

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A', NEW DELHI**

**BEFORE SH. AMIT SHUKLA, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 5084/Del/2017
Assessment Year: 2013-14

Sh. Ajay Sharma, Shop No. 13 CSC, A-Block, New Friends Colony, New Delhi	Vs.	Income Tax Officer, Ward- 28(4), New Delhi
PAN : AABPS3083Q		
(Appellant)		(Respondent)

Appellant by	Sh. S. Krishnan, Adv.
Respondent by	Sh. R.C. Danday, Sr.DR

Date of hearing	05.10.2017
Date of pronouncement	26.10.2017

ORDER

PER O.P. KANT, A.M.:

This appeal by the assessee is directed against order dated 29/06/2017 passed by the Commissioner of Income Tax (Appeals)-10, New Delhi [in short ~~the~~ CIT(A)] raising following grounds:

- 1. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in confirming the disallowance made u/s. 40(a)(ia) in respect of Rs.31,61,046/- pad as Commission on Sales.*
- 2. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in confirming the disallowance of Rs.32,663/- from Credit Card expenses, on erroneous considerations.*
- 3. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in confirming ad-hoc disallowances made by the Assessing Officer @ 10% of Telephone, Insurance, Business*

Promotion & Vehicle Maintenance expenses, without bringing on record a single instance of personal expenditure or referring to any evidence in this regard.

2. The facts in brief of the case are that the assessee, an individual, was engaged in manufacturing and export of apparels during the year under consideration. The assessee filed return of income on 29/09/2013 declaring total income of Rs.19,06,490/-. The case of the assessee was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short ~~the Act~~) was issued and complied with. The assessment was completed on 15/03/2016 and total income was assessed at Rs.51,68,376/- after making certain additions. Aggrieved, the assessee filed appeal before the Ld. CIT-(A), who upheld the additions made by the Assessing Officer. Aggrieved, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

3. The ground No. 1 of the appeal relates to disallowance made under section 40(a)(i) of the Act in respect of commission paid of Rs.31,61,046/- on sales to a non-resident individual, situated outside India.

3.1 During assessment proceeding, the Assessing Officer observed that no tax was deducted at source on payment of Rs.31,61,046/- debited in the profit and loss account towards processing charges and commission expenses to foreign national in terms of Section 195 of the Act. On the query raised by the Assessing Officer, as why the tax was not deducted at source on such payment, the Authorized Representative of the assessee submitted that commission was paid for procuring orders from abroad and provisions of Section 9 of the Act were not applicable to the commission income of the non-resident as it did not carry out any business operations in India and services rendered outside India and, therefore, no Tax was Deducted at Source (TDS) on the remittance

made to the foreign agents for the services rendered by them outside India. On the basis of brief description of the note given by the Authorized Representative, the Assessing Officer concluded that the assessee made payment to the non-resident for exploring business opportunities in abroad, exploring overseas market and to realize the sale consideration which tantamount to fee for consultancy services. According to the Assessing Officer, the assessee obtained professional advice and services in a specialized field, which falls under the fee for consultancy services and as per section 9(1)(vii) read with Explanation - 2, the income of the non-resident in respect of payment of fee for technical services is deemed to accrue or arise in India as per clause (v), clause (vi) or clause (vii) of sub-section 1 and shall be included in the total income of the non-resident, whether or not- (i) the non-resident has a residence or place of business or business connection in India ; or (ii) the non-resident has rendered services in India. Accordingly, the AO held that the assessee was required to deduct tax at source while making payment towards fee for consultancy services rendered to the non-resident and due to non-deduction of tax at source, the payment was disallowable under section 40(a)(i) of the Act.

3.2 The Ld. CIT-(A) confirmed the disallowance with following observations:

“It is being claimed by the Ld. AR that the payment in question has been made to non-resident agent outside India for the services rendered outside India and any payment made in context of above is not chargeable to tax in India as the agent is a non-resident, operating his business activity outside India, services have been provided outside India and agent does not have any permanent establishment in India. In view of these facts, it is being claimed that applicability of TDS provisions are not applicable in the case of the appellant. Further to substantiate his claim, Ld. AR has submitted on the basis of Explanation 2 to Section 9(1)(vii) of the IT Act that fees for technical

services means any consideration for the rendering of any managerial, technical or consultancy services only. Placing reliance on various judicial pronouncements, It is being claimed that commission paid to non-resident foreign agent for procuring export orders cannot be equated with either to rendering of technical services or managerial or consultancy services.

Although appellant explained that the payment received by foreign national is a commission payment to procure orders in abroad but no documentary evidence has been provided even during the appellate stage, the basis on which it can be held that the scope of work of the foreign national was limited only to procure orders for the appellant and does not require any specialized services In the nature as managerial, technical and consultancy In nature. The fact cannot be denied that to procure orders special technical knowledge is also required to make a breakthrough to procure orders from the international market, the basis on which a product can be launched. For the same specific specialization is also required to study the market which is a pre-condition for any businessmen to explore business opportunities abroad. And procure orders. In the absence of any documentary evidence provided by the Ld. AR to controvert the finding of the AO, it is worthwhile to mention here that to explore business opportunities on behalf of the appellant technical expertise is required without which no person can study the market and give advice to launch a product in an alien country the basis on which businessmen commences his business. Mere procuring a order cannot fetch a substantial amount of payment to the extent of Rs.31,61,046/-. Without technical, managerial support, assessee cannot reach to a logical conclusion that it is advisable for him to venture into business in foreign country.

Therefore, considering the above factual matrix of the case, I am of the considered view that in the absence of any documentary evidence defining the scope of work of the person to whom the payment was made for the above services falls in the category of fees for technical services which is taxable as per the provisions of Section 9(1)(vii) of the Act. Further as far as reliance placed on various judicial pronouncements by the appellant, it is noticed that appellant has failed to explain and substantiate that its facts are similar and identical to those cases. In the absence of any documentary evidence, assessee has failed to justify that payment made to the foreign national was commission in nature whereas in all the cases relied upon the issue involved was taxability of commission income in the hands of foreign

national paid in foreign country. Hence, no interference is called for to the finding given by the AO that amount of Rs.31,61,046/- is nothing but fees for consultancy services, which has been claimed as commission payment, without any corroborative documentary evidence. Accordingly, the addition made by the AO is upheld.”

3.3 Before us, the Id. counsel filed a paper book containing pages 1 to 133. The paper book contains detail of payment, copies of shipping bills, invoice raised etc. The Ld. counsel submitted that no specific documents to hold that income was in the nature of fee for managerial, technical and consultancy, were asked by the Assessing Officer. According to him, the assessee explained nature of services rendered by the commission agent and onus was on the Revenue to establish that it was in the nature of fee for services in the nature of consultancy requiring specialized knowledge.

3.4 The Ld. Sr. DR, on the other hand, relied on the order of the lower authorities and submitted that the assessee was liable for deducting tax at source on the payments. However, he submitted that issue may be restored to the file of the Assessing Officer for re-examination in the light of the agreement between the assessee and the foreign agent to whom amount has been paid.

3.5 In rejoinder, the Id. counsel also concurred with the proposal of the Sr. DR for restoring the matter to the file of the Assessing Officer.

3.6 We have heard the rival submission and perused the relevant material on record. In the facts of the case, the agreement between the assessee and the agent and any documentary evidence supporting the services rendered are critical for deciding, whether the services rendered are in the nature of purely commission services or in the nature of consultancy services. The lower authorities have not examined the services rendered by the foreign agent in the light of required documentary evidences. In view of the facts and circumstances of the

case, we are of the opinion that the issue of holding the services rendered by the agent as fee for consultancy services, need re-examination by the Assessing Officer. Accordingly, we restore the matter to the file of the Assessing Officer for re-examination of the issue in dispute. The assessee shall be free to submit any evidence(s) to substantiate its claim that the payments made are purely in the nature of commission and not falling under fee for consultancy services liable to be taxed in the hands of foreign agent in terms of Section 5 read with Explanation -2 to section 9(1)(vii) of the Act. The assessee shall be provided sufficient opportunity of being heard. The ground No.1 of the appeal is accordingly allowed for statistical purposes.

4. The ground No. 2 relates to disallowance of Rs.32,663/- out of credit card expenses. The Ld. CIT-(A) adjudicated the issue as under:

“In ground no.4, the issue involved is addition of Rs.32,663/- made by the AO on account of difference by making payment through credit cards in the month of April, 2014 which were noticed from the details submitted by the assessee during the course of assessment proceedings. During the appellate proceedings, Ld. AR has provided a copy of statement dt.07.04,2013 for the transactions during the month of March, 2013 and on the basis of the same it is being explained that no disallowance is called for. However, ongoing through the statement filed for the month of April, 2013, the Ld. AR has failed to reconcile the difference pointed out by the AO of Rs.32,663/- at the time of assessment proceeding. Mere filing of a statement does not make it a sacrosanct statement, the basis on which it can be held that assessee has reconcile the difference as pointed out by the AO. Hence, the addition made by the Assessing Officer is upheld and the ground of appeal taken by the appellant is dismissed.”

4.1 Both the parties agreed that the issue in dispute need to be restored to the file of the Assessing Officer for reconciling the difference pointed out by the Assessing Officer.

4.2 We have heard the parties on the issue in dispute. In view of the facts of the case, we feel it appropriate to restore the matter to the file of the Assessing Officer for consideration afresh. The assessee shall be afforded sufficient opportunity of being heard. The Ground No. 2 of the appeal is also allowed for statistical purposes.

4.3 The Ground No. 3 was not pressed before us; accordingly, it is dismissed as infructuous.

5. In the result, appeal of the assessee is allowed partly for statistical purposes.

The decision is pronounced in the open court on 26th Oct., 2017.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 26th October, 2017.

RK/-(D.T.D)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

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

Asst. Registrar, ITAT, New Delhi