आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री डी. करुणाकरा राव,लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No. 1535/PUN/2016

निर्धारण वर्ष / Assessment Year : 2010-11

Alpha Foam Limited.
J-172, MIDC, Bhosari,
Pune-411028
PAN : AACCA4196J

.....अपीलार्थी / Appellant

बनाम / V/s.

The Deputy Commissioner of Income Tax,
Circle-8, Pune.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Shri Mukesh Jha

सुनवाई की तारीख / Date of Hearing : 07.06.2018
घोषणा की तारीख / Date of Pronouncement : 29.06.2018

आदेश / ORDER

PER VIKAS AWASTHY, JM

This appeal by assessee is directed against the order of Commissioner of Income Tax (Appeals)-9, Pune dated 26.05.2016 for the assessment year 2010-11.

2. The assessee in appeal has raised three grounds. Shri Nikhil Pathak appearing on behalf of assessee stated at the Bar that he is not pressing ground No. 1 and 3. Thus, the only ground left for adjudication is ground No. 2 and the same reads as under:

> "*2. The learned CIT(A) erred in confirming the disallowance made u/s.40(a)(ia) in respect of commission and brokerage expenses paid to Mr. Mohd. Iqbal, resident of Oman on the ground that the assessee had failed to deduct TDS in respect of the said payment.*
>
> *2.1 The learned CIT(A) failed to appreciate that the assessee was not liable to deduct tax u/s.195 in respect of the payment of commission made to a non resident in Oman for in services rendered outside India and hence, the disallowance u/s.40(a)(ia) was not justified on the facts of the case.*
>
> *2.2 The learned CIT(A) ought to have appreciated that the commission paid by the assessee to the non-resident individual was not taxable in India and therefore, the appellant company was not liable to deduct any TDS on the said payment and therefore, the disallowance made u/s. 40(a)(ia) is not justified".*

3. The brief facts of the case as emanating from records are: The assessee is engaged in the business of manufacturing of P.U. Foam, Automobile Seat assembly, Vacuum formed parts, Chemical PVC, ABS, PP Sheets etc. The assessee is also exporting its products. During the period relevant to assessment year under appeal, the assessee paid commission to one Mohd. Iqbal of Oman for procuring orders. On the said commission paid, no tax was deducted by the assessee. During scrutiny assessment proceedings, the Assessing Officer made disallowance of the entire amount of commission Rs.5,04,977/-u/s.40(a)(ia) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

4. Aggrieved by the assessment order dated 31.01.2013, the assessee filed appeal before the Commissioner of Income Tax (Appeals). The First Appellate Authority rejected the contention of the assessee and confirmed disallowance

u/s.40(a)(ia) of the Act. Now, the assessee is in second appeal before the Tribunal assailing the findings of Authorities below.

5. The ld. AR for the assessee submitted that the assessee paid commission to Mohd. Iqbal for procuring orders outside India. Thus, the services were rendered by him outside India and he is not having permanent establishment in India. The commission paid to him is not chargeable to tax in India, therefore, no tax was deducted on the payment of commission to Mohd. Iqbal. The ld. AR further submitted that Commissioner of Income Tax (Appeals) primarily rejected assessee's plea on the ground that CBDT circular of 1969 was withdrawn on 22nd October, 2009 vide circular No.7/2009. After withdrawal of circular, assessee was required to deducted tax at source on the payment made to non-resident. The ld. AR pointed that even after withdrawal of circular No. 23 dated 23.07.1969, the various Benches of Tribunal have held that commission paid to non-residents for rendering services abroad where such non-residents has no permanent establishment in India, no TDS is to be deducted on payment of commission to such non- resident. In support of his submissions, ld. AR placed reliance on the following decisions:

i. Assistant Commissioner of Income Tax Vs, S.K. International reported as 56 taxmann.com 215 (Lucknow-Trib.)

ii. Lucid Colloids Ltd. Vs. ACIT, in ITA No.2349/Mum/2014 for assessment year 2010-11 decided on 20.04.2017.

6. On the other hand, Shri Mukesh Jha representing the Department, vehemently defended the order of Commissioner of Income Tax (Appeals) in upholding the disallowance made u/s.40(a)(ia) of the Act in respect of payment made by the assessee to non-resident without deduction of tax at source. The

assessee was under obligation to deduct tax at source on the payment of commission to the non-resident.

7. We have heard the submissions made by representatives of rival sides and have perused the orders of Authorities below. The solitary issue raised before us, in appeal by the assessee is disallowance u/s. 40(a)(ia) of the Act in respect of commission paid to Mohd. Iqbal of Oman. It is the contention of assessee that commission has been paid to a non-resident for the services rendered outside India. The overseas party has no permanent establishment in India, therefore, payment of commission is not chargeable to tax in India, hence, no TDS was deducted.

8. The Hon'ble Apex Court in the case of GE India Technology Centre (P) ltd. vs. CIT reported as 327 ITR 456 has held that mere remittance to non-resident would not attract provision for deduction to tax at source. The duty to deduct tax at source arise where remittance are wholly or partially taxable in India. If, tax is not assessable, there is no question of tax at source being deducted.

9. The Lucknow Bench of Tribunal in the case of ACIT Vs. S.K. International (supra.) held that where assessee paid commission on sales to foreign nationals for procuring orders from customers outside country, TDS was not required to be deducted on said payment. The relevant extract of findings of the Tribunal read as under:

> *"6. Now, we examine other contentions raised by the Revenue in its grounds. In ground No.6, the Revenue has raised the issue regarding applicability of the explanation in sub section (2) of section 9 inserted by Finance Act, 2010 with effect from 01/06/96. We have considered this*

explanation and we find that as per this explanation, income of non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) of section 9 of the Act even if the non-resident does not have a residence or place of business or. business connection in India and non-resident has not rendered services in India. As per this explanation in sub section (2) of section 9, only those incomes which are covered by clause (v), (vi) and (vii) of section 9 (1) are affected. Clause (v) of section 9(1) is regarding interest income and therefore, this clause is not applicable. Clause (vi) is regarding income by way of royalty and clause (vii) is regarding income by way of fees for technical services (FTS). In the present case, the dispute is not regarding payment of royalty or FTS but the dispute is regarding payment of commission and therefore, these clauses are not applicable and as a consequence, explanation to section 9(2) has no relevance.

7. As per ground No.7, the Revenue has raised the issue regarding Board's ***Circular No. 7/2009 dated 22/10/2009.*** *We find that as per this Circular, CBDT has withdrawn some earlier circulars particularly* ***Circular No. 786 dated 07/02/2000,*** *which provided certain clarifications with respect to* ***Circular No. 23 dated 23/07/69.*** *This Circular No. 786 provided that tax is not deductible at source from payments made to non-resident agents. In our considered opinion, the impact of the withdrawal of* ***Circular No. 786 dated 07/02/2000*** *is this much only that now Indian exporters making payments to agents outside India will need to examine whether such an agent is liable to tax in India and follow the procedure as prescribed in the provisions of the Act. Since in the present case, it is not shown by the Revenue that the non-resident commission agents have rendered services in India or have received the payment in India without the help of* ***Circular No. 786 dated 07/02/2000,*** *income is not taxable in India in the hands of those non-resident commission agents and therefore, TDS was not required to be deducted and as a consequence, no disallowance can be made u/s 40(a)(i) in respect of those payments.*

8. The CIT(A) has decided the issue by following various judgments including a judgment of Hon'ble Delhi High Court rendered in the case of DIT v. Sheraton International Inc. [2009] 313 TTR 267/178 Taxman 84. The CIT(A) has also followed Tribunal decision in the case of ITO v. Faizan Shoes (P.) Ltd. [2013] 58 SOT 245/34 taxmann.com 79 (Chennai - Trib.). In that case, the assessee was engaged in the business of shoe uppers and leather shoes and paid certain commission to non-residents for procuring export orders. Since the assessee did not deduct tax at source while making said payments, Assessing Officer disallowed the same u/s.40(a)(i) of the Act. Under these facts, it was held by the Tribunal that non-residents were only procuring orders for the assessee and following up payments and apart from that, no other services were being rendered. It was held that since non-residents were not providing any technical services to assessee, payments made to them did not fall under category of royalty or fee for technical services u/s. 9(1)(vii) of the Act. The Tribunal further held that even otherwise, since commission paid to non-resident was not taxable in India, the assessee was not required to deduct tax at source while making said payments. The facts in the present case are identical because in the present case also, commission was paid to non-resident for procuring orders without deducting tax.

9. As per above discussion, we have seen that even after considering Circular No.7/2009 dated 22/10/2009 as per which ***Circular No. 786 dated 07/02/2000*** *was withdrawn, it comes out that in the facts of the*

present case, no TDS was required to be deducted because as per this circular in the case of payment of commission to foreign agents, nothing was required to be seen and examined and it could be concluded that no TDS was required to be deducted. Now in the absence of this circular, such decision has to be taken after examining these aspects as to whether the services were rendered in India or outside India and whether the payment was made in India or outside etc. Since, in the present case, this is not a case of the revenue that the services were rendered in India or the payment was made in India and the incomes in the hands of the non resident agent can be considered as deemed to accrue or arise in India by way of operation of section 9(1), no disallowance can be made u/s.40(a)(i) of the Act. We have also considered the explanation to section 9(2) and have seen that this explanation also has no relevance in the present case and therefore, we decline to interfere in the order of CIT(A)."

In the aforesaid decision, the Tribunal has also dealt with the objection raised by the Revenue with respect to withdrawal of Circular No. 23 dated 23.07.69 and circular No.786 dated 07.02.2000. The withdrawal of circular has not charged the taxability of non-resident where services are rendered outside India and non-resident has no permanent establishment in India. Similar view has been taken by Mumbai Bench of the Tribunal in the case of Lucid Colloids Ltd. Vs. ACIT (supra.)

10. In the present case, we find that the Revenue has not controverted the submissions of the assessee that Mohd. Iqbal of Oman has rendered services to the assessee outside India and that he has no permanent establishment in India. The commission has been paid to him for the services rendered to assessee outside India. Thus, in view of the undisputed facts of the case and the decisions discussed above, we are of considered view that commission paid to Mohd. Iqbal was not chargeable to tax in India. Therefore, there was no question of deducting tax at source on the payments made to him by assessee. We find merit in the submissions of the assessee. Accordingly, ground No. 2 raised in appeal by assessee is allowed.

11. The ld. AR for the assessee stated at Bar that he is not pressing ground No. 1 and 3 of the appeal. Accordingly, ground No. 1 and 3 are dismissed as not pressed.

12. The ground No. 4 raised in appeal by the assessee is general in nature, hence require no adjudication.

13. In the result, appeal of the assessee is partly allowed in the terms aforesaid.

Order pronounced on Friday, the 29th day of June, 2018.

Sd/-	Sd/-
(**डी. करुणाकरा राव**/D. KARUNAKARA RAO)	(**विकास अवस्थी** /VIKAS AWASTHY)
लेखा सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 29th June, 2018
SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT (Appeals)-9, Pune.
4. The Pr. CIT-5, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

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आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.