आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "जी" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

सर्वश्री बी.आर.बास्करन, लेखा सदस्य एवं संदीप गोसाई, न्यायिक सदस्य के समक्ष
BEFORE S/SHRI B.R.BASKARAN, ACCOUNTANT MEMBER AND SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.3973/Mum/2014
(**निर्धारण वर्ष /** Assessment Year :2009-10)

Dy.Commissioner of Income Tax-7(1), Room No.615, 6th floor, Aayakar Bhavan, M K Road, Mumbai-400020	**बनाम**/ Vs.	M/s Zodiac Clothing Co.Ltd., 254 D-2, Nyloc House, Dr. A B Road, Worli, Mumbai-400030
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

स्थायी लेखा सं./जीआइआर सं./PAN. :AAACZ0151A

अपीलार्थी की ओर से / Appellant by :	Ms.Anu K Aggarwal
प्रत्यर्थी की ओर से/ Respondent by :	Mrs.Vasanti B Patel.

सुनवाई की तारीख **/ Date of Hearing : 1.12.2015**
घोषणा की तारीख /**Date of Pronouncement : 4.3.2016**

O R D E R

PER SANDEEP GOSAIN, JM:

By way of this appeal, the revenue is challenging the order dated 13.3.2013 passed by the ld.CIT(A)-13, Mumbai for the assessment year 2009-10 wherein it has challenged the deletion of addition made by the AO u/s 40(a)(i) of the Income Tax Act, 1961.

2. Assessee filed return declaring total income of Rs.24,12,74,491/- on 30.9.2009. The assessee is engaged in the business of export of garments

manufactured by it. On perusal of accounts it was observed by the assessing officer that the assessee has paid a sum of Rs.6,79,40,492/- and no TDS was deducted. Therefore, the AO called the assessee to explain as to why this amount should not be added to the total income of assessee on the ground that neither the assessee obtained TDS certificate from the department u/s 195(2) nor the TDS was deducted. The submissions of the assessee did not find favour of the AO and accordingly, by invoking he provisions of section 40(a)(i) of the Act the additions were made. Aggrieved by the order of AO, the assessee filed appeal before the ld. CIT(A). The ld. CIT(A) accepted the contentions of the assessee and granted relief to the assessee. Aggrieved by this order the revenue is in appeal before us.

3. The ld. DR reiterated the facts of the case and relied on the order of the AO.

4. The ld.AR submitted that the assessee is in export business and he paid some commissions to non-residents agents for services render outside India and according to CBDT Circular 786 dated 7.2.2000, tax is not deductible at source when the payments made to non-resident agents for survives provided by them. Therefore, the provisions of section 195 are not attracted. The ld. AR submitted that all the agents to whom commission were paid were non-residents of India and no permanent establishment was in India. He submitted that in the AY 2010-11 and 2011-12, in a similar situation, the Asstt.Director of Income Tax (International Tax division) issued a certificate u/s 195 to the department to remit the commission without deduction of tax at source. Therefore, the view taken by the ld.CIT(A) be confirmed and reject the appeal of the revenue. He also placed reliance on the decision in the case of ACIT V/s Vilas N Tamhankar (2015) 55 taxmann.com 413 (Mumbai), wherein directions of the CBDT circular have been followed and allowed

the claim of the assessee, he also relied on the decision of Delhi Bench of the Tribunal on the similar issue in the case of Welspring Universal V/s JCIT reported in (2015) 56 taxman.com 175 (Delhi.Trib).

5. We have heard the parties at length and perused the record. We find that the assessee has paid commission to a person who is non-resident. As per the CBDT Circular supra, if a person pays commission to the non-resident no tax be deduced from the payment. We find that an identical issue had come up before the Mumbai Bench of the Tribunal in Vilas N Tamhankar(supra) and Welspring Universal (supra), wherein this issue has been decided in favour of the assessee by observing as under :

> **"4.** We have heard the parties, and perused the material on record. The payment to the payee, Sangeeta Choudhary, even as clarified before the assessing authority, was for sales and marketing support outside India. No part of the services, toward which payment had been made to her, was rendered in India; the payee also having no place of business or establishment in India. There was thus, as per the assessee, no question of any part of the impugned sum being chargeable to tax in India; further relying on the decision in the case of *GE India Technology Centre (P.) Ltd.* (*supra*). The facts being not in dispute, the issue arising is primarily legal, i.e., whether the provision of s. 40(a)(i) is attracted in the facts of the case. Section 40(a)(i), overriding sections 30 to 38, provides that where any interest, royalty, fees for technical services or other sum chargeable under the Act, is paid either outside India or in India to a non-resident (not being a foreign company) or to a foreign company, on which tax is deductible at source under Chapter XVII-B, and such tax has not been deducted or, after deduction not been paid during the previous year or in the subsequent year before the expiry of the time allowed u/s. 200(1), the said amount shall not been allowed in computing the business income. The first thing, therefore, that we would need to see is whether the provisions of Chapter XVII-B are attracted to the impugned payment. The payments to a non-resident being covered under section 195, we begin by reproducing the same in its relevant part, the interpretation of which is in issue:
>
> 'Other sums.
>
> 195. (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being

interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries" shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (*23D*) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode;

Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-O.

(2) Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.'

The ld. CIT(A) having allowed relief to the assessee on the basis that the decision by the apex court in *GE India Technology Centre (P.) Ltd.* (*supra*), rendered after considering the decision in the case of *Transmission Corpn. of A.P. Ltd.* (*supra*), covers the assessee's case, so that no tax was deductible u/s. 195, what we are required to, in order to decide the Revenue's appeal there-against, do is to examine the validity of the said finding, and toward the same, the said decision.

As explained by the apex court therein, if the interpretation being accorded by the Revenue to section 195, i.e., that the moment payment to a non-resident is made, the obligation to deduct the tax at source (TAS) arises, is accepted, the same would imply obliterating the words 'chargeable under the provisions of the Act' occurring in section 195(1). Section 195 falls under Part B of Chapter XVII of the Act, titled 'collection and recovery of tax'. As explained therein, the Act forms one integrated code, and the charging sections cannot be read *de hors* the machinery sections. Due weight has to be given to every word in the section. The interpretation by the Revenue was, in its view, guided

more by administrative convenience, and which would though imply deduction of tax even on payments *qua* which there was no territorial nexus with India or otherwise were not chargeable to tax in India. Administrative considerations could not be the basis of the interpretation of the statutory provisions, even as the law contemplates adequate safeguards in the form of section 40(a)(i) and section 195(6); the latter being inserted on the statute by Finance Act, 2008 w.e.f. 01.04.2008. The hon'ble court also explained the decision in the case of *Transmission Corpn. of A.P. Ltd.* (*supra*). Section 195 contemplates deduction of tax at source not only on amounts, whole of which are pure income payments, but also covers payments which have an element of income imbedded or incorporated therein. Where, therefore, the payer entertains a doubt as to the amount on which the tax is to be deducted or otherwise considers that the same is not deductible on the gross amount on the footing that only a part thereof represented income chargeable to tax in India, it was necessary for him to approach the A.O. u/s.195(2) and obtain permission for deduction at source of tax at a lesser amount. Section 195(2), thus, gets attracted only in case of composite payments, a part of which have an element of income chargeable to tax in India. The observations by it in *Transmission Corpn. of A.P. Ltd.* (*supra*) that if no such application was filed, income tax on such sum was to be deducted and that it was the statutory obligation of the person responsible for paying this sum to deduct income tax thereon before making the payment, it was explained, were made in that context.

In our view too, the said decision by the apex court, which we find to be in consonance with the decisions rendered earlier, as in *CIT* v. *Cooper Engg. Ltd.* [1968] 68 ITR 457 (Bom.); *CIT* v. *Eli Lilly & Co. (India) (P.) Ltd.* [2009] 312 ITR 225/178 Taxman 505 (SC); *Vijay Ship Breaking Corpn.* v. *CIT*[2009] 314 ITR 309/[2008] 175 Taxman 77 (SC) and, rather *Transmission Corpn. of A.P. Ltd.* (*supra*) as well, squarely covers the facts of the instant case. The Revenue, to enable us to disturb the like finding by the ld. CIT(A), ought to have explained as to how it is infirm or does not amount to a correct reading of the said decision, or is otherwise not applicable in the facts of the case. In fact, the assessee having admittedly neither deducted tax at source nor made any application u/s.195(2) to the A.O., on the footing that no part of the relevant payment represents income chargeable to tax in India, the Revenue ought to, in our view, have impugned the said basis, on which the assessee's case rests. And which it has failed to in any manner. If, as maintained throughout by the assessee, no part of the services, for which payment has been made, stand rendered in India, how we wonder could he be faulted in holding it to be not chargeable to tax in India. This in fact is also the

requirement and an essential ingredient of s. 40(a)(i), so that the A.O., invoking the same, is in fact obliged in law to render a finding as to the chargeability of the impugned sum to tax under the Act, which is absent in the instant case.

We are conscious that *Explanation* 2 to section 195(1) has since been co-opted on the statute, i.e., by Finance Act, 2012 w.e.f. 01.04.1962, and which reads as under:

> 'Other sums.
>
> "195. (1)** ** **
>
> *Explanation 2.*-For the removal of doubts, it is hereby clarified that the obligation to comply with sub- section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has-
>
> (*i*) a residence or place of business or business connection in India; or
>
> (*ii*) any other presence in any manner whatsoever in India.'

The same, however, in our view, would not operate to disturb the law as enunciated in *GE India Technology Centre (P.) Ltd.* (*supra*), except where the basis of the payer's belief, i.e., as to the non-chargeability of the payment to tax in India, is on the ground that the payee has no place of business or business connection or otherwise any presence whatsoever in India. In the present case, the edifice of the assessee's case is the rendering of the services outside India. Therefore, though for a consideration for marketing and sale support services and, thus, only in the nature of commission or service charges, the same has no nexus with India. All that, in our clear view, the said *Explanation* does is to remove the issue of the determination of the tax incidence on the basis of whether the payee is a tax resident in India from being a consideration for non-deduction of tax at source u/s.195. The payee in the instant case, being admittedly a resident of Canada, with the services being rendered thereat, the issue of place of business in India is not an issue. The assessee's stating of the payee having no place of business or establishment in India, is only toward and in support of its contention of the services being rendered wholly outside India. There is in fact no charge by the Revenue of the payee having any place of business or otherwise business connection in India. The said explanation would, therefore, be of no consequence. We decide accordingly".

Before us, the ld. DR could not bring any new material to contradict the submissions of the ld. AR and decisions relied upon by the AR. Therefore, respectfully following the views taken by the Tribunal earlier, we dismiss the appeal of the revenue.

6. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court 4th March, 2016.

Sd	sd
(बी.आर.बास्करन/ B.R.BASKARAN)	**(संदीप गोसाई/SANDEEP GOSAIN)**
लेखा सदस्य /Accountant Member	**न्यायिक सदस्य/Judicial Member**

मुंबई Mumbai; दिनांक Dated..4th March, 2016

व.नि.स./ *SRL*, Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

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आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai