

आयकर अपीलीय अधिकरण “जे” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “J” BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JM AND SHRI N. K. PRADHAN, AM

आयकर अपील सं./I.T.A. No.4642/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2012-13)

ITO-2(2)(1) R. No. 549, 5 th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020	बनाम/ Vs.	M/s. Indo Industries Ltd. A-1, Sameer Apartments, S. V. Road, Andheri (W), Mumbai-400 058
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACI 8197 D		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Ms. Arju Garodia
प्रत्यर्थी की ओर से/Respondent by	:	Shri Bhupendra Shah
सुनवाई की तारीख / Date of Hearing	:	09.03.2018
घोषणा की तारीख / Date of Pronouncement	:	11.05.2018

आदेश / ORDER

Per Saktijit Dey, J. M.:

The aforesaid appeal at the instance of the Revenue is directed against the order dated 04.04.2016 of the Id. Commissioner of Income Tax (Appeals)-5, Mumbai for the assessment year 2012-13.

2. The solitary issue arising for consideration in the present appeal relates to the deletion of disallowance made u/s. 40(a)(i) of the Income Tax Act, 1961 by the Assessing Officer on account of commission paid to foreign agents.

3. Briefly the facts are that the assessee an Indian company, as stated by the Assessing Officer, is a Government of India recognized Star Export House. The main business of the assessee is exporting of cotton yarn. For the assessment year under dispute, the assessee filed its return of income on 29.09.2012 declaring total income of Rs.21,03,080/-.

4. During the assessment proceedings, the Assessing Officer while verifying the financial statements of the assessee found that the assessee has claimed deduction of an amount of Rs.1,36,71,242.13 on account of commission paid to foreign agents for booking export orders for the assessee. The Assessing Officer was of the view that while paying commission to the foreign agents the assessee was required to deduct tax at source u/s.195 of the Act. Since, he has failed to do so, he called upon the assessee to explain why the deduction claimed should not be disallowed. In response, it was submitted by the assessee that commission was paid to foreign agents towards services rendered outside India and the said foreign agents neither have any permanent establishment nor any business connection in India. The payment was also made outside India. Thus, it was submitted, such payment cannot be considered as income of the foreign agents chargeable to tax in India. Therefore, the provisions of section 195 are not applicable. It was further submitted, in the assessee's own case for the preceding assessment years, the Tribunal has deleted the similar disallowance made by the Assessing Officer on account of payment of commission to foreign

agents. The Assessing Officer after considering the submissions of the assessee, however, was not convinced with the same. The Assessing Officer held that as per the ruling of the Hon'ble Supreme Court in the case of *GVK Industries vs. ITO* 332 ITR 130 (SC) the commission paid to foreign agents for obtaining export order for exports from India is liable to be taxed in India. Therefore, the assessee was liable to deduct tax at source on the commission paid as it falls within the purview of section 9(1)(i)/9(1)(vii) r.w.s. 195. The assessee having failed to deduct tax at source on such payment, it was liable for disallowance u/s. 40(a)(i) of the Act. In this context, the Assessing Officer also relied upon his reasoning while making similar disallowance in the assessee's case for assessment years 2010-11 and 2011-12. While doing so, though he took note of the fact that the Tribunal in the assessee's own case for assessment year 2010-11 has decided the issue in favour of the assessee, however, he refused to follow the decision of the tribunal on the reasoning that the department has not accepted such decision and filed an appeal before the Hon'ble High Court.

5. Being aggrieved by the disallowance made u/s. 40(a)(i) of the Act, the assessee preferred an appeal before the Id. Commissioner of Income Tax (Appeals).

6. The Id. Commissioner of Income Tax (Appeals) taking note of the fact that the Tribunal in the assessee's own case for assessment year 2010-11 has deleted similar disallowance made by the Assessing Officer u/s. 40(a)(i) of the Act, followed the same and deleted the addition in the impugned assessment year as well.

7. The Id. Departmental Representative strongly relied upon the observations of the Assessing Officer and submitted that though the payments were made to foreign agents for procuring orders outside India, however, the payment made to the foreign agents is taxable in India, as the work was executed in India. The Id. Departmental Representative relying upon the decision in the case of *GVK Industries* (supra) submitted that as held by the Hon'ble Supreme Court, in respect of such types of payment the source rule will apply. Further, he submitted, though the commission paid by the assessee to foreign agents is towards procuring orders outside India, however, since such payment has a nexus with the source located in India, irrespective of the fact whether the recipient is located outside India, the payment made to them is taxable in India. In this context, he referred to the provision contained u/s. 9(1)(vii)(b) and Explanation to section 9(2) of the Act.

8. The Id. Authorized Representative strongly relying upon the findings of the Id. Commissioner of Income Tax (Appeals) submitted that the payment was made by the assessee to persons who are not only located outside India but they have rendered services in their respective countries. Therefore, neither they have any business connection in India nor any permanent establishment in India. He submitted, as per the provision of section 195 of the Act, only in the event of a particular payment made to a non resident, is chargeable to tax in India tax is required to be deducted at source while making such payment. He submitted, since, the payment made by the assessee

to foreign agents are not chargeable to tax in India, the provision of section 195 are not applicable and the assessee is not required to deduct tax at source on such payment. He submitted, in assessee's own case for assessment years 2010-11 and 2011-12, similar disallowance made by the Assessing Officer was deleted by the tribunal. He submitted, there being no difference in facts in the impugned assessment year. The decisions of the tribunal in the assessee's own case for the preceding assessment years have to be followed.

9. We have carefully considered the rival contentions and perused the materials on record. The basic issue which arises for consideration before us is, whether the commission/brokerage paid to foreign agents are chargeable to tax in India, thereby requiring the assessee to deduct tax at source on such payment in terms of section 195 of the Act. On a perusal of the impugned assessment order, it is evident that the Assessing Officer has accepted the fact that the assessee has paid commission/brokerage to persons/entities located outside India for booking export orders for the assessee. The reasoning of the Assessing Officer for disallowing the payment made is that such payment is chargeable to tax in India, as it falls within the purview of section 9(1)(i)/9(1)(vii) of the Act. At this stage, it will be relevant to look into certain provisions of the Act. Section 5 of the Act defines the scope of total income. Sub section (2) of section 5 says that the total income of a non resident of any previous year will include all income from whatever source derived, which is either

received or deemed to be received in India or accrued or arises or is deemed to accrued or arise in India. Section 9 speaks of income deemed to accrue or arise in India. As per section 9(1)(i) of the Act, all income accruing or arising directly or indirectly through or from any business connection in India or through and from any property in India or through source of asset in India or through the transfer of capital asset situated in India, shall be deemed to accrues or arises in India. However, Explanation 1 carves out certain exceptions by providing that in the case of a business of which all the operations are not carried out in India, it shall be restricted to such part of the income as is reasonably attributable to the operations carried out in India. Explanation 2 to section 9(1)(i) of the Act defines business connection which means and includes any business activity carried out through a person who, acting on behalf of the non-resident, has and habitually exercises in India, an authority to conclude contracts on behalf of the non-resident; or habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident; or habitually secures orders in India, mainly or wholly for the non-resident. Thus from the reading of the aforesaid provision, it is clear that if any income is received by a non resident through its business connection in India then it will be taxable in India. From the definition of the business connection as provided under *Explanation 2* to section 9(1)(i) of the Act, it is very much clear that the nonresident agents to whom the assessee has paid commission/brokerage do not have any business connection in India. Further, the other conditions of section 9(1)(i) are also not applicable to the payments

made by the assessee to non-resident agents. It is also a fact on record that none of the non-resident agents have permanent establishment in India. While making the disallowance u/s. 40(a)(i) of the Act, the Assessing Officer has placed strong reliance upon the decision of the Hon'ble Supreme Court in the case of *GVK Industries* (supra) and in fact to apply the said decision, the Assessing Officer has made attempt to rope in the payment made by the assessee u/s. 9(1)(vii). Therefore, at this stage, it is necessary to examine the nature of the payment made by the assessee to non-resident agents. As could be seen, the Assessing Officer himself at more than one place in the assessment order has recorded a finding of fact that the assessee has paid commission to foreign agents for booking/obtaining export orders. Thus, it is very much clear that the payment by the assessee is simply and purely in the nature of commission/brokerage for procuring export orders. Section 9(1)(vii) speaks of payment of fees for technical services. Applying the decision of the Hon'ble Supreme Court in the case of *GVK Industries* (supra), the payment made by the assessee to foreign agents under no circumstances can be brought within the term 'fees for technical services' as prescribed u/s. 9(1)(vii) of the Act. In fact, while examining identical nature of payment made by the assessee in assessment year 2010-11, the co-ordinate Bench in ITA No. 183/Mum/2014 dated 14.11.2014 has clearly and categorically held that the commission/brokerage paid to non-resident agents cannot be termed as fees for technical services. That being the case, the reasoning of the

Assessing Officer that the provisions of section 9(1)(vii) of the Act is applicable to the commission paid, is unacceptable.

10. As regards the argument of the department that the source rule applies to the payment made by the assessee, by relying upon the decision of the Hon'ble Supreme Court in the case of *GVK Industries* (supra), on a careful reading of the said decision it is crystal clear that the ratio laid down in the said decision cannot be applied to the facts of the present case. As could be seen from the facts of *GVK Industries* (supra) case the assessee therein wanted to set up a gas based power project to generate and sell electricity. For achieving the desired object, it went to utilize the expert services of qualified and experienced professionals who could prepare a scheme for raising the required finance and tie-up the required loan. For that purpose, it entered into an agreement with a non resident company who agreed to offer its services as financial advisor for the assessee's project. The services included inter alia financial structure and security package to be offered to the lender, making an assessment of export credit agencies worldwide and obtaining commercial bank support on the most competitive terms, assisting the assessee's loan negotiation and documentation with lender and structuring/negotiating and closing the financing for the project in a coordinate and expeditious manner. For the services rendered, the non resident company was to be paid at the rate of 0.75% of the total debt financing which is termed as "success fee". The dispute between the assessee and the department was with regard to the nature of

success fee and whether the assessee was required to deduct tax at source in terms of section 195 while making payment of success fee. The Hon'ble Supreme Court after examining the issue at depth as well as the nature of the payment made by the assessee held that success fee paid by the assessee to the non-resident company is in the nature of fee for technical services as per section 9(1)(vii) of the Act. Having held so, the Hon'ble Supreme Court referring to the provisions of section 9(1)(vii)(b) of the Act as well as section 9(2) held that applying the source rule, the success fee paid to the non resident company is chargeable to tax in India. Facts are completely different in the appeal before us. In Assessing Officer's own admission, the main business of the assessee is export of cotton yarn and the disputed payment is in the nature of commission paid to foreign agents for procuring orders in their respective countries of residences. That being the case, the payment is not in the nature of fee for technical services. Thus keeping in perspective, the aforesaid factual as well as legal position, it needs to be seen whether the provisions of section 195 are applicable. A reading of the said provision makes it clear that while making payment to a non resident, which is chargeable to tax in India, the assessee is required to deduct tax at source as per the said provision. In the facts of the present case, the commission paid to non-resident agents are not chargeable to tax in India either u/s. 9(1)(i) or under any other provisions of the Act since the non residents have no business connection in India or permanent establishment in India. That being the case, there was no liability on the assessee to deduct tax at source while paying commission to the non resident agent.

Moreover, the provisions of section 9(2) of the Act are not applicable, as the payment made by the assessee are not of the nature as provided under clauses (v), (vi) and (vii) of section 9 of the Act. While dealing with identical issue in the assessee's own case for assessment year 2010-11 in ITA No. 183/Mum/2014, the co-ordinate Bench has held that the payment made to non-resident for services rendered outside India, is not chargeable to tax in India. Hence, the assessee was not liable to deduct tax at source on such payment. The same view was reiterated by the Tribunal while deciding assessee's appeal for assessment year 2011-12 in ITA No. 1379/Mum/2015 dated 01.05.2015. Respectfully following the aforesaid decisions of the co-ordinate Bench, we uphold the order of the Id. Commissioner of Income Tax (Appeals) by dismissing the grounds raised by the department.

11. Before parting we must observe, the other decisions referred by the Assessing Officer were not found to be applicable to the facts of the present case, hence, it is not considered necessary to discuss in detail the ratio laid down in the said decisions.

12. In the result, the Revenue's appeal is dismissed.

परिणामतः राजस्व की अपील खारिज की जाती है ।

Order pronounced in the open court on 11.05.2018

Sd/-

Sd/-

(N. K. Pradhan)

(Saktijit Dey)

लेखा सदस्य / Accountant Member

न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated : 11.05.2018

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**