

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE

BEFORE SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER
AND SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

ITA No.714/Bang/2015
Assessment year : 2008-09

M/s. J.K. Fabrics Bangalore Pvt.Ltd., No.28, 28/1, 25 th Cross, Cubbonpet, Bangalore – 560 002. PAN: AABCJ 6118Q	Vs.	The Assistant Commissioner of Income Tax, Circle 11(5), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Padamchand Khincha, CA
Respondent by	:	Shri Korra Meghanath Chowhan, Addl.CIT(DR)

Date of hearing	:	08.10.2015
Date of Pronouncement	:	23.10.2015

ORDER

Per Asha Vijayaraghavan, Judicial Member

This appeal by the assessee is directed against the order dated 28.01.2010 of the CIT(Appeals)-4, Bangalore relating to assessment year 2008-09.

2. The assessee is a private limited company, engaged in the business of export and sale of silk fabrics. During the course of assessment proceedings, the Assessing Officer observed that the assessee firm had

claimed expenses relating to overseas commission paid to a foreign non-resident agent amounting to Rs. 17.87 lakhs. The facts brought on record by the AO are reproduced as under:-

“The agreement entered into by the assessee company was perused into to know the true nature of these transactions. The following points in the agreement are worth mentioning.

Function of the agent:

- (a) The agent will utilize its best efforts to procure orders in favour of the principals (assessee) for the supply and export of fabrics.
- (b) Inform to and receive from principals required samples for submission to prospective buyers in Italy.
- (c) Will link all instruction, technical details, clarifications and requests between customers and principals and time.
- (d) Will follow-up with customers for prompt payment to principals in the power manners.
- (e) Will act in general to the best advantage of the principals and take care of their interests sincerely.

The above agreement can be summarised to understand that the agent is marketing the product in Italy and Brazil and has obtained the right to market the product. It is not only limited to marketing the product of the assessee but procuring business opportunities, and all other services regarding the potential clients, collecting information on clients, competitors, their products and prices, complying with the laws, rules and regulations of the land, obtaining approvals, advertising and promoting the services of the assessee etc.”

3. The assessee submitted the copy of the agreement entered into with Dr. Matteo Mora, Italy and a note explaining as to why the commission of

Rs. 17,89,110/- paid to Dr. Matteo Mora, Italy was not liable for TDS under section 195.

4. The AO, however, was of the view that the services rendered by the non-residents were technical in nature falling within the purview of section 9(1)(vii) of the Act, as fees for technical service and hence, the assessee was liable to deduct taxes as per the provisions u/s. 195(1) of the Act, and therefore, the entire expenditure was disallowed u/s. 40(a)(ia) of the Act.

5. Before the CIT(Appeals) the assessee submitted that it is not in dispute that the commission paid to Dr. Matteo Mora, Italy was for procurement of orders and the said payment was made during the financial year 2007-08 relevant to AY 2008-09. It was further submitted that the agent rendered services outside India and no services were rendered from India or in India. The agent was a 'non resident' under section 2(30) read with section 6 of the Act.

6. It was submitted by the assessee that Circular No. 23 dated 23-7-1969 and Circular No. 786 dated 07.02.2000 provides that there would be no requirement to deduct tax at source u/s. 195 in respect of the commission paid to a non resident agent. In Circular No.786, it has been stated as follows:-

“2. The deduction of tax at source under section 195 would arise if the payment of commission to the non-resident agent is chargeable to tax in India. In this regard attention to C. B. D. T. Circular No. 23, dated 23rd July, 1969, is drawn, where the

taxability of “Foreign Agents of Indian Exporters” was considered alongwith certain other specific situations. It had been clarified then that where the non-resident agent operates outside the country, no part of his income arises in India. Further, since the payment is usually remitted directly abroad it cannot be held to have been received by or on behalf of the agent in India. Such payments were therefore held to be not taxable in India. The relevant sections, namely, section 5(2) and section 9 of the Income-tax Act, 1961, not having undergone any change in this regard, the clarification in Circular No. 23 still prevails. No tax is therefore deductible under section 195 and consequently, the expenditure on export commission and other related charges payable to a non-resident for services rendered outside India becomes allowable expenditure. On being appraised for this position, the Comptroller and Auditor-General have agreed to drop the objection referred to above.”

7. Further it was submitted that Circular No. 7/2009 [F. No. 500/135/2007-FTD-1], dated 22-10-2009 has withdrawn Circular No. 23 and Circular No. 786. However, in the present case, the assessment pertains to AY 2008-09 relevant to financial year 2007-08. Circular Nos. 23 and 786 were in force when commission was paid. These circulars were operative on the first day of the assessment year under consideration. No tax was deducted at source in respect of the commission paid, inter alia, relying on the above circulars. Circular No. 7 of 2009 states that circular nos. 23 and 786 has been withdrawn with immediate effect i.e., w.e.f. 22.10.2009. In other words, the said circulars cannot be said to be inoperative prior to 22.10.2009. Thus, the said circulars would be applicable/operative in respect of transactions prior to 22.10.2009. In other

words, Circular No. 7 of 2009 does not operate retrospectively. Reliance was placed on the following decisions:-

- Exotic Fruits Pvt. Ltd v ITO (IT) ITA Nos. 1008 to 1013fBang/2012 dated 4.10.2013 ITAT Bangalore. (Copy enclosed)
- CIT v. Angelique International Ltd. [2013] 359 ITR 9 (Delhi)
- CIT v. Model Exims [2013] 358 ITR 72 (All)
- CIT v. Allied Exims [2014] 363 ITR 62 (All)
- Asst. CIT v. Modern Insulator Ltd. [2011] 110 ITR (Trib) 147 (Jaipur)
- DCIT v. Divi's Laboratories Ltd. [2011] 110 ITR (Trib) 501 (Hyd)
- ACIT v Rapid Pack Engg. P Ltd (2014] 32 ITR (Trib) 329 (Mumbai)

8. The assessee also submitted that it has been held that services of export commission agent does not constitute managerial, technical or consultancy services u/s. 9(1)(vii) and hence not chargeable to tax in India and not liable for TDS u/s. 195 of the Act in the following decisions:-

- DIT (IT) v Panalfa Autoelektrik Ltd ITA No. 292/2014 dated 18.9.2014 Delhi HC
- Adidas Sourcing Ltd v ADJT [2012] 80 DTR 369 (Delhi)

9. It was submitted that the Hon'ble Supreme Court in *Ishikawajma Harima Heavy Industries Ltd v CIT 288 ITR 408* held that to attract section 9(1)(vii), two conditions are to be satisfied viz., services should be rendered

in India and such services should be utilised in India. The decision of the Bombay High Court in *Clifford Chance v. DCIT 12009] 318 ITR 237* is an authority for the proposition that the ratio of Supreme Court in *Ishikawajma Harima Heavy Industries Ltd.* (supra) regarding twin criteria of rendering of service in India and its utilisation in India has not been done away with by the incorporation of Explanation to section 9(2) by Finance Act, 2007. Similar view was taken by the jurisdictional High Court in *Jindal Thermal Power Co. Ltd v CIT (2009) 182 TAXMAN 0252* wherein it was held that there was no requirement to deduct tax at source in respect of technical services which are rendered outside India. It was further held as follows:-

“ in respect of “technical services” the rendering of services being purely offshore and outside India, the remuneration whatever paid towards technical services does not attract tax liability.”

10. It was submitted that following the above decision of the Hon'ble jurisdictional High Court, the Tribunal in the case of *Bovis Lend Lease India P Ltd v ITO, order dated 28.08.2009* held that there was no liability to deduct tax at source in respect of fees for technical services paid outside India for services rendered outside India.

11. In view of the above, the assessee submitted that the commission paid to Dr. Matteo Mora, Italy could not be considered as 'fees for technical services' u/s. 9(1)(vii) of the Act. Thus, the said payment would not constitute income chargeable to tax in India under any of the limbs of

section 5(2) or under section 9 and as such, there was no liability to deduct tax at source in respect of commission paid to agents under section 195 of the Act.

12. It was also submitted that the Bangalore Bench of the Tribunal in *DCIT v Anand Marakala* (ITA No.1584/2012 and CO 58/2013) held that disallowance u/s. 40(a)(ia) is limited to the extent of amount 'payable' as on the last day of the previous year and the payments actually made during the year cannot be disallowed u/s. 40(a)(ia). The Chennai Bench of the Tribunal in *DCIT v MRF Ltd.* in ITA No. 1985/Mds/2011, order dated 4.3.2014 held that if there are two views possible, the view favourable to the assessee is to be followed and consequently payments actually made were held to be not liable for disallowance under section 40(a)(ia).

13. It was submitted that in the present case there was no outstanding commission amount payable to Dr. Matteo Mora, Italy as on 31.3.2008. The entire sum of Rs. 17,89,110/- was actually paid to Dr. Matteo Mora during the relevant previous year. In view of the above, commission of Rs. 17,89,110/- paid to Dr. Matteo Mora, Italy was not liable for TDS u/s. 195 and consequently the said expenditure cannot be disallowed u/s. 40(a)(i) / 40(a)(ia) of the Act.

14. The Id. CIT(Appeals) relying on the decision of AAR in the case of *SKF Boilers and Driers Pvt. Ltd. In Re, 345 ITR 385 AAR*, held as follows:-

“5. On examining the instant case carefully, there can be no two opinions that the similar issues considered by the Hon’ble Authority are on identical facts. In fact, the contentions of the assessee’s representative are similar to that raised in the aforesaid cases. With respect to Treaty Law, the Indo-French DTAA was considered in Rajiv Malhotra case (supra) and relevant articles dealing with taxability of the payment in the Indo-French DTAA as well as DTAAs relied on are pari-materia. The decisions of the AAR are certainly case specific, but possess persuasive value. In my view, the decisions are wholly applicable to the instant case as the facts and issues are identical. When a Higher Judicial Forum considers similar issues on identical facts, I see no reason in not applying the reasoning as well as decision to the instant case. Hence, the action of the AO is upheld.”

15. Aggrieved by the order of CIT(Appeals), the assessee has come up in appeal before us on the following effective grounds of appeal:-

“2.1 The learned CIT(A)-IV, Bangalore has erred in confirming the disallowance of commission paid to non-resident agent amounting to Rs 17,87,000/- under section 40(a)(ia) for the reason that the payment to non-resident agent constitute fees for technical services under section 9(1)(vii) of the Income Tax Act, 1961.

2.2 The learned CIT(A)-IV has erred in holding that the commission paid to a non resident agent in the nature of ‘fees for technical services’ under section 9(1)(vii) of the Income tax Act, 1961. The appellant was not obliged to withhold tax at source under section 195(1) of the Act. The payment made does not fall within the ambit of the definition of ‘fees for technical services’ under section 9(1)(vii) of the Income Tax Act, 1961.

16. The Id. counsel for the assessee, Shri Padamchand Khincha, reiterated the submissions made before the CIT(Appeals) and took us through the paperbook which contained the compilation of case laws. He pointed out to the decision of the Hon'ble Allahabad High Court in the case of *CIT v. Allied Exims [2014] 48 taxman.com 180 (All)* wherein the assessment year involved was AY 2008-09 as in the present case. The Hon'ble Allahabad High Court held as follows:-

“A certain sum was disallowed under section 40(a)(i) for non-deduction of TDS on payments made to non-resident as per Circular No.7, dated 22-10-2009 – Assessee submitted that when return was filed, earlier circular No.786, was applicable as per which assessee was not obliged to deduct TDS – Whether since earlier circular created a vested right in taxpayer and subsequent circular sought to withdraw said right, subsequent circular will not have retrospective effect and disallowance was to be deleted – Held, yes [Para 6] [in favour of assessee].”

17. The Id. counsel for the assessee also relied on the ITAT Delhi Bench decision in the case of *Welspring Universal v. Jt. CIT [2015] 56 taxman.com 174 (Delhi-Trib.)* wherein at para 13 of the order, it has been observed as follows:-

“It can be seen that the Id. CIT relied on two decisions of the Authority of Advance Ruling in *SKF Boilers & Driers (supra)* and *Rajiv Malhotra (supra)* . It is correct that at least in *SKF Boilers (supra)*, the Authority has held that the payment of commission on export orders is chargeable to tax u/s 5(2)(b) read with section 9(1)(i) of the Act. By an independent evaluation of the matter in the light of the provisions of section 5(2) read with section 9 of the Act, we have held above that the foreign commission is not chargeable to tax in the hands of the non-

resident. Be that as it may, it is important to note that it is not a solitary precedent available on the subject. The Hon'ble jurisdictional High Court in Director of Income-tax (International Taxation) vs. Panalfa Auto Elektrik Ltd. (2004) 272 CTR (Del) 117, has held that the services rendered by non-resident agent for procuring export orders for the assessee cannot be held as fees for technical services u/s 9(1)(vii) of the Act. In this case, the assessee made an application u/s 195(2) for authorization to remit certain amount as commission for arranging export sales and realizing payment to non-resident company. The AO held that the commission payment was taxable as fees for technical services u/s 9(1)(vii) of the Act. That is how, when assailed, the Hon'ble High Court held that the payment of commission cannot be considered as fees for technical services in terms of section 9(1)(vii) so as to call for any deduction of tax at source. The Hon'ble Madras High Court in CIT vs. Faizan Shoes (P) Ltd. (2014) 367 ITR 155 / 226 Taxman 115 / 48 taxmann.com 48, has also held that no disallowance can be made u/s 40a(i) in respect of commission paid to non-resident agent for providing services outside India.”

18. The assessee also relied on the decision of *DIT v. Panalfa Auto Elektrik Ltd.* [2014] 49 taxmann.com 412 (Delhi).

19. The Id. DR, on the other hand, relied on the order of CIT(Appeals).

20. We have considered the rival submissions. Taking the totality of facts and circumstances into consideration and relying on the decision of the Hon'ble Delhi High Court in the case of *CIT v. Eon Technology P. Ltd.*, 343 ITR 366, we are of the view that the business profits of a non-resident cannot be brought to tax until and unless there is a PE in India. Further it has been observed by the Delhi Bench with respect to the position of placing reliance on the decision of Authority for Advance Ruling as follows:-

“ The fact that the decision of the Authority for Advance Ruling, relied by the Id. CIT favours the Revenue’s case, at the maximum, makes the issue about deduction of tax at source from foreign commission, a debatable one.”

21. Hence in the present case, the CIT(A)’s reliance on the decision of the Authority for Advance Ruling is controverted by the decision of the Hon’ble Madras High Court in *CIT v. Faizan Shoes (P.) Ltd.*, 367 ITR 155. Further, we find that the AO has not disputed the nature of payment being the commission paid to Dr. Matteo Mora of Italy and therefore the said payment does not fall u/s. 5(2) or clause (vii) of Section 9(1) so that Explanation 2 can be attracted on this amount. Further, Circular No.786 of 7.2.2000 was withdrawn on 22.10.2009 and therefore withdrawal of the Circular is prospective and not retrospective. The assessee was not liable to deduct tax in respect of commission paid to the non-resident agent, when during the relevant year, Circular No.786 dated 7.2.2000 was very much in existence. The subsequent withdrawal of the Circular does not affect the position of the assessee on this issue during the year under consideration.

22. In Circular No.23 dated 23.7.1969, it has been made clear that “*A foreign agent of Indian exporter operates in his own country and no part of his income arises in India. His commission is usually remitted directly to*

him and is, therefore, not received by him or on his behalf in India. Such an agent is not liable to income-tax in India on the commission."

23. Hence, the assessee's appeal is allowed.

Pronounced in the open court on this 23rd day of October, 2015.

Sd/-

(JASON P. BOAZ)
Accountant Member

Sd/-

(ASHA VIJAYARAGHAVAN)
Judicial Member

Bangalore,
Dated, the 23rd October, 2015.

/D S/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.