

IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD BENCH

Before: Shri S. S. Godara, Judicial Member  
And Shri Amarjit Singh, Accountant Member

ITA No. 3298/Ahd/2014  
Assessment Year 2010-11

The DCIT, Cir. 2(1)(2), Ahmedabad (Appellant)	Vs	Komal Amin Exports Pvt. Ltd. 309/310 Shanti Arcade, Nr. Sahajanand Complex, Naranpura, Ahmedabad-380013 PAN: AACCK5343B (Respondent)
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Revenue by: Shri Sumit Kr. Verma, Sr. D.R.  
Assessee by: Shri S.N. Divetia, A.R.

Date of hearing : 21-12-2017  
Date of pronouncement : 08-02-2018

**आदेश/ORDER**

**PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-**

This Revenue appeal for A.Y. 2010-11, arises from order of the CIT(A)-VIII, Ahmedabad dated 30-09-2014, in proceedings under section 143(3) of the Income Tax Act, 1961; in short the Act.

2. The revenue has raised following grounds of appeal:-

*"1. The Ld.CIT(A) has erred in law and on facts in deleting the disallowance of Rs.51,99,991/- u/s 40(a)(ia), in respect of commission expenses to overseas agents.*

*2. The Ld. CIT(A) has erred in law and on facts in holding that the commission paid to overseas agents is not to be deemed to accrue or arise in India and thereby not chargeable to tax in India and liable to deduction of tax u/s 195 of the I.T. Act.*

*3. On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.*

*4. It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent."*

3. The brief fact of the issue in appeal is that return of income declaring income of Rs. 33,65,540/- was filed on 28<sup>th</sup> September, 2010. On scrutiny during the course of assessment proceedings, the assessing officer has noticed that assessee has debited commission expenses to the amount of Rs. 60,20,990/- to the P & L account which included an amount of Rs. 52,99,258/- as commission paid to overseas agents of different countries. On questioning by the assessing officer the assessee explained that it has paid commission to non-resident agents for services performed in foreign countries and no service was performed in India. He further stated that non-resident agent has neither any business collection in India nor have any permanent establishment in India, therefore, the provision of section 195 is not applicable. The assessing officer has not accepted the explanation of the assessee and stated that section 195 of the act cast an obligation on the person to deduct tax at source while making a payment to a non-resident from a sum which is chargeable to tax in India. He further stated that section 5 of the IT Act, 1961 brings in the concept of deemed income to be taxed in India and the deeming provision of section 9 of I.T. Act creates a legal fiction. He further stated that the income arising on account of commission payable to the overseas agents is deemed to accrue and arise in India and is taxable under this act in view of the specific provision of section 5(2)(b) r.w.s 9(1)(i) of the act. Provision of section 195 would therefore squarely be applicable to the case of the assessee company. Consequently, the expenditure claimed under the head commission expenses amounting to Rs. 51,99,991/- was disallowed and added to the total income of the assessee u/s. 40(a)(ia).

4. Aggrieved assessee filed appeal before the Id. CIT(A). The Id. CIT(A) has allowed the appeal of the assessee by observing as under:-

**3.3 Decision:**

*I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The AO has disallowed the commission paid to foreign*

agents by holding that the income arising on account of commission payable to overseas agents was deemed to accrue or arise in India and was accordingly taxable under the Provisions of section 5 (2)(b) read with section 9 (1)(i) of Income Tax Act. It has further been observed by the AO that the appellant company had failed to comply with the Provisions of section 195 (2). He has also held, without prejudice to the main findings, that the appellant had also failed to prove the commissions paid to the agents were genuine and justified.

The appellant on the other hand, in its detailed written submission, -has claimed that the Provisions of Section 5 (2)(b) read with section 9 (1)(i) of Income Tax Act were not applicable in its case. The income has been earned abroad and is therefore, not taxable in India. It has also given detailed evidences to prove that the commission paid was genuine.

The issues which are to be examined and decided are: -

1. Whether the commission paid to foreign agents is taxable in India by virtue of the provisions of sections 5 (2)(b) read with section 9 (1) (i) of Income Tax Act.
2. Whether the provisions of section 195(2) were applicable on the appellant and it should have deducted tax and in case of no deduction he should have obtained a no deduction certificate from the AO. And
3. Whether the commission paid was genuine and the services have been rendered.

2.3.1 Regarding the first issue it is noted from the evidences given by the appellant as well as noted by the AO in his order that the services have been rendered by the foreign agents outside India. The sales were booked by them in their country or for the country for which they have been appointed as commission agents. None of the activity of soliciting the clients and procuring the orders is in India. The goods are being delivered by the appellant company in the other country. The activities of procuring the payment on behalf of the appellant company are also done abroad. The AO was therefore, not right in holding that the source of income lies in India as the sales have been made from India. The provisions of Income

Tax Act clearly provide that the tax would be deducted on the income which is taxable in India. The activity of earning the income is not the sale but soliciting the sales by commission agents. Though this activity is linked to the sales of the company but it cannot be said that the income has been derived from sales which has been made from India. The income has been derived from the activity of soliciting the sales on behalf of the appellant company. The agents have carried out all the activity on the foreign soil and none of their activity is in India therefore, it cannot be said that the income has accrued or arisen in India and the source of income was in India. There is no fact brought out by the AO in the order as well as observed by me during the course of appellate proceedings to indicate that the services have been rendered in India.

The appellant has rightly relied on the judgement of honourable Supreme Court in the case of Toshoku (supra) wherein it has been held that commission earned by the non-resident for acting as the selling agent for the Indian exporter, wherein such non-resident was rendering services from outside India does not accrue in India. In the present case before me also, the foreign selling commission agent is resident of foreign country, from where the procurement service has been provided for which the commission has been paid, and therefore, the issue is directly and squarely covered by the Apex Court decision.

Regarding the observation of the AO that the income is deemed to accrue or arise in India by applying the provisions of section 9 (1)(i) it is seen that there is no fact on record to indicate that any of the agents had any permanent establishment in India. All the agents had their offices on the foreign soil and the correspondence which has been placed before me do not indicate that they had any PE in India. Further the assessing officer has also not pointed out any such fact in its order which indicate that there was any such office which attracts the deeming provisions. Further the observation that the

source of income was in India, is also not proper as it has clearly been discussed in the preceding paragraphs that none of the services have been rendered in India and source of income cannot be said to be in India as the source of income is the services rendered and not the sales. There is no business connection in India from which the income has been earned, there is no property through or from which the income has been earned. Therefore, the provisions of section 9(1)(i) also cannot be applied. The appellant has rightly placed reliance on the judgement of honourable Supreme Court in the case of GE India Technology Centre Private Limited 327 ITR 456. In a recent judgement of honourable ITAT Chennai bench in the case of I M Gears Private Limited, 49 taxmann.com 175 it has been held that no tax was deductible at source on commission payment to overseas agent for procuring orders, as said services not being in nature of technical services, payments in question were not taxable in India. In the present case also the services rendered by the agents of the appellant to whom the commission payment has been made, are in the nature of soliciting orders for the appellant and no other services, which can be categorized as technical services, have been offered. The appellant has also rightly placed reliance on the judgement of Honourable Gujarat High Court in the case of Vinayak Exports (supra) and the judgement of Bangalore Bench of ITAT Exotic Fruits Pvt Ltd (supra).

Therefore, in view of the preceding discussion the AO was not justified to hold that the commission payable to the overseas agents was deemed to accrue or arise in India and is taxable under the Act in view of the specific Provisions of sections 5 (2)(b) read with section 9 (1)(i) of Income Tax Act.

2.3.2 Regarding the issue of obtaining no deduction certificate under section 195 it is seen that for the applicability of the provisions of this section, the sum must be chargeable under the provisions of the Income Tax Act. Section 195 provides for deduction of tax by the person responsible for paying to a non-resident any interest or any other sum chargeable under the Provisions of the Act. It is clear that the payment was not the interest. It has to be seen whether the payment is covered under the term "any other sum chargeable under the provision of this Act". It has been observed in the preceding discussion that income was not chargeable to tax as it has not been received in India nor it has accrued or arisen in India directly or indirectly. Therefore, once the income is not taxable there is no liability to deduct tax and therefore, it was not obligatory for the appellant to deduct tax in view of this there was no violation of the provisions of section 195 and the appellant also was not required to pay no deduction certificate from the AO.

The issue whether the payer has to apply for a certificate under section 195 if some payment has been made, has been considered by various courts. The special bench of Chennai ITAT in the case of Prasad Productions reported in 125 ITD 263 has held in para-35 of the order that in if the assessee has not applied to the Assessing Officer under section 195(2) for deduction of tax at a lower or nil rate of tax under a bona fide belief that no part of the payment made to the non-resident is chargeable to tax, then he is not under any statutory obligation to deduct tax at source on any part of thereof. While deciding the case the honourable Bench has considered several cases which were relevant to the issue. In the present case the appellant did not deduct the tax or approached the AO for low/no deduction of tax certificate as there are several judicial pronouncements in support of the appellant which have been relied by it in the written submission. It has submitted that the commission paid to nonresident agent was not liable to tax under the Provisions of the Act when the services were rendered outside India, services were used outside India payments were made outside India and there was no permanent establishment or business connection in India. The submission given by the appellant clearly demonstrates its bona fide belief.

Therefore, considering the above discussion there was no liability on the part of the appellant to deduct tax under section 195 or approach the I.T. Authorities for no deduction tax certificate.

2.3.3 The last issue which is to be adjudicated is that whether the commission payment was genuine and the services were rendered. The AO has briefly dealt with the issue in para- 5 of his order. The appellant, during the course of appellate proceedings, has submitted evidences which could not be produced during the course of assessment proceedings. The evidences were in the nature of various correspondences which were undertaken by the appellant with various commission agents regarding the payments and also the bills in respect of which commission has been paid. It has also submitted various debit notes issued by different agents to whom the commission have been paid. Various evidences submitted by the appellant were forwarded to the AO for its comments an observation. The report given by the AO vide its letter dated 25/08/2014 has been reproduced in the preceding pages of this order. As discussed earlier the evidence submitted by the appellant has been admitted as sufficient opportunity was not given during the course of assessment proceedings to produce the evidences in respect of the rendering of services. The AO has commented in its remand report that the details given by the appellant were examined by her and no prima facie discrepancies were noticed. It has been reported by her that the appellant had submitted, on random basis copies of invoices, debit notes, request letters addressed to the banks and bank information regarding those commission payments. It is noted from the details submitted by the appellant during the course of appellate proceedings, that it has given various types of information in support of the claim of the rendering of services. In some of the cases copies of e-mail exchanges have been produced. In other cases it has produced debit notes in the form of letters received from those parties. It is noted that the commission payment have been sent through banking channel and are duly supported by various evidences. It is noted that the appellant is also doing business with the help of these commission agents during the current year and in the later period also as the appellant has given copies of e-mail correspondence in respect of some commission agents pertaining to the current period also. In view of these evidences, I am of the considered opinion that the appellant has also furnished sufficient evidence to prove that the services have also been rendered by the agents to whom commission payment has been made.

The AO has also placed reliance on the decision of Hon'ble Authority of Advance Rulings in the case of SKF Boilers and Driers (P.) Ltd. (2012) 18 Taxmann 325 and Rajive Malhotra (2006) 284 ITR 564 (Delhi). The judgements are not applicable to the present facts as there are several other decisions which hold that such kind of commission is not taxable in India and accordingly no liability to deduct tax was there. Further the decision of honourable Supreme Court of India in the case of Hon'ble Supreme Court in the case of CIT vs. Toshoku Limited 125 ITR 525, still prevails as on date and is the law of the land as regards applicability of TDS provisions to commission paid to overseas/non-resident agents by Indian Exporters.

In view of the preceding discussion, it is clear that the appellant was not liable to deduct tax on the commission paid foreign agents. Therefore, the disallowance of Rs. 51,99,991/- under section 40(a)(ia) made by the AO is directed to be deleted."

5. We have heard the rival contentions and perused the material on record carefully. The assessing officer has disallowed the claim of the assessee on the ground that the assessee was under obligation to deduct tax at source as envisaged u/s. 195 of the act from the payment made to non-residents towards the services rendered by them. In this connection we have perused the material on record and observed that the assessee has paid commission to the overseas

parties in respect of services rendered by them at abroad. The assessing officer failed to establish that the overseas parties were having business connection or PE in India. The assessee has furnished evidences of payment of impugned commission through the bank on the basis of debit notes raised by the payees and stated that none of the activities of soliciting the customers or procuring orders were carried out in India. The assessee had not deducted TDS according to provisions of section 195 of the act since income was not raised in India because the payee had no permanent establishment or any business connection in India. The provision of section 5(2)(b) r.w.s. 9(1)(i) of I.T. Act are not applicable as the payee has not earned any income in India as the services by the foreign agents have been rendered outside India without having any PE or business connection in India. The Hon'ble Apex Court in the case of Toshoku (125 ITR 525) held that commissions earned by the non-resident acting as selling agent for the Indian exporter wherein such non-resident was rendering services from outside India does not accrue in India. Further the decision of the Hon'ble Supreme Court in the case of G.E. India Technology Centre P. Ltd. Vs. CIT (193 Taxmann 234) has rightly supported the case of the assessee that tax is not deductible in the case of the assessee.

In view of the above facts and after considering the detailed findings of the Ld. CIT(A) in his order, we observe that the non-resident commission agents had rendered services outside India and they were not having P E in India therefore, we uphold the decision of the Id. CIT(A) that the assessee was not liable to deduct tax on the commission paid to foreign agents. Accordingly, the appeal of the Revenue is dismissed.

6. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 08-02-2018

**Sd/-**  
**(S.S. GODARA)**  
**JUDICIAL MEMBER**  
**Ahmedabad : Dated 08/02/2018**

**Sd/-**  
**(AMARJIT SINGH)**  
**ACCOUNTANT MEMBER**

