आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद /

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD - BENCH 'D'

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA No.634/Ahd/2017**
*निर्धारण वर्ष***Asstt. Year: 2013-2014**

DCIT, Panchmahal Circle Godhra 389 001.	Vs.	The Panchmahal Steel Ltd. GIDC, Kalol Dist: Panchmahal,Gujarat.

अपीलार्थी/ (Appellant)		*प्रत्यर्थी/* (Respondent)

Revenue by :	Shri V.K. Singh, Sr.DR
Assessee by :	Shri M.J. Shah, AR

*सुनवाई की तारीख/*Date of Hearing : 25/06/2018
*घोषणा की तारीख /*Date of Pronouncement: 09/07/2018

*आदेश/***O R D E R**

PER RAJPAL YADAV, JUDICIAL MEMBER:

Revenue is in appeal before the Tribunal against order of the ld.CIT(A)-4, Vadodara dated 4.11.2016 passed for the assessment year 2013-14.

2. Though Revenue has taken three grounds of appeal, but its grievance revolves around a single issue viz. the ld.CIT(A) has erred in deleting disallowance of Rs.1,05,98,558/- made by the AO.

3. Brief facts of the case are that the assessee-company at the relevant time was engaged in manufacturing of steel billets and related products at its factory located at Kalol, Dist. Panch Mahals. It filed its return of income electronically on 23.9.2013 declaring income at NIL. The case of the assessee was selected for scrutiny assessment and

notice under section 143(2) was issued and served upon the assessee. On scrutiny of the accounts, it revealed to the AO that the assessee had claimed expenditure of commission payment of Rs.1,05,98,558/- in foreign currency. The ld.AO has confronted the assessee to show as to whether it has deducted TDS on such commission payment. If not, then why it should not be disallowed by applying the provisions of section 40(a)(ia) of the Income Tax Act. In response to the query of the AO, the assessee filed a detailed written submissions which has been reproduced by the AO on page nos.2 to 5 of the assessment order. In brief the contention of the assessee was that it had paid commission to foreign agent for the services rendered by them outside India. Services were of providing details of prospective customers and after sale ensuring payment towards export sales. It was also contended that normally talks with such agents were by means of electronic media, such as telephone, email etc. The agents also arrange meetings with prospective buyers during the visit of marketing head in that country. There was no formal agreement. However, for the sales made through them commission is payable/paid to them on receipt of their debit notes after realization of export proceeds. The payments were made through banking channels to the agents in their accounts with the bank. Agents have no business establishment in India. They have not carried out activity in India. Hence, the commission paid by the assessee does not have element of income assessable in the hands of alleged agents, and if there was no element of income available, then the assessee was not supposed to deduct TDS. However, the ld.AO was not satisfied with the explanation of the assessee. He made disallowance with help of section 40(a)(i) on the ground that the assessee failed to deduct TDs on the alleged commission payment. Dissatisfied with the disallowance the assessee carried the matter in appeal before the ld.CIT(A) it again filed written submissions which

have been reproduced by the ld.CIT(A) in the impugned order. The ld.CIT(A) has allowed the claim of the assessee by recording the following finding:

> *"3.3.1. I have considered the submissions of the Ld. Authorized Representative and the order of the Assessing Officer. The only issue pertains to the disallowance of commission payments made to foreign agents claimed by the appellant of Rs.1,05,98,558/-. The Assessing Officer has not doubted the genuineness of the payments made to the commission agents located in Foreign Countries based on the confirmation letter as well as letter received from the foreign agents who had no PE or place of business in India. The Foreign Agents had done the services in their countries and received commission payments for the services rendered by them in their countries for getting orders to the appellant.*
>
> *The operation of the Section 195 of the Income-tax Act comes into force for deducting TDS on foreign payments paid by the resident assessee to non-resident agents only when the payment made to the non-residents. Various court decisions have held that in such type of situations, the provisions of deducting tax will not arise as the overseas commission income of a foreign agent is not taxable in India in the absence of 'business connection. A commission agent working outside India for obtaining export orders does not carry out any business operation in India and, therefore, no income is stated to accrue or arise in India. The CBDT Circulars clarifying this provision have been withdrawn but it has not changed the fundamental principles. If the commission agent acting as a selling agent outside India is not chargeable to tax in India and the receipt in India of the sale proceeds remitted by the purchasers from abroad did not amount to an operation carried out by the non-resident commission agent in India as contemplated by clause (a) of the Explanation to 9(1) of the Act. The Apex Court in the case of CIT Vs Toshoku Ltd [1980] 125 ITR 525(SC) has categorically held that the commission amounts which were earned by the non-resident for services rendered outside India could not be deemed to be income which had either accrued or arisen in India. Further, in the case of Authority for advance rulings in the case Ind Telesoft(P) Ltd [2004] 267 ITR 725 (AAR) it is held that no tax was deductible at source under section 195 of the Act on payments of commission and retainer fee made by the appellant to the non-*

resident companies for securing business outside India where the said entities had no office or business operations in India.

3.3.2. Hon'ble Apex Court, in the case of GE India Technology Cen. (P.) Ltd. [2010] 327 ITR 456(SC) has held that the expression "chargeable under the provisions of the Act in Sec.195(1)" shows that the remittance has to be of trading receipt, the whole or part of which, is liable to tax in India. If tax is not so assessable, there is no question of tax at source being deducted. Ld. Authorized representative has also relied on some recent decisions which are directly on this issue and support the claim of the Appellant. These are:

(i) Gujarat Reclaim and Rubber Products Ltd. ITA No. 8868/Mum/2010
(MumTrib.)
(ii) DCIT v. Divi's Laboratories Ltd. - (2011-TII-182-ITAT-HYD-INTL)
(iii) Exotic Fruits (P) Ltd vs. ITO [2013] 40 taxmann.com 348 (Bang. Trib.) (iv) CIT v. Eon Technology (P) Ltd. (2012) 246 CTR 40 (Delhi) (High Court) (v) Southern Borewells v. CIT [2014] 43 taxmann.com 378 (HC-Kerala)
(vi) ITO vs Trident Exports [2014] 44 taxmann.com 297 (Chennai - Trib.) (vii) Andrew Yule & Co.Ltd. Vs CIT(1994) 206 ITR 381 (MAD) :TC5PS.170 (viii) Rupajee Ratnachand & Anr.Vs CIT (1955)282 (AP):TC5R453 &
(ix) ITO Vs Shriram bearings Ltd.(1987)164 ITR 419(Cal):TC5R453A

Considering the ratio of aforementioned decisions, the issue needs to be allowed in favour of the appellant which is allowed in para below.

3.3.3. Moreover, this issue is covered in favour of the assessee by the decisions of my predecessors as well as by the undersigned as contended by the Ld. Authorized Representatives that on the same issue, Ld.CIT(A) Baroda had allowed the similar payment in earlier years i.e. for A.Y. 2001-02, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09 2009-10 and 2011-12 vide orders dated 18.09.2009, 28.01.2010, 21.01.2013, 29.11.2013 and 15.02.2016 respectively. From the copies of orders placed before me it transpires that this contention of the Authorized Representatives is correct. Three different ClT(A) have allowed appeals of the assessee for A.Y. 2001-02, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10. I also agree

with the Ld. Authorized Representative that Hon'ble ITAT, Ahmedabad vide its order dated 20.08.2010 for A.Y. 2002-03 and 2007-08 in ITA No. 1443 and 1444/Ahd/2010 have dismissed the appeals of the revenue. Similarly, vide order dated 13.07.2012 Tribunal has dismissed the appeals of revenue for A.Y. 2001-02, 2003-04, 2004-05, 2005-06 and 2006-07 in ITA No 5-14/Ahd/2010. Considering the various judicial precedents as mentioned above, the Assessing Officer is not justified in disallowing the commission payments made abroad on the ground that no IDS was deducted. In view of the various case laws mentioned supra and respectfully following them, I am of the considered view that the claim of the Appellant is in accordance with law. The Assessing Officer is directed to delete the addition made at Rs.1,05,98,558/-. This ground of appeal is allowed."

4. At the very outset, the ld.counsel for the assessee contended that similar payments were made in the assessment years 2001-02 to 2009-10 and 2011-12. Dispute in all these years either at the instance of the Revenue or at the instance of the assessee travelled upto the Tribunal, and consistently it has been held that element of income was not involved in such transactions. Thus, non-resident commission agents are not taxable in India because they have not carried out any activity in India. He placed on record copy of the tribunal's order in the assessment year 2009-10. He further pointed out that the ld.CIT(A) has made reference to the facts and the status of disallowance of such commission payments in earlier years. He also contended that ITAT, Ahmedabad in the case of DCIT Vs. Welspun Corporation Ltd., 77 taxmann.com 165 (Ahd) has considered similar aspects elaborately. Facts of both these concerns are identical. They are also in similar products, and commission was paid to foreign agents. The AO sought to disallow on the ground that payment made by the assessee was a fee for technical services as per section 9 and even if the recipients are not having any PE in India or any other establishment then also their services are being used in India for supplying of the goods. Thus, the payment made to them, involved element of income and TDS ought to

be deducted. This stand of the AO has not been approved by the CIT(A) as well as by the ITAT in the case of Welspun Corporation Ltd. (supra). The ld.counsel for the assessee placed on record copy of the order of the Tribunal which is reported in 77 taxmann.com 165 (Ahd) and 55 ITR (T) 405 (Ahd). On the other hand, the ld.DR relied upon the order of the AO.

5. We have duly considered rival contentions and gone through the record carefully. A perusal of the CIT(A)'s order would indicate that identical issue has been considered in earlier years. Consistently, it has been held that payments made by the assessee to alleged foreign commission agents does not involve element of income assessable in India, and therefore, there is no obligation upon the assessee to deduct TDS. Reference to the decision of the Hon'ble Supreme Court in the case of GE India Technology Centre P. Ltd. v. CIT [2010] 327 ITR 456 (SC) was made. Apart from consistency, we would like to make reference to the facts noted in the head notes of the judgment of Welspun Corporation Ltd. (supra), which reads as under:

- *The assessee-company was a global manufacturer of steel pipes, plates and coils, offering the highest quality of pipes. The manufacturing activities performed by the company were highly technical in nature. The manufacturing of specialised pipe was a highly technical activity involving a highly-technical complex exercise of technology and skilled labour and the finest grade of raw materials. To procure orders, the company required specialist agents who could understand the technical nitty-gritty of the assessee's business and could demonstrate the assessee's business profile and the quality of the products of the assessee to the potential clients to convince them to enter into a contract with the assessee for supply of the pipes etc. and other allied works.*
- *In order to perform the aforesaid highly technical activity, the assessee entered into a contract with foreign agents. In terms of the agreement, the agent was to develop, expand and promote the sales and marketing for assessee's products, make market plans and establish a marketing network of*

representatives to help and promote assessee's products, to provide information such as market development, activities of competitors, intentions and plans of clients and financial information on clients, to provide advanced information about the tenders, gathering technical specifications of project and work incidental thereto, and to identify sub-contractors and logistic service provider, such as shippers and cargo handling agencies, to ensure the smooth execution of contracts.

- *During relevant year, the assessee made payment of export commission to commission agents without deducting tax at source. The assessee claimed that the export commission was not a service and if at all they are being construed as services, the same was being rendered outside India and was not taxable in India under section 5(2). Accordingly, the tax was not required to be withheld under section 195.*
- *The Assessing Officer held that the responsibilities of agents showed that agents were required to render technical services, allow the use of information containing industrial, commercial and technical experience which was made available to the assessee, and that the consideration received for these services was nothing but fees for technical services. These payments according to the Assessing Officer were taxable under section 9(1)(vii). Therefore, the assessee was liable for tax deduction at source from these payments under section 195.*
- *On appeal, the Commissioner(Appeals) held that the payments could not be held to be FTS and they were in the nature of commission earned from services rendered outside India which did not have tax implications in India.*

6. The Tribunal made elaborate discussion on all possible angles in this judgment, and thereafter concluded as under:

> *"41. We are in considered agreement with the views so expressed by the coordinate bench. In view of these discussions, as also bearing in mind entirety of the case, we uphold well reasoning findings of the learned CIT(A) that the commission payments made to the non-resident agents did not have any taxability in India, even under the provisions of the domestic law i.e. Section 9. Once we come to the conclusion that the income embedded in these payments did not have any tax implications in India, no fault can be found in not deducting tax at source from these payments or, for that purpose, even not approaching the Assessing Officer for order under section 195. In our considered*

view, the assessee, for the detailed reasons set our above, did not have tax withholding liability from these payments. As held by Hon'ble Supreme Court in the case of GE India Technology Centre (P.) Ltd. v. CIT [20101 327 ITR 456/193 Taxman 234/7 tax.mann.com 18, payer is bound to withhold tax from the foreign remittance only if the sum paid is assessable to tax in India. The assessee cannot, therefore, be faulted for not approaching the Assessing Officer under section 195 either. As regards the withdrawal of the CBDT circular holding that the commission payments to non-resident agents are not taxable in India, nothing really turns on the circular, as de hors the aforesaid circular, we have adjudicated upon the taxability of the commission agent's income in India in terms of the provisions of the Income Tax Act as also the relevant tax treaty provisions."

7. The facts in both the case are identical. Both the assesses were engaged in manufacturing of steel billets, wire rods, bright bars etc. They have been exporting these products to foreign countries. They have certain agents who have procured orders outside India and the assessees have paid commission on such orders. Therefore, respectfully following order of the ITAT in the case of Welspun Corporation Ltd. (supra) as well as orders in the assessee's own case, we are of the view that no interference is called for in the order of the ld.CIT(A).

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

Order pronounced in the Court on 9th July, 2018 at Ahmedabad.

Sd/- Sd/-

(AMARJIT SINGH) (RAJPAL YADAV)
ACCOUNTANT MEMBER JUDICIAL MEMBER

Ahmedabad; Dated 09/07/2018