

आयकर अपीलिय अधीकरण, न्यायपीठ – “B” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “B” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and
Dr. A.L. Saini, Accountant Member

**ITA No.93/Kol/2015 &
ITA No.1462/Kol/2016**
Assessment Years :2010-11 & 2012-13

ACIT, Circle-34, Aayakar Poorva, 7 th Floor, 110, Shantipally, Kolkata-107	V/s.	M/s Calcutta Export Co. 18, R.N. Mukherjee Road, 4 th Floor, Kolkata-700 001 [PAN No.AACFC 3872 C]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

राजस्व की ओर से/By Revenue	Shri S. Dasgupta, Addl. CIT-DR
आवेदक की ओर से/By assessee	Shri A.K. Tulsian, FCA
सुनवाई की तारीख/Date of Hearing	28-05-2018
घोषणा की तारीख/Date of Pronouncement	31-05-2018

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

These two Revenue's appeal for assessment years 2010-11 and 2012-13 arose against Commissioner of Income Tax (Appeals)-XX and Commissioner of Income Tax (Appeals)-10 Kolkata's orders dated 12.11.2014 & 22.04.2014, in case Nos.47/CIT(A)-XX/JCIT R-34/2013-14/Kol and 45/CIT(A)-10/R-34/2014-15/Kol; respectively involving proceedings u/s. 143(3) of the Income Tax Act, 1961; in short 'the Act'.

Heard both the parties. Case files perused.

2. It emerges at the outset that Revenue's grievance is identical in both the impugned assessment year(s). It seeks to restore the Assessing Officer's action disallowing assessee's commission expenditure of ₹83,20,320/- in former and ₹57,31,800/- in latter assessment year in respect of export overseas representation charges paid to USA based payee M/s Allcast

Corporation without deducting TDS. Both the Learned Representatives fairly suggest that the CIT(A)'s finding in latter assessment year follows his detailed discussion in former assessment year reading as under:-

"8- Ground No (ii) relates to contention of the appellant against disallowance of Rs.83,20,320/- made u/s. 40(a)(ia) of the IT Act, 1961. The fact that the case is that the AO observed that the appellant had debited a sum of 1,04,26,620/- to the P/L account on account of Export Overseas Representation Charges claimed to have been paid to M/s Allcast Corporation, the company based on USA and had been appointed by the appellant as their representative in the States of USA and Canada for rendering certain services. The AO further noted that an amount of Rs.21,06,300/- had been credited to the account aforesaid company on 22.04.2009 on which a TDS of Rs.2,16,949/- was deduction u/s 195 of the IT Act, 1961. However, on the subsequent credits/payments made to the aforesaid company amounting to Rs.83,20,320/- on which not was deducted as envisaged u/s. 195 of the IT Act. In the assessment order, The AO also discussed about services rendered by M/s Allcasat Corporation to the appellant. From the contents of the agreement the appellant had with M/s Allcast Corporation, the AO concluded that the nature of services rendered the aforesaid company was of professional services rendered as market research providing main power in USA for carrying out these activities and other incidental activities connected with the company in USA. Since, the payment was not made for procuring business but the same was made with regard to professional services rendered by the aforesaid company, therefore, the provisions of sec. 195 is clearly attracted in this case. Since, the appellant fail to deduct tax as provided u/s. 195 of the IT Act, 1961, the AO made disallowance u/s 40(a)(i) of the IT Act, 1961. Further, the AO noted that the appellant did not procure a no deduction certificate from the Department provided u/s 195(2) of the IT Act, 1961. However, the appellant submitted that they required service in USA and Canada from the aforesaid company from the very beginning, hence, payment of Overseas Representation Charge was being made since beginning. They have given the details o payments made by them from FY 2007-08 onwards and also the details of export sales made those years. Thereby, the payments made was genuine and made in connection with the business of the appellant. Further, the payment were made through banking channels. They further submitted that M/s Allcast Corporation was non-resident company which did not have any permanent establishment India and the services by the said company was rendered outside India and such no services was rendered or no activity was performed in India. The relied on the judgement of Hon'ble Supreme Court in the case of M/s G. Technology Centre (P) Ltd vs. CIT (2010), 327 ITR 456 (SC) in which the hon'ble Apex Court has held that the question of deduction of tax u/s. 195 arises on when the remittance is a sum chargeable under the head i.e. chargeable u/s. 4,5 and 9 of the IT Act. Section 195(2) gets attracted to cases where payment made is a composite payment in which certain proportion of payment has an element of income chargeable to tax in India. Therefore, the payment made in respect of the amount which was not chargeable to tax under the provisions of the Act, no tax was liable to be deducted on the same.

After going through the facts and circumstances of the case and also the decision of the Hon'ble Supreme Court (supra) as mentioned by the appellant, I find merit in their argument. The income earned by M/s Allcast Corporation was not chargeable to tax in India. There was no permanent establishment of the said company in India. The payment was made in lieu of services rendered in USA and Canada. The company was a non resident company based on USA. No part of its income had accrued or arose in India. The money was paid with reference to procuring export orders outside India. The AO had not brought any material on record to establish that the relevant income accrued to the company in India as stipulated u/s. 9 of the IT Act. The amount was paid for promoting propagating and enhancing the business of the appellant as mentioned in the agreement. In view of the above discussion, since provision of sec. 195 is not applicable on the payment made by the appellant to the aforesaid company, the AO was no justified to invoke section 40(a)(i) of the IT Act. Hence, appeal on this ground is allowed."

Mr. Dasgupta vehemently contends during the course of hearing that the CIT(A) has erred in law as well as on facts in deleting the impugned disallowance(s). His case therefore is that the payee's income concerned was very much taxable in India so as to be liable TDS deduction u/s. 195 of the Act. The assessee on the other hand strongly supports the CIT(A)'s above extracted findings. There is no dispute about the fact that assessee has indeed paid two commission sums to the above USA based payee as Export Overseas Representation charges. There can hardly be any quarrel about the settled legal proposition as hon'ble Apex Court's decision in *G.E. Technology Centre (P) Ltd vs. CIT* (2010) 327 ITR 456 (SC) that section 195 of the Act comes into play only if the concerned recipient's income is chargeable to tax in India. The Revenue has failed to place on record even a single document throwing light towards the fact that the payee herein has rendered any of its services in India thereby making it liable to be assessed u/s 9 r.w.s 5 of the Act. The assessee's payee has not rendered any service in India as per the relevant agreement dated 01.4.009 forming part of the case file. It rather emerges that Article 7 of the Indo-USA Double Taxation Avoidance Agreement makes it clear that "the profits of an enterprise of a contracting state shall be taxable only in that state unless the enterprise carries on business in the other contracting state through permanent establishment situated". It has already come on record that assessee's payee (supra) does

not have any permanent establishment in India. We therefore quote Section 90(2) of the Act that where the Government of India has executed such a Double Taxation Avoidance Agreement then, in relation to an assessee to whom the same applies, the provision of the Act would be applicable to the extent there are more beneficial. We conclude in these facts that once the assessee's payee derives business profits in question without having permanent establishment not taxable in India, the instant taxpayer's case is very well covered under Article 7 of the Indo-USA Double Avoidance Agreement. We thus conclude that CIT(A) has rightly it reversing the Assessing Officer's action invoking the disallowance(s) in both these assessment year(s). This Revenue's identical substantive grounds raised in these two appeals fail therefore.

3. These two Revenue's appeals are dismissed.

Order pronounced in the open court 31/05/2018

Sd/-

(लेखा सदस्य)

(Dr. A.L. Saini)

(Accountant Member)

Kolkata,

*Dkp, Sr.P.S

दिनांक:- 31/05/2018 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व/Revenue-ACIT, Circle-34, Aayakar Poorva, 7th Floor, 110, Shantipally, Kolkata-107
2. आवेदक/Assessee-M/s Calcutta Export Co.18, R.N.Mukherjee Road, 4th Floor, Kolkata-001
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

Sd/-

(न्यायिक सदस्य)

(S.S.Godara)

(Judicial Member)

By order/आदेश से,

Sr. Private Secretary, Head of
Office/DDO

आयकर अपीलीय अधिकरण,

कोलकाता ।