आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'बी', मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH MUMBAI

BEFORE : SHRI R.C.SHARMA, AM
&
SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./**ITA No.6211/Mum/2013**

(**निर्धारण वर्ष /** Assessment Year : 2010-2011)

Macoma Hardwares, 71/C, Govt. Ind. State Near Ganesh Nagar Kandivali (West) Mumbai-400067	Vs.	DCIT, Circle-25(3), Bandra, Mumbai-400051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAAFM 1385 L**		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by : Shri Ishwar Prakash Rathi

राजस्व **की ओर से** /Revenue by : Shri Aarsi Prasad

सुनवाई की तारीख **/ Date of Hearing : 15/09/2015**

घोषणा की तारीख**/Date of Pronouncement : 20/11/2015**

आदेश / O R D E R

PER R.C.SHARMA (A.M.) **:**

This is an appeal filed by the assessee against the order CIT(A), dated 7-8-2013 for assessment year 2010-2011, in the matter of order passed u/s. 143(3) of the I.T. Act on the following ground :-

> *"1) That the learned Commissioner of Income Tax (Appeals) erred in confirming the disallowance of Rs.45,92,450/- u/s.40(a)(i), being export commission paid to non resident agents without deduction of TDS, however TDS was no deductable on those payments."*

2. Rival contentions have been heard and record perused. Facts in brief are that the assessee is a firm engaged in the business of Export of Hardware & Engineering Goods. During the course of assessment proceedings, the AO found that the assessee firm had debited an amount of Rs.45,92,450/- under the head export commission paid in the P&L

account. From the details filed, it is seen that the two recipients of this commission are based on Dubai, UAE. However, no tax was deducted on such payment of commission. Accordingly, the AO disallowed the same by invoking the provisions of Section 40(a)(ia) of the Act.

3. By the impugned order the CIT(A) confirmed the action of the AO.

4. We have considered rival contentions and found that the issue is squarely covered by the decision of Bangalore Bench of the Tribunal in the case of **Exotic Fruits (P) Ltd., 40 taxmann.com 348**, wherein it was held that commission paid to non-resident agents without deduction of TDS is not liable to disallow on the plea that services of non-resident agents were rendered outside India and commission was also paid outside India, income of such agents by way of commission could not be considered as accrued or arisen or deemed to accrue or arise in India. It was further held that in the absence of permanent establishment(s) of such agents in India, incomes of said agents were not liable to be taxed in India and, as such, assessee was not obliged to effect any deduction of tax on commission payments made to agents who were positioned overseas.

5. The Chennai Bench of the Tribunal in the case of **Comex Exports (P) Ltd., 45 taxmann.com 406**, held that the payment of commission to foreign agents for rendering services abroad in view of the fact that those agents do not have permanent establishment in India and moreover services rendered were not in the nature of technical services, income could not be said to accrue or arise in India and, thus, assessee was not liable to deduct tax at source while making payments to said agents.

Similar view was taken by Chennai Bench of the Tribunal in the case of **Farida Prime Tannery (P) Ltd., 45 taxmann.com 174**.

6. Hon'ble Supreme Court in the case of **GE India Technology Cen. (P) Ltd. 193 Taxman 234(SC)**, observed as under :-

> *"Section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any interest (not being interest on securities) or any other sum (not being dividend) chargeable under the provisions of the Act, to deduct income-tax at the rates in force unless he is liable to pay income-tax thereon as an agent. Payment to non-residents by way of royally and payment for technical services rendered in India are common examples of sums chargeable under the provisions of the Income-tax Act to which the aforestated requirement of tax deduction at source applies. q/ The tax so collected and deducted is required to be paid to the credit of the Central Government in terms of section 200, read with rule 30 of the Income-tax Rules, 1962. Failure to deduct tax or to pay tax would also render a person liable to penalty under section 201, read with section 221. In addition, he would also be liable under section 201 (JA) to pay simple interest at 12 per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax was actually paid. The most important expression in section 195(1) consists of the words 'chargeable under the provisions of the Act'. A person paying interest or any other sum to a non-resident is not liable to deduct tax ([such sum is not chargeable to tax under the Act. For instance, where there is no obligation on the part of the payer and no right to receive the sum by the ''recipient does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the Act. Section 195 contemplates not merely amounts, the whole of which are pure income payments, it also composite payments which have an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct TDS in respect of such composite payments. The obligation to deduct TDS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. This obligation being limited to the appropriate proportion of income flows from the words used in section 195(1), namely, chargeable under the provisions of the Act'. It is for this reason that vide Circular No. 728, dated 30-10-1995, the CBDT has clarified that the tax deductor can take into consideration the effect of the DTAA in respect of payment of royalties and technical fees while deducting TDS. It may also be noted that section 195(1) is in identical terms with section 18(3B) of the 1922 Act. In CIT v. Cooper Engg. Ltd.[1968] 68 ITR 457 (Bom.) it was pointed out that if the payment made by the resident to the non-resident is an amount which is not chargeable to tax in India, then no tax is deductible at source even though the assessee may not have made an application under*

section 18(3B) [now section 195(2)]. The application of section 195(2) presupposes that the person responsible for making the payment to the non-resident is in no doubt that tax is payable in respect of some part of the amount to be remitted to a non-resident but is not sure as to what should be the portion so taxable or is not sure as to the amount of tax to be deducted. In such a situation, he is required to make an application to the ITO ('TDS) for determining the amount. It is only when these conditions are satisfied and an application is made to the ITO(TDS), that the question of making an order under section 195(2) will arise.

While deciding the scope of section 195(2), it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of section 195. Hence, apart from section 9(1), sections 4, 5, 9, 90 and 91 as well as the provisions of the DTAA are also relevant, while applying tax deduction at source provisions. Reference to the ITO (TDS) under section 195(2) or 195(3) either by the non-resident or by the resident prayer is to avoid any future hassles for both resident as well as non-resident. Section 195(2) and 195(3) are safeguards. The said provisions are of practical importance."

7. We found that the non-resident brokers have not rendered any services in India, therefore, commission income neither accrued nor arose in India in view of the decision of the Hon'ble Delhi High Court in the case of **Eon Technology Pvt. Ltd., 343 ITR 366 (Del)**. There is no dispute to the well settled proposition that provisions of Section 195 does not apply when no income is found to be taxable in India, therefore, there was no reason for making any disallowance under provisions of Section 40(a)(i) in view of decision of the Hon'ble Supreme Court in the case of **G.E.India Technology Centre Pvt. Ltd., 327 ITR 456**. There are also judicial pronouncements supporting this proposition, which are reported in **10 ITR 501(Trib), 86 ITD 102 and 10 ITR 147(Trib)**.

8. Respectfully following the above decision of Hon'ble Supreme Court, High Courts and ITAT Benches, we do not find any merit in the action of lower authorities for the disallowance of foreign commission on the plea of non-deduction of tax at source u/s.195 of the Act.

9. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this 20/11/2015.

आदेश की घोषणा खुले न्यायालय में दिनांकः 20/11/2015 को की गई ।

Sd/-	**Sd/-**
(SANDEEP GOSAIN)	**(R.C.SHARMA)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated 20/11/2015

प्र.कु.मि/pkm, नि.स/ 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), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**