

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'G' : NEW DELHI)**

**BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER  
and  
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.1522/Del./2014  
(ASSESSMENT YEAR : 2010-11)**

ACIT, Circle 27 (1), vs. Smt. Sangeeta Khanna,  
New Delhi. RZ-A-4, Dwarka Puri, Palam Road,  
New Delhi.

**(PAN : ABAPK9156E)**

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri U.S. Kochar, Advocate  
REVENUE BY : Shri Amit Jain, Senior DR

Date of Hearing : 19.04.2018

Date of Order : 23.04.2018

**ORDER**

**PER KULDIP SINGH, JUDICIAL MEMBER :**

The appellant, Assistant Commissioner of Income-tax, Circle 27 (1), New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeal, sought to set aside the impugned order dated 18.12.2013 passed by Ld. CIT (Appeals)-XXIV, New Delhi qua the assessment year 2010-11 on the grounds inter alia that :-

*“On the facts and circumstances of the case and in law CIT(A) has erred in-*

*1. Deleting the disallowance of Rs. 4,06,78,105/- u/s 40(a)(ia) read with sec.195 for the I.T. Act on*

***account of Non Deduction of TDS on payment of the Foreign Commission.***

***2. Deleting disallowance merely on the basis that one of the six commission agent non resident vide order 04.07.2013 by the Addl. DIT (International Taxation), Range-3, New Delhi.***

***3. Ignoring the Board's circular No. 7/2009 dated 22.10.2009 and order of AAR in appeal no. 983- 984 of 2010 dated 22.02.2012 in the case of SKF Boilers and Driers Pvt. Ltd and other judgment stated in assessment order of the AO.***

***4. Ignoring explanation 2 of the section 195 of the Income Tax Act.”***

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : Assessee claimed to have incurred expenditure of Rs.4,06,78,105/- on account of foreign commission in the profit and loss account without deducting tax at source (TDS). Assessing Officer by invoking the provisions contained under section 40(1)(i) of the Income-tax Act, 1961 (for short ‘the Act’) made disallowance of Rs.4,06,78,105/- and made addition thereof to the total income of the assessee.

3. Assessee carried the matter by way of an appeal before the Id. CIT (A) who has deleted the addition of by allowing the appeal. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal.

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. Undisputedly, the assessee has paid export commission to the tune of Rs.4,06,78,105/- to a non-resident without deducting the TDS. It is also not in dispute that a non-resident to whom the export commission has been granted by the assessee has rendered services outside the country and no part of the income arises in India. It is also not in dispute that the entire commission has been remitted directly abroad.

6. Identical issue has already been set at rest by the Hon'ble Delhi High Court in case cited as *CIT vs. Eon Technology P. Ltd.* – (2012) 343 IT4R 366 (Delhi) in favour of the assessee.

Operating part of the judgment is reproduced as under :-

***“12. On the said aspect we may refer to the decision of the Supreme Court in C.I.T. vs. Toshoku Limited, (1980) 125 ITR 525 (SC). This case relates to the assessment year 1962-63. The Indian assessee had paid commission to two foreign companies through whom they had procured export orders. Questions arose; what was the effect of the entries in the books of accounts of the Indian assessee which had resulted in debit and credit entries on account of commission and secondly, whether procurement of export orders by the foreign companies for the Indian company had resulted in a business connection. Two contentions were rejected by the Supreme Court inter-alia recording as under:-***

*“ It cannot be said that the making of the book entries in the books of the statutory agent amounted to receipt by the assesseees who were non-residents as the amounts so credited in their favour were not at their disposal or control. It is not possible to hold that the non-resident assesseees in this case either received or can be deemed to have received the sums in question when their accounts with the statutory agent were credited, since a credit balance, without more, only represents a debt and a mere book entry in the debtor's own books does not constitute payment which will secure discharge from the debt. They cannot, therefore, be charged to tax on the basis of receipt of income actual or constructive in the taxable territories during the relevant accounting period.X X X*

*In the instant case, the non-resident assesseees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assesseees in India as contemplated by cl. (a) of the Explanation to s. 9(1)(i) of the Act. The commission amounts which were earned by the non-resident assesseees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the department.”*

*13. The aforesaid decision is a complete answer to the contention raised by the Revenue and as mentioned in the assessment order that commission income had accrued and arisen in India when credit entries were made in the books of the respondent assessee in favour of the ETUK and the said income towards commission was received in India. As noticed above, the stand of the Revenue is contrary to the two circulars issued by the*

*CBDT in which it is clearly held 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, 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. This fact alone does not establish business connection. In Circular No. 786 dated 7<sup>th</sup> February, 2000, it has been stated that in such cases, the Indian assessee is not liable to deduct TDS under Section 195 of the Act from the commission and other related charges payable to such a non-resident having rendered service outside India.*

*14. The term “business connection” has been interpreted by the Supreme Court to mean something more than mere business and is not equivalent to carrying on business, but a relationship between the business carried on by a non-resident, which yields profits and gains and some activities in India, which contributes directly or indirectly to the earning of those profits or gains. It predicates an element of continuity between the business of the non-resident and the activity in India [CIT Vs. R.D. Aggarwal and Company(1965) 56 ITR 20 (SC), Carborandum & Co. Vs. CIT(1977) 2 SCC 862 and Ishikawajma-Harima Heavy Industries ltd. Vs. Director of income Tax, Mumbai(2007) 3 SCC 481]. The test which is to be applied is to examine the activities in India and whether the said activities have contributed to the business income earned by the non-resident, which has accrued, arisen or received outside India. The business connection must be real and intimate from which the income had arisen directly or indirectly. The question of business connection, therefore, has to be decided on facts found by Assessing Officer (or in the appellate proceedings). In the present case, facts found by the Assessing Officer do not make out a case of business connection as stipulated in Section 9(1) (i) of the Act. There is hardly any factual discussion on the said aspect by the Assessing Officer. He has not made any foundation or basis for holding that there was business connection and, therefore, Section 9(1)(i) of the Act is*

*applicable. Appellate authorities, on the basis of material on record, have rightly held that “business connection” is not established.*

*15. The scope and ambit of Section 195 of the Act has been explained by the Supreme Court in GE India Technology Centre (P) Ltd. vs. CIT (2010) 327 ITR 456. In the said case the expression “any other sum chargeable under the provisions of the Act” in Section 195 of the Act was elucidated and explained. It was held that if payment is made in respect of the amount which is not chargeable to tax under the provisions of Act, tax at source (TDS, for short) is not liable to be deducted. Decision of Supreme Court in Transmission Corporation of Andhra Pradesh vs. CIT, (1999) 239 ITR 587 (SC), operates and is applicable when the sum or payment is chargeable to tax under the provisions of the Act. In such cases, TDS has to be deducted on the gross amount of payment made and not merely on the taxable income included in the gross amount. The said decision would not apply in case payment is made but the said sum in entirety is not chargeable or exigible to tax under the provisions of the Act. The said distinction has been rightly understood by the first appellate authority and the ITAT and correctly applied by them.”*

7. In view of the decision rendered by the Hon’ble Delhi High Court in *Eon Technology P. Ltd.* (supra) on the basis of decision rendered by Hon’ble Supreme Court in case cited as *CIT vs. Toshoku Limited – (1980) 125 ITR 525 (SC)*, we are of the considered view that when it is not in dispute that the commission payment on export has been made to a non-resident Indian by the assessee for services rendered abroad and no part of said income has arisen in India, TDS was not required to be deductible at source and disallowance u/s 40(a)(i) is not sustainable in the eyes of law.

8. Moreover, the Id. CIT (A) has meticulously relied upon the provisions contained u/s 90(2) of the Act and Article 7 (1) of the Double Taxation Avoidance Agreement (DTAA) entered into between India and Italy, France, Germany and UK vide which existence of Permanent Establishment (PE) in India is necessary for subjecting to tax business of any entity in India. Since M/s. Sari Oren of France is admittedly a non-resident having no PE in India, the provisions contained u/s 40(a)(ia) are not applicable in this case. Hence, we find no illegality or perversity in the impugned order passed by Id. CIT (A). Consequently, the appeal filed by the Revenue is hereby dismissed.

**Order pronounced in open court on this 23<sup>rd</sup> day of April, 2018.**

**Sd/-  
(N.K. SAINI)  
ACCOUNTANT MEMBER**

**sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

**Dated the 23<sup>rd</sup> day of April, 2018  
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-XXVI, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT  
NEW DELHI.**