

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

श्री भागचन्द, लेखा सदस्य एवं श्री कुल भारत, न्यायिक सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, JM & SHRI KUL BHARAT, AM

आयकर अपील सं./ITA No. 993 & 970/JP/2016
निर्धारण वर्ष / Assessment Year : 2008-09.

M/s JC Fashions, Jaipur.	बनाम Vs.	The ACIT Circle 6 Jaipur.
स्थायी लेखा सं./जीआईआर सं./ PAN No. AAAFJ 9370 N		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारित की ओर से / Assessee by : Shri Shrawan Kumar Gupta
(Advocate) & Shri R.C. Svarnkar (CA)

राजस्व की ओर से / Revenue by : Shri R.A. Verma (Addl CIT)

सुनवाई की तारीख / Date of Hearing : 02.03.2017.

घोषणा की तारीख / Date of Pronouncement : 16 /03/2017.

आदेश / ORDER

PER SHRI KUL BHARAT, JM.

These two appeals by the assessee and the revenue are directed against the order of Income Tax (A)-2 Jaipur, dated 23rd Aug. 2016, pertaining to the assessment year 2008-09.

First we take up the assessee's appeal in ITA No. 993/JP/2016. The assessee has raised followings grounds of appeal as read a under:-

1. "Under the facts and circumstances of the case the learned CIT(A)-2, Jaipur has erred in upholding the re-assessment proceeding in order and as per law.
2. The Assessee craves your indulgence to add/amend or alter all or any grounds of appeal before or at the time of hearing."

2. The only effective ground in this appeal is against the validity of re-assessment proceedings.

3. Briefly, stated the facts are that the case was assessed under section 143(3) on the returned income on 15/12/2010. Subsequently, the case was reopened and the assessment under section 143(3) read with section 148 was framed vide order dated 10/3/2015. The reason for re-opening was that, that the assessee had made commission payment of Rs. 31,76,338/- to a non-resident Indian but no tax was deducted at source on this commission payment. The aforesaid amount of Rs. 31,76,338/- was disallowable under section 40(a)(ia) because of CBDT Circular No. 7/2009 dated 22nd Oct. 2009. Thus, the Assessing Officer made addition of Rs. 31,76,338/- against this, the assessee preferred an appeal before Id. CIT(A) wherein the assessee had challenged to reopening of the assessment. The Id. CIT however granted relief by holding that there is no law to deduct tax at source on commission under section 195 or chapter XVII-B of the IT Act, 1961.

3.1 However, the Ld. CIT(A) rejected the grounds challenging for the reopening of the assessment against both these revenue and assessee have challenged by filing appeal before this Tribunal. The Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. He submitted that the reassessment was made after expiry four years. Therefore, it was incumbent upon the assessing officer to demonstrate that assessee has failed to disclose fully and truly all materials facts necessary for his assessment for the assessment year under appeal. He further submitted even otherwise also this issue is squarely clear by the judgment of the Jurisdictional High Court in the case of CIT Vs. Modern Insulators Ltd. 369 ITR 138(Raj.) wherein it has been held that the circular no. 7 dated 22/10/2009 cannot be considered retrospectively to make it applicable to make payment before that date. He submitted that the assessment year involved is 2008-

09 the circular was issued on 22/10/2009. Admittedly, the assessee was not required to deduct the tax prior to the circular dated 22/10/2009. The liability if any to deduct tax would arise post 22/10/2009. He submitted the payments were made prior to the issuance of circular and even return of income was filed originally on 25/9/2008.

3.2 On the contrary, the Id. Departmental Representatives opposed the submissions and supported the orders of the authority below.

3.3 We have heard the rival contention, and perused the material available records and gone through the orders of the authorities below. There is no dispute with regard to the fact that reopening was made after four years. The assessing officer has not brought any material available on record, that the assessee was guilty of not disclosing fully and truly all materials facts necessary for the assessment. We find that the Assessing Officer during the original assessment had made a specific query with regard to payment of commission and the assessee replied the same. Therefore, it cannot be inferred that the materials facts related to the payments of commission was not before Assessing Officer during the original assessment proceedings. The basis for reopening is admittedly the circular dated 22/10/2009 which was not having retrospective effects as held by the Hon'ble Jurisdictional High Court in the case of CIT Vs. Modern Insulators(supra) wherein the Hon'ble High Court has held as under:

"From a perusal of relevant paragraph 2 of the aforesaid circular, it clearly specifies that the question of deduction of tax at source under section 195 would arise only if the payment of commissioner to a non-resident is chargeable to tax in India the fact that the said payment was remitted directly abroad and it cannot be held to have been received on or on behalf of the agent in India. It is a finding by the two appellate authorities that the commission pay abroad is not chargeable to tax in India under the Income-

tax Act. Circular No.7, dated October 22, 2009, in our view, cannot be considered retrospectively to make it applicable for payments made before that date. The Income-tax Appellate Tribunal has also held that the above non-residents/foreign agents have provided services for earning commission and the services have been rendered outside India, the commission so earned by the non-resident is a business profit. As per the DTAA between India and the UK and the DTAA between India and the UAE, it is mentioned in article 7 of both the DTAA's that the business profit can be taxed in other contracting State in case the enterprise of a Contracting State is having a permanent establishment in other contracting State and it has never been a case admittedly of the Revenue that the aforesaid non-resident companies/entities are having their permanent establishment in India. Circular No. 786, dated February 7, 2000, governs the case of the respondent-assessee as the year involved is the assessment year 2007-08 and, in our view, the Circular No. 7, dated October 22, 2009, which came into force from October 22, 2009, cannot be said to be applicable in the facts of the instant case or can be said to be retrospective in nature or even clarificatory in nature."

In the light of the above we are of the considered view that the assessing officer was not justified for reopening the assessment. Therefore, we hereby quash the assessment order dated 10/3/2015. The ground raised in this appeal are allowed. The appeal of the assessee is allowed.

4. Now, we take up the Revenue's Appeal in ITA No 970/JP/2016, pertaining to the assessment year 2008-09. The revenue has raised followings grounds of appeal:

1. "Whether on the facts and circumstances of the case and in law, Id. CIT(A) has erred in deleting addition made by the AO u/ 40(a)(ia) of the Act though the assessee was required to deduct TDS as per provisions of the section 195 of the Act and income is chargeable to tax u/s 9 of the IT Act.
2. The appellant craves its rights to add, amend or alter any of the ground on or before the hearing."

5. The representatives of the parties have adopted the same argument as, in ITA No 993/JP/2016 of the assessee as we already have quashed, the reopening of the assessment by holding as under:

"We have heard the rival contention, and perused the material available records and gone through the orders of the authorities below. There is no dispute with regard to the fact that reopening was made after four years. The assessing officer has not brought any material available on record, that the assessee was guilty of not disclosing fully and truly all materials facts necessary for the assessment. We find that the Assessing Officer during the original assessment had made a specific query with regard to payment of commission and the assessee replied the same. Therefore, it cannot be inferred that the materials facts related to the payments of commission was not before Assessing Officer during the original assessment proceedings. The basis for reopening is the circular dated 22/10/2009 which was not having retrospective effect as held by the Jurisdictional High Court in the case of CIT Vs. Modern Insulators(supra) wherein the Hon'ble High Court has held as under:

"From a perusal of relevant paragraph 2 of the aforesaid circular, it clearly specifies that the question of deduction of tax at source under section 195 would arise only if the payment of commissioner to a non-resident is chargeable to tax in India the fact that the said payment was remitted directly abroad and it cannot be held to have been received on or on behalf of the agent in India. It is a finding by the two appellate authorities that the commission pay abroad is not chargeable to tax in India under the Income-tax Act. Circular No.7, dated October 22, 2009, in our view, cannot be considered retrospectively to make it applicable for payments made before that date. The Income-tax Appellate Tribunal has also held that the above non-residents/foreign agents have provided services for earning commission and the services have been rendered outside India, the commission so earned by the non-resident is a business profit. As per the DTAA between India and the UK and the DTAA between India and the UAE, it is mentioned in article 7 of both the DTAA's that the business profit can be taxed in other contracting State in case the enterprise of a Contracting State is having a permanent establishment in other contracting State and it has never been a case admittedly of the Revenue that the aforesaid non-resident companies/entities are having their permanent establishment in India. Circular No. 786, dated February 7, 2000, governs the case of the respondent-assessee as the year involved is the assessment year 2007-08 and, in our view, the Circular No. 7, dated October 22, 2009, which came into force from October 22, 2009, cannot be said to be applicable in the facts of the instant case or can be said to be retrospective in nature or even clarificatory in nature."

In the light of the above we are of the considered view that the assessing officer was not justified the assessment. Therefore, we hereby quash the assessment order dated 10/3/2015."

Since we have quashed the assessment order being illegal. The grounds raised in this appeal are dismissed.

6. In the result , the appeal of the assessee in ITA No.993/JP/2016 is allowed and that of the Revenue's appeal in ITA No. 970/JP/2016 is dismissed.

Order pronounced in the open court on this 16th day of March 2017.

Sd/-

(भागचन्द)
(BHAGCHAND)
लेखा सदस्य / Accountant Member

Jaipur

Dated:- 16 /03/2017.

Pooja/-

Sd/-

(कुल भारत)
(KUL BHARAT)
न्यायिक सदस्य / Judicial Member

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

1. The Appellant- M/s J.C.Fashions, Jaipur.
2. The Respondent- The ACIT Circle-6, Jaipur.
3. The CIT
4. The CIT (A)
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 993 & 970/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar

