

**आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI**

**BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND**

**SHRI C.N. PRASAD, JUDICIAL MEMBER**

**आयकर अपील सं /I.TA No. 6565/Mum/2012**

**(निर्धारण वर्ष / Assessment Year: 2009-10**

The DCIT, Tower No. 6, 4 <sup>th</sup> Floor, Vashi Railway Station Bldg., Vashi, Navi Mumbai	<b>बनाम/</b> Vs.	Mrs. Supriya Suhas Joshi, 85/N/SG-23, Behind Bldg., No. 3, Pant Nagar, Ghatkopar, Mumbai-400 075
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.AAIPJ 1596L		
<b>(अपीलार्थी /Appellant)</b>	..	<b>(प्रत्यर्थी / Respondent)</b>
अपीलार्थी ओर से/ <b>Appellant by:</b>		Shri Pankaj Kumar
प्रत्यर्थी की ओर से/ <b>Respondent by:</b>		Shri M.C. Naniwadekar

**सुनवाई की तारीख / Date of Hearing :26.05.2016**

**घोषणा की तारीख /Date of Pronouncement :31.05.2016**

**आदेश / O R D E R**

**PER C.N. PRASAD, JM:**

This appeal is filed by the Revenue against the order of the Ld. CIT(A)-33, Mumbai dated 28.08.2012 pertaining to assessment year 2009-10.

2. The only issue in the appeal of the Revenue is that the Ld. CIT(A) erred in holding that payment made to manpower deployed overseas is in the nature of salary and the provisions of Sec. 195 or 192 of the Act does not apply to such payments.

3. The assessee is engaged in the business of manpower recruitment services filed return of income on 30.9.2009 declaring income at Rs. 25,02,480/-. The assessment was completed u/s. 143(3) on 22.12.2011 determining income at Rs. 2,04,64,180/-. While completing the assessment, the Assessing Officer disallowed Rs. 1,56,73,056/- u/s. 40(a)(ia) being the payments made by the assessee to the persons recruited by her treating such payments as not in the nature of salary. It is the contention of the assessee that the payments were made towards salary to the employees who are all non-residents and therefore the provisions of Sec. 195 have no application for the salary payments. However, the Assessing Officer held that the amount debited under the head "salaries" to the persons recruited abroad are not in the nature of salaries and disallowed u/s. 40(a)(ia) of the Act since no TDS was made at source.

4. On appeal, the Ld. CIT(A) deleted the disallowance holding that the payments made by the assessee were towards salaries to her employees who are all non-residents and the provisions of Sec. 195 have no application. He also held that the provisions of Sec. 192 also have no application since the salaries paid by the assessee to the employees abroad are not liable to be chargeable to tax in India.

5. Against this decision, Revenue is in appeal before us. The Ld. Departmental Representative vehemently supports the orders of the Assessing Officer in invoking the provisions of Sec. 40(a)(ia) of the Act for non-deduction of TDS on the salaries paid by the assessee to its non-resident employees. Reiterating the contentions of the Assessing Officer, the Ld. Departmental Representative submits that

there is no employee-employer relationship between the persons recruited abroad and the assessee and therefore the payments made by the assessee are not in the nature of salary. Hence, the provisions of Sec. 195/192 are attracted and the Assessing Officer has rightly made the disallowance u/s. 40(a)(ia) for non deduction of TDS on such payments.

6. The Ld. Counsel for the assessee referring to the provisions of Sec. 195 submits that the provisions of Sec. 195 are applicable only to the interest or any other sum chargeable under provisions of the I.T. Act except income chargeable under the head salaries. Therefore, he submits that the provisions of Sec. 195 are very clear that the same are not attracted to the payments made towards salaries. He also submits that provisions of Sec. 192 are also not attracted since all these salaries were paid to the non-resident employees and they are not chargeable to tax in India. He strongly places reliance on the order of the Ld. CIT(A) in deleting the disallowance made u/s. 40(a)(ia) of the Act and pleads for sustaining the order of the Ld. CIT(A).

7. Heard both sides, perused the orders of the authorities below. The Assessing Officer treated the payments made by the assessee to the persons recruited abroad is not in the nature of salaries and applied the provisions of Sec. 195 r.w. Sec. 40(a)(ia) and disallowed the same as no TDS was made by the assessee. The Assessing Officer concluded that there is no master and servant relationship between the assessee and the recruited persons and therefore, the payments cannot be held to be salaries. The Ld. CIT(A) considering the material

evidences submitted by the assessee and examining the averments of the Assessing Officer concluded that the recruited persons are employees of the assessee and therefore the payments made for the recruited persons abroad are nothing but salaries only and the provisions of Sec. 195 are not attracted to such salaries. While holding so, the Ld. CIT(A) observed as under:

*“ 3.2. The appellant has also cited case laws in the case of CIT vs UR Chaphekar & Ors (1977) 107 ITR 49(Bom). Appellant has filed further written submission dated 09.08.2012 stating as under:-*

I) Employer Employee Relationship

***It was submitted that greater the degree of control exercised over the person employed, conclusion would be in favour of employer / employee relationship.***

*In the case of persons working on sites abroad of foreign clients it was submitted that*

*i) The appointment is by the assessee.*

*ii) The supervision of the assessee is through supervisor and consultant.*

*iii) The working hours, salary overtime. leave increment, health / personal accident insurance, bocking, rescheduling / cancellation of air tickets, giving advance in the event of contingencies and other welfare measures are implemented by the assessee.*

*iv) The power to settle disputes, to terminate services of the employees vests with assessee solely.*

*2) In addition to various evidences laid in support of above-stated contention of employer-employee relationship, it is proposed to submit further evidence as under:*

***i) Copy of license issued by Ministry of Labour/ Overseas Indian Affairs***

*Pursuant to which the entire business of the assessee is carried out in market as Annexure-I. The attention of learned CIT(A) is drawn to clauses of the License.*

*ii) The license was issued to recruit maximum 300 workers for 5 years.*

*vi) The assessee cannot appoint sub agents to carry out her business*

*vii) The assessee has to pay prescribed standard wages*

*viii) Maintenance of various particulars employees.*

*Thus the License under which the assessee is allowed to carry out business also clearly shows that assessee can employ employees only and not agents.*

*ii) The persons visiting foreign visited on employment or work visa which is for longer duration. Specimen of work visa is marked as Annexure-2. When employee arrives in foreign country, he is given disembarkation card by Department of Foreign Affairs of the traveled country showing purpose of journey as "employment" Specimen is marked as Annexure-3. Any foreigner if he visits country on business visa or tourist visa is required to leave that country in six months. This fact also supports the contention that persons employed who were granted employment visa for five years were employees only and not consultants of professionals visiting foreign country on six months visa*

***3) Employment for a fixed tenure.***

*The employment contract can be for a fixed tenure or for the tenure of the project. Please find enclosed herewith Annual Reports of some of the companies appointing Managing Directors for fixed tenure of say 3-5 years as Annexure-4. Managing Director being subject to overall supervision and control of Board of Directors is an employee of the Company. It is*

*not necessary that employments should be perpetual or that employee should be given assurance of job on completion of tenure. In spite of above legal position it has been endeavor of the assessee to provide employment to the employees who completed their tenure. Specimen example is in case of Mr. Rajan Chatham vally who was working on Saudi Arabia site from 17.05.2008 to 23.06.2008 was employed to work on Qatar site from 25.1.2008 to 24.05.2009 Annexure 5 '*

*3.3 Along with this the appellant has filed a copy of agreement Technical Service Blanket Contract by and between Toyo Engineering Corporation, on behalf of Joint Venture of TOYO ENGINEERING CORPORATION (TEC, INDUSTRIAL DEVELOPMENT & RENOVATION ORGANIZATION OF IRAN (IDRO), JGC CORPORATION (JGC) ANI DAELIM INDUSTRIAL CO. LTD. (DIC). He has also filed a copy of agreement of Technical Service Contract entered by appellant with individuals deployed for the job abroad. I have gone through the same. A reading of the first one makes it clear that the appellant entered into contract with TEC-FIRM on one side, on behalf of joint venture and the appellant. The appellant then entered into contract with individuals upon the TEC's request made, governed by the technical service "BLANKET CONTRACT" entered into TEC and the appellant. As per that, the individual technical service contract was entered to supply the manpower to carry out the project of - TEC in the joint venture. This makes it clear that the appellant as well as TEC both were required to enter individual service contract with these persons who are to be deployed for the job on the site of the project. The technical service contract between appellant and individual then makes it clear that what appellant has contracted is services of the qualified and skilled personnels as per which they are required to work 60 hours a week for 25 months on provisional basis. This contract also provides that accommodation and meal will be free of cost and then sick leave of maximum 12 days in a year and home leave for 15 days will be available from appellant's side to the person. The contract also talks of P.A. Policy and other insurances in India and working country, uniform, safety apparatus, Air ticket and Air Fare and necessary documentation for Visa and work permit which all are to be reimbursed by appellant firm. It is only the Import Tax, custom duty and excess baggage charges on personal effects which will be borne by the person entering in to*

*the contract with the appellant firm. In view of these clauses there is no doubt that appellant has entered in to the contract with these persons who are deployed as man power of the appellant to the Site of the project as was required by the blanket contract between TEC and the appellant Radiant Services is Technical service contract is governed by the contract between TEC and appellant only dealing with issues of sick leave, reimbursement of Air Fare, PA Policy, Visa Documentation, Provisions for bonus for overtime and most importantly Job description to be specified at the job site and then provision for accommodation and meal free of cost. Thus, here facilities or perquisites whose monetary values also is not measured go a long way to show that the contract is of hiring service of these persons with fixed remuneration per month where nature of job work is also not pre determined. This can only be a contract of service and when the service itself is not specified at the time of entering the contract, it can be only employment on contract basis. The appellant has also furnished copies of some E-mail correspondences wherein TEC has communicated with the appellant saying that a particular persons performance is not satisfactory and hence he is not required them anymore. Simultaneously, TEC has asked appellant to arrange alternative person for them. The appellant has also filed a copy of certificate given to proprietor Mrs. Supriya S Joshi certificate u/s10 of the immigration at 1983 to commence or carry off the business of recruitment for deployment of Indian workers with foreign employers.*

*3.4. I have gone through the same and noted that certificate has been given by Ministry of Labour, Govt. of India allowing to continue recruitment for 5 years. This certificate puts an obligation on the appellant not to employ and sub-agent to conduct or carry her business and also makes it mandatory for the holder of certificate to maintain some permanent records at her place of business. It shows that power of recruitment and dismissal rests with appellant firm only. I have also gone through Sec. 195 which is reproduced as under:*

*“ 195. (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest {\*\*\*} 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 rate in force:"*

*3.5 Since sec. 195 does not take salary in its purview application of Sec.195 in the case is not tenable. The appellant in the submission has made an alternative submission also and i.e. as all the persons are working outside India to whom remunerations were paid from the bank account of the assessee situated outside India, neither section 192 nor section 195 are applicable as the income is not accruing or arising in India as per the provision of Section 9(1). Appellant has also stated that as per the relevant provisions of DTAA applicable in the case provision of section 40(a)(ia) are not attracted in the case.*

*3.6. Having decided that in the instant case when the service is obtained on fixed remuneration basis and control of removal and recruitment is exercised by the appellant, I am of the considered view that the contract is contract in the nature of employment for a particular period and hence I am convinced that sec 195 is not applicable in the case. The appellant has also made an alternative plea that these all persons recruited by her are non resident Indians and income has not accrued or arisen in India and then under DTAA scheme also no TDS has to be made in their cases from their remunerations. After going through the submissions, I am in agreement with the appellant that the remuneration paid by the appellant firm for the contract of service being in the nature of salary only, no TDS required to be deducted. The disallowances made u/s. 40(a)(ia) is deleted. Ground No. 1,2 and 3 are allowed."*

8. As could be seen from the above, it is the finding of the Ld. CIT(A) that the persons recruited in abroad are all employees of the assessee and the contract is in the nature of employment, therefore provisions of Sec. 195 are not applicable. The above findings have not been controverted or rebutted by the Revenue with evidences. In the circumstances, we do not find any infirmity in the order passed

by the Ld. CIT(A) in holding that remuneration paid by the assessee for the contract of services are in the nature of salary only and no TDS is required to be made u/s. 195 of the Act. Hence, we direct the Assessing Officer to delete the disallowance made u/s. 40(a)(ia) of the Act.

9. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 31<sup>st</sup> May, 2016.

Sd/-

Sd/-

**(B.R. BASKARAN)**

**(C.N. PRASAD )**

लेखा सदस्य / ACCOUNTANT MEMBER न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 31<sup>st</sup> May, 2016

व.नि.स./ Rj , Sr. PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

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

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार**

(Dy./Asstt. Registrar)

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**