the AY 2008-09 are reproduced as under:

1. The order of the Commissioner of Income Tax (Appeals) is contrary to law, facts and in the circumstances of the case.

2. The Commissioner of Income Tax (Appeals) erred in confirming the disallowance of Professional fees paid to nonresidents for non-deduction of Tax at source.

2.1 The Commissioner of Income Tax (Appeals) erred in relying on the decision of the Tribunal in the case of Van Oord ACZ India Pvt Ltd v Addl CIT (112 ITD 79) which has been reversed by the Hon'ble High Court in 323 ITR 130 (Del).

2.2 The Commissioner of Income Tax (Appeals) erred in holding that appellant has not proved as to whether the payment made to the non-residents was a professional fee or a commission without appreciating that the assessing officer has not disputed the payment of professional fee to non-residents.

2.3 The Commissioner of Income Tax (Appeals) ought to have appreciated that the above payments were made for services rendered outside India and hence tax was not deducted

2.4 The Commissioner of Income Tax (Appeals) ought to have appreciated that the non-residents do not have PE in India and the amount paid to nonresidents are in the nature of business profits for service rendered outside India under Article 7 of the India - USA DTAA.

2.5 The Commissioner of Income Tax (Appeals) ought to have appreciated that the amount was paid to an individual, the same falls under independent professional service under Article 14 of India-USA DTAA and hence not taxable in India.

2.6 The Commissioner of Income Tax (Appeals) erred in not following the ratio laid down In the case of G.E.India Technology Centre(P) Ltd (vs) CIT (327 ITR 456 (SC) wherein it was held that a person paying interest or any other sum to non-resident is liable to deduct tax u/s.195 only if such sum is chargeable to tax in India and not otherwise.

3. The Commissioner of Income Tax (Appear) erred in confirming the disallowance of the compensation paid under Welfare Oriented VRS of Rs.23, 61,5287- on the ground that the payments are squarely covered as per the guidelines laid down in rule 2BA and section 40A (9).

3.1 The Commissioner of Income Tax (Appeals) ought to have appreciated that the above payments are made to employees who opted for the above scheme on medical grounds.

3.2 The Commissioner of Income Tax (Appeals) ought to have appreciated that the scheme is applicable for only those employees whose health is not fit enough to continue in employment. As per the scheme, the eligible employees should provide a recommendation form a suitable physician illustrating the individual's inability to continue on the employment under the medical grounds.

3.3 The Commissioner of Income Tax (Appeals) failed to appreciate that the scheme is not as per the guidelines laid down in rule 2BA and hence not considered for exemption u/s.10(10C) in the hands of the employees for tax deduction at source and no claim was

made u/s.35DDA by the company. The entire amount paid to the employees was taxed in the hands of employees.

3.4. The Commissioner of Income Tax (Appeals) ought to have appreciated that the above expenditure was incurred in connection with the business of assessee and hence the same is allowable u/s.37.

4. The Appellant craves leave to adduce additional grounds at the time of hearing.

3. The brief facts of the case are that the assessee company is engaged in the business of automobile components, filed its return of income for the AY 2008-09 on 29.09.2008 declaring total income of Rs.1,03,29,435/-. During the financial year relevant to the assessment year 2008-09, the assessee has paid professional fee in foreign currency to (i) Eva Delith, Germany, towards payment for customer support services in Germany, (ii) Folk Craft Trading, Australia, for rendering professional services in connection with promotion of products in Australia and (iii) Pro Maxus SDN BHD, Malaysia, towards professional fee for market study. The assessee has made payment to the above three non-resident service providers without deduction of TDS as required u/s.195 of the Act. The AO disallowed the payment made to non-residents u/s.40(a)(i) of the Act on the ground that in order to prove the payment made to non-residents are outside the scope of taxation in India, the assessee needs to obtain Certificate u/s.195(2) of the Act from the AO. Unless, the assessee produce the certificate u/s.195(2) of the Act, the claim of the assessee that income of non-residents is not liable to tax in India and consequently, the assessee is not required to deduct TDS u/s.195 of the Act, cannot be accepted. Therefore, rejected the arguments of the assessee and made additions u/s.40(a)(i) of the Act, for non-deduction of TDS on payment made to non-

residents. The assessee carried the matter in appeal before the Ld.CIT(A), but could not succeeded. The Ld.CIT(A) for the reasons stated in his appellate order dated 31.01.2017, sustained the additions made by the AO towards payment made to non-residents on the ground that the assessee has failed to deduct TDS as required u/s.195 of the Act. Aggrieved by the order of the Ld.CIT(A), the assessee is in appeal before us.

4. The Ld.AR for the assessee submitted that the issue involved in the appeal regarding payment made to non-residents without deduction of TDS u/s.195 of the Act and consequent disallowance of payment u/s.40(a)(i) of the Act, is covered in favour of the assessee by the decision of ITAT Chennai Benches in the case of M/s.TVS Electronics Ltd. v. ACIT in ITA No.949/Chny/2017 for the AY 2005-06 dated 24.09.2021, wherein, the Tribunal under identical facts held that the assessee cannot be fastened liability on the basis of subsequent amendment to the law with retrospective effect, because the assessee cannot be expected to do impossibility of performance and thus, for non-deduction of TDS u/s.195 of the Act, payment made to non-residents, cannot be disallowed u/s.40(a)(i) of the Act.

5. The Ld.DR, on the other hand, supporting the order of the Ld.CIT(A) submitted that, if at all, the assessee claims that it was not required to deduct TDS u/s.195 of the Act, then the proper course of action is to obtain a Certificate u/s.195(2) of the Act from the AO and unless, the assessee obtained a Certificate, it cannot be argued that payment made to non-

residents are not liable to tax in India and consequently, no disallowances can be made u/s.40(a)(i) of the Act. Therefore, the Ld.DR further submitted that there is no error in the reasons given by the Ld.CIT(A) to sustain the additions made by the AO and his order should be upheld.

6. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. We find that an identical issue has been considered by the Tribunal in the case of M/s.TVS Electronics Ltd. v. ACIT in ITA No.949/Chny/2017 for the AY 2005-06 dated 24.09.2021, wherein, on identical circumstances held that liability towards TDS cannot be fastened on the assessee on the basis of subsequent amendment to law with retrospective effect, because which was impossible on the part of the assessee to do the impossible things and deduct TDS on payment made to non-residents, because, the assessee cannot foresee the amendment and deduct TDS on said payment and consequently, payment made to non-residents, cannot be disallowed u/s.40(a)(i) of the Act, for failure to deduct TDS u/s.195 of the Act. The relevant findings of the Tribunal are as under:

> *8. Be that as it may. The issue before us is not taxability of payment made by the assessee to non-resident entity for services rendered outside India as fees for technical services or not in terms of section 9(1)(vii) of the Act. The issue before us is disallowance of sum paid to non-resident without TDS u/s 40(a)(i) of the Act. Admittedly, the AO has brought amended explanation 9(2) with retrospective effect from 1-4-1976 by the Finance Act, 2010 and held payment made by the assessee as FTS u/s 9(1)(vii) of the Act and further, for non TDS disallowed the same u/s 40(a)(i) of the Act. Therefore, to decide the issue, one has to understand the judgment of Hon'ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd., vs. DIT, (supra. The Hon'ble Supreme court while deciding the issue of FTS has considered preamended provisions of section 9(1)(vii) and held that if any payment in the nature of FTS to be taxed in India, as per provisions of section 9(1)(vii) of the Act, then, both services rendered and services received to be in India. If services are rendered outside India, even such services are received in India then same cannot be brought to tax under Indian Income-Tax laws as per the judgment of Hon'ble Supreme Court*

in the case of Ishikawajma-Harima Heavy Industries Ltd., vs. DIT. Although, definition of FTS was amended by the Finance Act, 2010 with retrospective effect from 01.06.1976 but, the law prevailing at the time of making payment by the assessee to the non-resident was on the basis of judgment of Hon'ble Supreme Court which clearly held that payment made to a non-resident for services rendered outside India cannot be brought to tax in India as fees for technical services in absence of place of business / permanent establishment in India. Since, there was clear law by the decision of Hon'ble Supreme Court, the assessee has made payment without deducting tax at source. Therefore, liability towards TDS cannot be fastened on the assessee on the basis of subsequent amendment to law with retrospective effect, because it was impossible on the part of assessee to deduct tax on income of non-resident because the assessee cannot foresee the amendment and deduct TDS on said payments. This view is supported by various decisions of Tribunal including decision of ITAT, Mumbai Bench in the case of Channel Guide India Ltd., vs. ACIT and the Ahmadabad Tribunal in the case of Sterling Abrasive Ltd., vs. ACIT and Agra Bench in the case of Metro & Metro vs. Addl.CIT, where the Tribunal by following the decision of Hon'ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd., vs. DIT, held that at the relevant point of time, it was impossible on the part of the assessee to deduct tax at source on income of non-resident and thus, on that basis no disallowance can be made towards payment made to a nonresident u/s.40(a)(i) of the Act.

7. In this view of the matter and by respectfully following the decision of the co-ordinate Bench of ITAT, Chennai, in the case of M/s.TVS Electronics Ltd. v. ACIT, we are of the considered view that the assessee cannot be expected to deduct TDS on payment made to non-residents on the basis of subsequent amendment to the law with retrospective effect from earlier date, because the assessee cannot foresee the amendment and deduct TDS and hence, we are of the considered view that the AO was erred in disallowing the payment made to non-residents u/s.40(a)(i) of the Act, for failure to deduct TDS u/s.195 of the Act. The Ld.CIT(A) without considering the relevant facts, simply sustained the additions made by the AO. Hence, we are reversed the findings of the Ld.CIT(A) and direct the AO to delete the additions made towards disallowance of payment made to non-residents u/s.40(a)(i) of the Act.

8. The next issue that came up for our consideration from Ground No.3 of the assessee's appeal is disallowance of compensation paid to

employees' under 'Welfare Oriented VRS Scheme' amounting to Rs.23,61,528/-. The AO has disallowed the compensation paid to employees under 'Welfare Oriented VRS Scheme' on the ground that the assessee failed to establish that tax deducted at source was claimed as refund by claiming deduction u/s.10(10C) of the Act. It was the explanation of the assessee before the AO that payments made to five employees under 'Welfare Oriented VRS Scheme', is not covered under Rule 2BA to be eligible for the employees to claim exemption u/s.10(10C) of the Act and consequently, payment made by the assessee, cannot be disallowed u/s.40A(9) of the Act.

9. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. The provisions of Sec.40A(9) of the Act, deals with payment made to a Fund or Trust for VRS compensation. In this case, the assessee has made payment directly to employees under 'Welfare Oriented VRS Scheme', but not to a Trust or Fund and thus, we are of the considered view that payment made by the assessee cannot be disallowed u/s.40A(9) of the Act. We further noted that VRS Scheme provided by the assessee to five employees is on welfare oriented basis by considering their health, which is not covered under Rule 2BA and thus, employee's cannot claim exemption u/s.10(10C) of the Act. Once payment made to employees, is not exempted u/s.10(10C) of the Act, then it partakes the nature of expenses incurred for the purpose of business and thus, assessee can claim deduction u/s.37(1) of the Act.

However, the facts with regard to the claim of deduction u/s.10(10C) of the Act by the employees of the assessee, were not forthcoming from the records. Therefore, for the limited purpose to ascertain the facts with regard to claim of benefit u/s.10(10C) of the Act by the employees to allow the deduction claimed by the assessee needs to be re-examined by the AO in light of claim of the assessee that employees did not avail the benefit of exemption u/s.10(10C) of the Act. In case, the AO found that the employees have not availed the benefit of exemption u/s.10(10C) of the Act, then the AO is directed to allow the deduction as claimed by the assessee towards compensation paid to employees' u/s.37(1) of the Act.

10. In the result, the appeal filed by the assessee in ITA No.1175/Chny/2017 is allowed for statistical purposes.

ITA No.1495/Chny/2017 for the AY 2009-10:

11. The facts and issues involved in this appeal are identical to the facts and issues which we had already been considered in ITA No.1175/Chny/2017 for the AY 2008-09. The assessee has made payment to certain non-residents for rendering services in outside India. The assessee claimed that income of non-residents is not liable to tax in India and thus, it was not required to deduct TDS on payment made to non-residents and consequently, payment cannot be disallowed u/s.40(a)(i) of the Act. We find that an identical issue has been considered by us in ITA No.1175/Chny/2017 for the AY 2008-09, wherein, we by following the

decision of ITAT Chennai Benches in the case of M/s.TVS Electronics Ltd. v. ACIT in ITA No.949/Chny/2017 for the AY 2005-06 dated 24.09.2021, held that the assessee cannot be expected to do impossible things on the basis of subsequent amendment to law with retrospective effect and deduct TDS on payment made to non-residents. The reasons given by us in the preceding paragraphs shall ***mutatis mutandis*** to this appeal, as well. Therefore, for similar reasons, we direct the AO to delete the additions made towards payment made to non-residents u/s.40(a)(i) of the Act, for non-deduction of TDS u/s.195 of the Act.

12. In the result, the appeal filed by the assessee in ITA No.1495/Chny/2017 is allowed.

ITA No.1496/Chny/2017 for the AY 2010-11:

13. The first issue that came up for our consideration from Ground Nos.2.1 to 2.3 of the assessee's appeal is disallowance of payment made to non-residents u/s.40(a)(i) of the Act for non-deduction of TDS u/s.195 of the Act. We find that an identical issue had already been considered by us in ITA No.1175/Chny/2017 for the AY 2008-09, wherein, we by following the decision of ITAT Chennai Benches in the case of M/s.TVS Electronics Ltd. v. ACIT in ITA No.949/Chny/2017 for the AY 2005-06 dated 24.09.2021, held that the assessee cannot be expected to do impossible things on the basis of subsequent amendment to law with retrospective effect and deduct TDS on payment made to non-residents. The reasons

given by us in the preceding paragraphs shall ***mutatis mutandis*** to this appeal, as well. Therefore, for similar reasons, we direct the AO to delete the additions made towards payment made to non-residents u/s.40(a)(i) of the Act, for non-deduction of TDS u/s.195 of the Act.

14. The next issue that came up for our consideration from Ground No.3 of the assessee's appeal is disallowance of expenditure relatable to exempt income u/s.14A of the Act. The Ld.AR for the assessee submitted that the Ld.CIT(A) erred in sustaining the additions made by the AO towards disallowance u/s.14A of the Act without appreciating the fact that the opening and closing value of investment held by the assessee was 'Nil' and as such, the disallowance under Rule 8D of Income Tax Rules, 1962, cannot be computed.

15. The Ld.DR, on the other hand, supporting the order of the Ld.CIT(A) submitted that the AO has rightly computed the disallowance u/s.14A r.w.r.8D of Income Tax Rules, 1962 and hence, the reasons given by the Ld.CIT(A) to sustain the additions made towards disallowance u/s.14A cannot be faulted.

16. Having heard both sides and considering the material available on record, we find that the assessee has not disputed the applicability of Rule 8D of Income Tax Rules, 1962, for computing disallowance of expenses u/s.14A of the Act. We find that the AO has determined the disallowance u/s.14A r.w.r.8D of Income Tax Rules, 1962 @ 0.5% on average value of

investments. In our considered view, disallowance determined by the AO is in accordance with law and thus, we are inclined to uphold the findings of the Ld.CIT(A) and reject the ground taken by the assessee.

17. In the result, the appeal filed by the assessee in ITA No.1496/Chny/2017 is partly allowed.

18. In the result, the appeal filed by the assessee in ITA No.1175/Chny/2017 for the AY 2008-09 is allowed for statistical purposes, the appeal filed by the assessee in ITA No.1495/Chny/2017 for the AY 2009-10 is allowed and the appeal filed by the assessee in ITA No.1496/Chny/2017 for the AY 2010-11 is partly allowed.

Order pronounced on the 09th day of March, 2022, in Chennai.

Sd/-	***Sd/-***
(वी. दुर्गा राव**)**	**(जी. मंजूनाथा)**
(V. DURGA RAO)	**(G. MANJUNATHA)**
न्यायिक सदस्य**/JUDICIAL MEMBER**	लेखा सदस्य**/ACCOUNTANT MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 09th March, 2022.
TLN

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF