

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "A" BENCH NEW DELHI)**

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER

&

SHRI O.P. KANT, ACCOUNTANT MEMBER

In ITA No. 3893/Del/2014

Assessment Year: 2010-11

Ambica Steels Ltd. C-54/1, Wazirpur Industrial Area, Delhi	Vs.	Addl. CIT Range -1, New Delhi
(Applicant)		(Respondent)
(PAN: AAACA9942Q)		

Assessee by: Shri S.K. Jain, CA
Shri Nitin Jain, CA
Revenue by: Shri R.C. Danday, Sr. DR

Date of hearing	13/09/2017
Date of pronouncement	03/10/2017

ORDER

PER AMIT SHUKLA, JUDICIAL MEMBER:

The aforesaid appeal has been filed by the assessee against the impugned order dated 03.04.2014, passed by the Ld. CIT (Appeals)-IV, New Delhi for the quantum of assessment passed u/s 143(3) for the A.Y. 2010-11. The assessee is mainly aggrieved by disallowance of export commission of Rs. 87,45,323/- on the ground that the assessee has not deducted TDS on such export commission paid to the non-resident.

2. The brief facts are that the assessee has debited an amount of Rs. 1,88,68,756/- on account of commission out of which amount aggregating to Rs. 87,45,823/- was paid to a non-resident foreign agent

towards commission on export sales. The Assessing Officer noted that the assessee has not deducted TDS on the payment made to the non-resident as its income deemed to accrue or arise in India within the meaning of section 9 and therefore, the assessee was liable to deduct TDS on export commission paid to a non-resident. Before the Ld. CIT (Appeals), the assessee contended that in the earlier years similar disallowance was made by the AO in the A.Ys. 2008-09 and 2009-10, but in first appeal, the Ld. CIT (Appeals) had deleted the said addition. However the Ld. CIT (Appeals), held that the earlier orders of the CIT (Appeals) cannot be followed, because now there is a judgment of Hon'ble Jurisdictional High Court in the case of **CIT vs. Havells India Ltd. reported in 253 CTR 271 (Delhi)**, wherein the Hon'ble Court has held that tax has to be withheld on payment made to non-resident.

3. Before us, the Ld. Counsel for the assessee submitted that this issue stands covered by the decision of the Tribunal in the assessee's own case not only in the A.Y. 2008-09 (in ITA No. 2264/Del/2012. order dated 25.2.2013) but also by the Tribunal's order in the A.Y. 2009-10 (in ITA No. 878/Del/2013 vide order dated 13.8.2014). He also pointed out that decision of the Tribunal in A.Y. 2008-09 was subject matter of appeal by the revenue u/s 260A before the Hon'ble Delhi High Court, wherein the appeal of the revenue was dismissed vide order and judgment dated 29.4.2015 in ITA No. 268/Del/2015/ CM No. 7355 / Del/2015. On the other hand the Ld. DR relied upon the order of the Learned CIT (Appeals) wherein reliance was placed on the decision of Delhi High Court in the case of **CIT vs. Havells India Ltd. (supra)**.

4. After considering the rival submissions and on perusal of the relevant materials placed on record, we find that it is an undisputed fact that the similar issue of disallowance of payment of export commission to non-resident had been disallowed by the AO in the A.Ys.

2008-09 and 2009-10, on the same ground that no TDS was deducted while remitting the said payment to non-resident. In the earlier years this issue has been decided in favour of the assessee by the Tribunal vide two separate orders for the A.Y. 2008-09 and 2009-10. In the A.Y. 2009-10, the Tribunal has even taken note of judgment of Hon'ble Delhi High Court in the case of **CIT vs. Havells India Ltd. (supra)**. The relevant observation and the finding of the Tribunal for A.Y. 2009-10 is reproduced here under:-

“8. We have heard both the parties and perused the records and gone through the case laws cited before us. We find that the assessee company is manufacturing steel ingots, bars etc for domestic market as well as international market. It has paid commission of Rs. 2,82,54,644/- to non-residents on export sales of Rs. 126 crores for the year under consideration. The authorities below have held that assessee was obliged to deduct TDS on the commission paid to non-residents and in the absence thereof, the expenditure claimed is not eligible for deduction on account of provision contained in Section 40(a) (i) of the Act. We find identical issue had come up before the co-ordinate Bench in the case of the assessee for the immediate preceding Assessment Year, wherein, by order dated 25.02.2013 in ITA No. 2264/Del/2012 it was held as under:-

“6. We have heard both the sides, considered the material on record as well as orders of authorities below. It is found that the assessee has filed commission agreement at first appellate stage and CIT(A) has concluded to delete the impugned addition by elaborately discussing such issue from paras 5.10 of 5.13 of his order which reads as under:

5.10 I have carefully considered the assessment order, remand reports of the AO and the submissions made by the Id AR. The copy of commission agreement with M/s. Tranox GMBH to whom major commission was paid by the assessee

was not asked for the AO during the assessment proceeding, although AO has cited it as one of the reasons for disallowing the export commission paid by the appellant. The appellant was, therefore, prevented by sufficient cause from furnishing the above agreement during the assessment proceeding. Further, as mentioned earlier, the said commission agreement was duly forwarded to the AO for examination during the remand proceeding and the AO has not given any adverse comments on merit. The said additional evidence is very much related to the issue on which addition was made by the AO and the grounds of appeal raised by the appellant. Considering the above, the said additional evidence is admitted under Rule 46A in the interest of natural justice.

5.11. Coming to the merit of the impugned addition, I find that the AO has erroneously disallowed the total export commission paid at Rs. 3,67,19,237/- although the same included commission of Rs. 76,52,798/- paid to domestic parties on which TDS u/s 194H is stated to have been deducted by the appellant. In his remand report dated 16.01.2012, the AO has admitted the above mistake and has mentioned that the disallowance be restricted to the amount of commission expenses on which TDS had not been made. The addition to the extent of Rs. 76,52,798/- is, therefore deleted.

5.12. Coming to the balance amount of Rs. 2,90,66,440/-, as per the facts of the case, the assessee company is engaged in the business of manufacturing of steel ingots and bars etc, and selling the some in domestic market and also in international market. The assessee does not have any office outside of India. The export orders ore received through agents in various countries approved to procure the orders against which the assessee supplies the goods to the foreign buyers. The assessee has submitted details of services rendered by the foreign agents. The assessee has also submitted bill-wise details of exports mode and commission paid, along with copy of account of foreign agents giving particulars of the payments made to them against export invoices as well as commission accrued thereon, copy of payment vouchers and outward remittance advice issued by

the Bank showing that the remittance advice issued by the Bank showing that the remittance was made directly by the Bank to the foreign agent in foreign exchange etc. It is submitted by the Id AR that since the above exports commission relates to services rendered outside India and payment is made outside India, there is no income chargeable to tax in India in the hands of foreign agents and hence the provisions of Section 195 of the Act was not applicable. Further, it is argued by the Ld. AR that the commission agents do not require any professional or technical degree and hence the commission paid to them is not in the nature of fees for technical services as alleged by the AO. Further, it is argued that Circular No. 7 of 2009 dated 22.10.2009 issued by CBDT is prospective in income and as per CBDT's Circle No. 23 dated 23.07.1969 and Circular No. 786 dated 07.02.2002 applicable at the relevant time, the assessee was not obliged to deduct any tax u/s 195 on the above commission payment.

5.13. The Ld AR has relied upon a large number of case laws in support of his arguments. On careful examination of the matter, I find that under the facts and circumstances paid to the export agents cannot be construed as fees for technical services. As such, the said amount is not subject to TDS u/s 195 of the Act and hence the question of disallowance u/s. 40(a) does not arise. This is supported by the decision of the Hon'ble Apex Court in CIT Vs. Toshoku Ltd. (1980) 125 ITR 525 and GE India Technology com (P) Ltd Vs. CIT 193 Taxman 234. Further, the Hon'ble ITAT, Hyderabad in the case of DCIT Vs. Divis Laboratories Ltd. 140 TTJ 796 has held that the commission paid to non-resident agent for services rendered outside India are not chargeable to tax in India. Similar view has also been expressed by the Hon'ble ITAT, Jaipur in the case of ACIT Vs. Modern Insulators Ltd. 140 TTJ 715. The AO while making addition has relied upon the judgment of Hon'ble ITAT, Delhi which as pointed out by the Id AR has been overruled by the Hon'ble Delhi High Court in the case of Vanoord ACZ India Pvt. Ltd. Vs. CIT 323 ITR 130. Further the Hon'ble Delhi High court recently in CIT Vs. Eon Technology Pvt. Ltd. (2012) 246 CTR (Del) 40 on similar facts held that disallowance under section 40(a) (i) was not

called for on sales commission paid to non-resident as per the following head-notes:- Payment of sales commission to non-resident Assessee paid commission of Rs.33.36 lakhs to its holding company ETUK on the sales and amount realized on export contracts - When a non-resident agent operates outside the country no part of his income arises in India, and since payment is remitted directly abroad, and merely because an entry in the books of accounts is made. It does not mean that the non-resident has received any payment in India - Appellate authorities, on the basis of material on record, have rightly held that business connection is not established - Tax was not deductible at source and disallowance under section 40(a)(i) was not called for. In view of above, considering the facts and circumstances of the case, the statutory provisions and respectfully following the settled case laws on the matter. I find that the impugned addition of Rs. 2,90,66,440/- is not sustainable on facts or in law. To sum up, the addition of Rs.3,67,19,237/- (i.e. Rs.76,52.798/- plus Rs.2,90,66,440/-) is deleted.”

6. On perusal of the above reproduced portion of the conclusion as drawn by the CIT (A), we find that he has considered each and every aspect of the matter in detail before arriving at the finding. Neither any flaw nor infirmity has been pointed out nor noticed. Moreover, the basis and reasoning as given by the CIT(A) are otherwise found to be just and appropriate. In view of the facts and circumstances and material on record, we are of the considered opinion that conclusion as drawn by the CIT(A) in this case is just and appropriate, which calls for no interference at our ends. As such, while concurring with the finding as arrived at by the CIT (A), we uphold his order and dismiss the appeal of the Revenue being de void of any merits.”

9. Having regard to the aforesaid decision, we are of the opinion that the assessee was not obliged to deduct TDS on payment of export commission to the non-resident and therefore disallowance need to be deleted. The Ld. CIT (A) as well as the Id DR, have relied upon the judgment in Havell's case (supra), in the said case, the assessee had incurred testing charges to a U. S. Company which was disallowed u/s 40(a) (i) of the Act. The Tribunal held that sec

9(i)(vii) (b) exempts fees for technical services paid for purpose of making of earning income outside India and as such disallowance made u/s 40(a)(i) was deleted. However, the Hon'ble High Court held that the source of income in respect of testing charges since emanated from India, therefore the exemption did not apply to the assessee. It is thus evident that the controversy before the Hon'ble High court was in respect of testing charges paid to a non-resident and its taxability u/s 9(i) (vii) (b) of the Act. The issue however before us is neither in respect of testing charges nor in respect of Section 9(i) (i) of the Act. The issue has been already held in favour of the assessee in the provision Assessment Year 2008-09. Ld DR apart from placing reliance on the aforesaid judgment has not been able to distinguish or point out any error in the decision rendered by the aforesaid order of the co-ordinate bench in assessee's own case. In fact we also find that the Hon'ble Delhi High court in the case of **CIT Vs. EON Technology Pvt. Ltd. 246 CTR 40 (Delhi)** held that:-

“payment of sales commission to non-resident to its holding company on the export sales is not liable to disallowance u/s 40(a) (i) on the ground that when a non-resident agent operates outside the country no part of his income arises in India, and since payment is remitted directly abroad it does not mean that the non-resident has received any payment in India.”

10. Having regard to the aforesaid case law, we are inclined to respectfully follow the order of the co-ordinate bench of the Tribunal in the assessee's own case for Assessment Year 2008-09 and allow the appeal of the assessee.

11. In the result the appeal is allowed.”

[Emphasis added is ours]

5. In the aforesaid decision, the Tribunal has very categorically distinguished the judgment of the Hon'ble High Court in the case of **CIT vs. Havells India Ltd. (supra)** on the ground that the issue involved therein and the nature of payment was entirely different from the facts of the assessee case. In that case the payment was for fees for technical

services under section 9(1)(vii) for which there is entirely different concept. The Tribunal on the contrary has followed the subsequent decision of Hon'ble Delhi High Court in the case of **CIT vs. Eon Technology P. Ltd. (2012) 343 ITR 366 (Delhi)**, wherein Hon'ble High Court has deleted the similar disallowance of payment of sales commission to a non-resident operating outside India on the ground that the same cannot be treated as payment received or accrued in India by a non-resident. Apart from that, in assessee's own case in the A.Y. 2008-09, Hon'ble High Court has dismissed the revenue's appeal on this point and thus, in assessee's own case on the same issue, this matter stands settled and therefore, respectfully following the judicial precedence of the earlier years, we hold that no disallowance u/s 40(a)(i) can be made on the commission paid to non-resident on export sales, because non-resident has carried out its activities outside India and no part of his/its income arises or accrues in India and further payment which has been remitted directly to the non-resident. Hence it cannot be held that non-resident has received any payment in India and therefore liable to TDS on such payment. Thus, the grounds raised by the assessee are allowed.

5. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 03.10.2017.

**Sd/-
(O.P. KANT)
(ACCOUNTANT MEMBER)**

**Sd/-
(AMIT SHUKLA)
(JUDICIAL MEMBER)**

Dated: 03/10/2016

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

		Date	
1.	Draft dictated on	13.9.2017	
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3.	Draft proposed & placed before the second member		
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7.	File sent to the Bench Clerk	03.10.2017	
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		