

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'C' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A .No. 5806/DEL/2014 (A.Y 2011-12)

ACIT Circle-28(1) New Delhi (APPELLANT)	Vs	Maharani Enterprises 20-A, Gadodia Market, Khari Baoli Delhi AAMFM4846Q (RESPONDENT)
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C.O .No. 115/DEL/2015 (A.Y 2011-12)

Maharani Enterprises 20-A, Gadodia Market, Khari Baoli Delhi AAMFM4846Q (APPELLANT)	Vs	ACIT Circle-28(1) New Delhi (RESPONDENT)
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Appellant by	Sh. Arun Kumar Yadav, Sr. DR
Respondent by	Sh. Suresh Kumar Gupta, Adv

Date of Hearing	19.07.2018
Date of Pronouncement	24.07.2018

ORDER

PER SUCHITRA KAMBLE, JM

The appeal is filed by the Revenue and the Cross Objection is filed by the assessee against the order dated 23/07/2014 passed by the CIT(A)-XXV, New Delhi for Assessment Year 2011-12.

2. The grounds of appeal are as under:-

ITA No. 5806/DEL/2014

“ 1. On the facts and the circumstances of the case the Ld.CIT(A) has erred in deleting the addition of Rs.1,19,87,105/- made by A.O on account of non-deduction of TDS u/s 40(a) (ia) of the I.T act on Contract Payment and Commission.”

C.O .No. 115/DEL/2015

“1. The Ld.CIT(A) on the facts, in law and in view of the circumstances of the cases, in confirming the addition of disallowance of Rs.259250/- u/s 40(a)(ia) of the I.T Act for non deduction of TDS on the payments covered by Section 194C of the I.T Act ignoring the authorities cited on behalf of the appellant against the disallowance under reference.”

3. During the year under consideration, the assessee is engaged as exporter and importer of Sanitary wares & tiles and also wholesale trading of dry fruits and Kirana items. The return of income declaring total income of Rs.98,18,474/- were electronically filed on 6/9/2011. It was processed u/s 143(1) of the Income Tax Act on 28/1/2012. The case was selected for scrutiny. Notice u/s 143(2) was issued on 3/8/2012. Subsequently, notice u/s 142(1) of the Income Tax was issued on 15/4/2013. Chartered Accountant of the assessee attended the hearing from time to time. The Assessing Officer disallowed Rs.1,19,91,774/- by holding that since the assessee has not obtained the necessary order from his Assessing Officer before transferring the commission to Shri Sanjay Mehta in Dubai, without deduction of tax the said amount is disallowed. The Assessing Officer also disallowed Rs.2,59,250/- in respect of payments made to Maa Bhawani Lifters u/s 40(a)(ia) of the Act for non deduction of TDS.

4. Being aggrieved by the Assessment Order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee thereby

deleting the addition of Rs.1,19,51,774/- and sustaining the addition of Rs.2,59,250/-. The Revenue is in appeal before us and the assessee has filed cross-objection for the amount which was sustained by the CIT(A).

5. The Ld. DR submitted that the CIT(A) failed to appreciate that the Assessing Officer has made addition of Rs.1,19,87,105/- on account of non deduction of TDS u/s 40(a)(ia) of the Act on contract payment and commission payment. The CIT(A) failed to appreciate that the amount of commission paid by the assessee to Shri Sanjay Mehta in Dubai is income deemed to accrue or arise of him in India and, therefore, the assessee has to deduct TDS. The Ld. DR supported the Assessment Order by pointing out that even if the said amount is held not to be liable for TDS deduction, the same cannot be allowed to the assessee as deduction in its profit and loss account, since the assessee has suo moto taken decision for non deduction of TDS rather than following the procedure prescribed by law. The Ld. DR submitted that since the assessee has not obtained the necessary order from his Assessing Officer before transferring the commission to Shri Mehta, the amount of Rs.1,19,51,774/- is properly disallowed by the Assessing Officer. As regards the Cross-Objection of the assessee, the Ld. DR submitted that the CIT(A) has rightly disallowed the said amount.

6. The Ld. AR submitted that as under:-

- “1. The appellant had paid commission of Rs. 1,19,91,774/- to an NRI Sh. Sanjay Mehta, a resident of Dubai against the export orders booked by him. There is no dispute about the genuineness and business expediency of this payment. Copy of the agreement was submitted before the authorities below.*
- 2. The AO disallowed the above payment invoking provision of sec 40(a) (i) of IT Act for non deduction of withholding tax on such payment as per provision of sec 195 r.w. sec 9 of IT Act.*
- 3. There is no dispute about the fact that the said payee has no permanent*

place of business in India and his services has no connection with the property in India and the amount has been directly remitted to Sh. Sanjay Mehta outside India. All his activities for which commission has been provided have been carried out outside India and no part of his activities are attributed to the activities in India.

4. The AO was given the explanation by the assessee in para 2.2.1 page 2 of the assessment order that commission payments to such non-residents are not taxable in India as conditions specified u/s 9(1)(i) of the Act are not fulfilled. The AO rejected the explanation of the respondent assessee. To support the above contention the following chart will show how such a payment is not taxable in India vis a vis the non-applicability of the various sub-clauses of sec 9(1) as detailed below:-

<i>Sub-Clause of Section 9(1) of IT Act</i>	<i>Applicability on the assessee</i>
<i>Section 9(1)(i)</i>	<i>This clause is applicable if the payee has earned income through business connection in India or through any property, any asset or any source of income in India or through transfer of capital asset in India. None of the Explanations 1 to 7 has application on the facts of the case. No such business connection or property or asset in India is established by the Department in the case of the payee assessee in terms of Explanation 2(Business Connection in India) and Explanation 5 & 6 (Assets and source of income in India) to sec 9(1)(i).</i>
<i>Section 9(1)(ii)</i>	<i>It is applicable only to payment of salaries earned in India.</i>
<i>Section 9(1)(iii)</i>	<i>It is applicable only to the payment of salaries by the government to citizen of India for services outside India.</i>
<i>Section 9(1)(iv)</i>	<i>It is applicable only to the dividend paid by Indian Company outside India.</i>
<i>Section 9(1)(v)</i>	<i>It is applicable only to the interest payments outside India</i>
<i>Section 9(1)(vi)</i>	<i>It is applicable only to the payments made towards royalty.</i>
<i>Section 9(1)(vii)</i>	<i>It is applicable to the fees for technical services as defined in Explanation 2 which includes managerial services also. The Hon'ble Delhi High Court in the case of DIT vs Panalpa Auto Elektrik Ltd 272 CTR 117</i>

	<p><i>(Del) (Case Law Compilation pages 7-13) held that in para 22 at page 11B Commission for arranging for export sales and recovery of payment cannot be regarded as consultancy services render by Non-Resident. Such non-resident cannot be held to be a consultant who advise or render consultancy services. The Skill, business acumen and knowledge of the Non-Resident is for his own benefit and use. These are neither technical services nor managerial services in the absence of any use of technology and managerial functions render by the payee. Similar view was taken by Delhi Bench of ITAT in the case of DCIT vs Angelique International Ltd (PB 20-28, relevant page 24 in para 11) approved by Delhi High Court in CIT vs Angelique International Ltd 359 ITR 0009 in para 5 of the order. Various authorities before Ld. CIT(A) in para 1.1.7 at page 7 7 8 of the CIT(A) order.</i></p>
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5. The sec 9(2) is also not applicable on the facts of the case and also considering the restriction contained in Explanation to above section as per which the income under following clauses of sec 9(1) will be deemed to accrue or arise in India by virtue of section 9(2). The relevant clauses are clause (v) {Interest payment}, clause(vi) {Royalty} and clause (vii) {Fee for technical services} which implies that only income through such payments which are made to the non residents will be deemed to accrue or arise in India. Since, the payment in the present case doesn't fall in the above categories, the provisions of section 9(2) too have no application.

6. The AO has also raised the issue of the circular No 7 dated 22.10.2009 through which old Circulars Nos 23 of 1969 and 786 of 2000 stood withdrawn. As per the AO, there is a change in the legal position post issue of circular 7 dt 22.10.2009 by which, the payments to Non-Residents have become taxable which was earlier exempt by virtue of old circulars. In this context it was explained that the circulars don't determine the taxability of an Income in India. If interpretation is given by a circular that interpretation

should not be in conflict with the legal provision in the Act. When sec 9(1) and 9(2), keep the income to foreign agents out of the ambit of taxation in India, the circulars cannot override the provisions of law. The various authorities have considered the impact of circular No. 7 vs a vis the taxability of Non-Residents read with provisions of sec 9 of the Act. The new circular per se in the absence of any amendment cannot change the character of commission or the taxability of the same. The circulars or the absence of the circulars don't define the taxability of a particular income. The Hon'ble Supreme Court in the case Kerala Financial Corporation vs CIT 75 Taxmann 573 (SC) held that circulars cannot override or detract the provisions of law.

7. On the validity of the circular to support the addition and the relevance of circulars in general vis a vis the powers of the appellate authorities, the Supreme Court in, CIT v. Hero Cycles (P) Ltd. 228 ITR 463 (SC) held that it is a settled law that circulars can bind the Income Tax Officer but will not bind the appellate authority or the Tribunal or the courts or even the assessee. Further the Supreme Court in Bengal Iron Corporation v. CTO (1993) UPTC 1312 (SC) observed that so far as clarifications/ circulars issued by the Central Government and/or State Government are concerned, they represent merely their understanding of the statutory provision. They are not binding upon the courts. There can be no estoppel against the statute. The understanding of the government, whether in favour or against the assessee, is nothing more than its understanding and opinion. It is doubtful whether such clarifications and circulars bind the quasi-judicial functioning of the authorities under the Act. While acting in quasi-judicial capacity, they are bound by law and not by any administrative instructions, opinions, clarifications or circulars. Law is what is declared by the Supreme Court and the High Court, it is for the Supreme Court and the High Court to declare what does a particular provision of statute say, and not for the executive. Of course, the Parliament/Legislature never speaks or explains what does a provision

enacted by it mean. In view of above, the support derived by the AO to make addition from the circular of the CBDT is not tenable in law when the circular in question is contrary to the interpretation of the provision made by the courts through the judgment relied in before.

8. *It was held in the following authorities after considering the Circular No 7 that no additional liabilities is fastened because of the substitution of the old circulars by the new circular No.7 Dated 22.10.2009*

(a) *DCIT vs Sanjeev Gupta 2011 135 HJ 641 (Lkw)*

(b) *DCIT vs Divi's Laboratories Ltd 2011 131 ITD 271 (Hyd)*

(c) *ACIT vs Avon Organics Ltd 2013 55 SOT 263 (Hyd)*

(d) *Gujarat Reclaim & Rubber Products Ltd Vs ACIT ITA No.8868/Mum/2010*

(e) *DCIT vs Angelique International Ltd (supra) ITAT Delhi Decision approved by Delhi High Court reported in 359 ITR 0009) (Case Law Compilation pages 20-28)*

(f) *Farida Shoes P Ltd ITA No.359/Mad/2013 Dated 11.04.2013.*

(g) *Farida Prime Tannery Pvt Ltd ITA No.360/Mad/2013 Dated 11.04.2013.*

(h) *T Abdul Wahid & Co ITA No84/Mad/2014 Dated 10.04.2014*

(i) *Accurate Engineering Co Pvt Ltd vs DCIT ITA No.620/PN/2014 Dated 14.03.2016 (Case Law Compilation pages 49-54)*

9. *The AO has also relied on the ruling by the AAR in the case of SKF Boilers & Driers Pvt Ltd dated 22.02.2012 wherein it was held that after withdrawal of old circular, the tax is required to be deducted on the payments of commission to non-resident agents for supply of boilers to Pakistan. The AAR Ruling is based on the finding that the fact that the agents have rendered services abroad and commission is remitted to Act. The above finding of the AAR applying section 9(1)(i) does not take them abroad is not relevant for determining the taxability of income in India and such commission was held to be taxable in India u/s 5(2)(b) r.w.s 9(1)(i) of the into account the inbuilt concept of existence of 'business connection' in the above*

section. The above finding is contrary to the decision of the Hon'ble Delhi High Court in EON Technologies P Ltd 343 ITR 366 (Case Law Compilation pages 1-6). It may also be noted that the decision of the Supreme Court in CIT Vs Toshoku Ltd 125 ITR 525 still holds ground where such payments were held to non-taxable in India in the absence of T&S business connection of the payee agent in India and no activities are done by such agent in India. The relevance of the ruling by the AR have been considered in the past to show whether such ruling have binding effect on the judicial authorities in the case of ADIT vs Green Emirates Shipping & Travels TOO ITD 203 (Mum), relying on the decision of Hon'ble Supreme Court in the case of Union of India vs. Azadi Bachao Andolan (2003) 263 ITR 706 (SC) held that AAR ruling has limited persuasive value. The Hon'ble Apex Court at p. 742 I the above judgment had the occasion to deal with the said AAR ruling and held that sec. 245 S of the Act provides that the Advance Ruling pronounced by the Authority under s. 245R shall be binding only :

- “(a) on the applicant who had sought it;*
- (b) in respect to the transaction in relation to which the ruling had been sought; and*
- (c) on the CIT, and the IT authorities subordinate to him, in respect to the applicant and the said transaction.”*

It is, therefore, obvious that, apart from whatever its persuasive value, it would be of no help to us. Having perused the order of the Advance Ruling Authority, we are not persuaded.

10. *Further, Ahmedabad Bench of ITAT in the case of Excel Chemicals India Ltd in ITA No.5/Ahd/2016 Dated 29.07.2016(Case Law Compilation pages 29-33) after considering the ruling of AAR in case of SKF Boilers held that commission remitted abroad to non-resident agents on identical facts was allowed to be made without deduction of tax and it was held in para 6 at*

page 32 of the Paper Book that the above ruling is not binding on appellate authorities. Further reliance is placed on the decision of the Mumbai Bench of ITAT DCIT vs Boston Solid Group PTE Ltd 93TTJ 293 (Mum).

11. *Finally, the Agra Bench of ITAT in the recent decision in the case of ACIT vs M/s Manufax (India) in ITA No.434 & 446/Agra/2015 Dated 11.04.2018 considered the issue of payment of commission in identical circumstances and held that such income is not taxable in India. The Hon'ble Bench considered the provision of sec 9(1) and 195, all the cases on the issue, the effect of withdrawal of circular No.29 and the AAR ruling in the case of SKF Boilers and Dryers Pvt Ltd. Copy enclosed. Kind attention of the bench is invited to the decision in the case of Divya Creation Vs ACIT ITA No 5603/Del/2014 dated 14.09.2017 where on the identical facts and circumstances the payment of the foreign agency commission without deduction of withholding tax was allowed by the C Bench of the Delhi Benches of the ITAT.(Copy of both the judgments enclosed)*

12. *On the issue raised in the MA about the applicability of the section 40a (ia) of the Act the case of the respondent assessee is covered by the jurisdictional High Court decisions in the cases CIT Vs Rajinder Kumar 362 ITR 241 and Naresh Kumar ITA No 218/2013 dated 06.09.2013 where the Court held that after the insertion of second proviso to section 40a(ia) through Finance Act 2012 that in case of no initiation of the proceedings against the assessee by the Department u/s 201(1 A) implying that the assessee is not treated as 'assessee in default' under first proviso to section 201 (1), no addition could be made in the hands of the assessee for failure to deduct tax . The above contention is based on the premise that the above amendment in section 40a(la) is retrospective and applies to old cases also as held by the Delhi High Court in CIT Vs Ansal Landmark Township P Ltd 377 ITR 635.*

7. As regards Department's appeal and Cross Objection, the Ld. AR submitted that the Tribunal in case of Divya Creation Vs. ACIT being ITA No.

5603/Del/2014 Assessment Year 2010-11 order dated 14/9/2017 categorically discussed this issue regarding commission paid to the non-resident. The Ld. AR submitted that the issue is decided in favour of the assessee.

8. We have heard both the parties and perused the material available on record. It is noted that the CIT(A) has given a detailed finding as to why the amount of Rs.1,19,51,774/- has to be deleted. To arrive at this finding, the CIT(A) has taken a cognizance of RBI's guidelines as well as CBDT Circular. At the time of hearing, it was pointed out by Ld. AR that the said Circular was withdrawn by the Department. All these aspects have been taken into consideration by the CIT(A). Besides this, the issue is also dealt by us in case of Divya Creation wherein we have held as under:-

“19. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer made addition of Rs.62,19,609/- u/s 40(a)(i) on the ground that assessee has not deducted tax from the foreign agency commission paid as per the provisions of section 195 of the I. T. Act. While doing so, the Assessing Officer relied on the decision of the AAR in the case of SKF Boilers and Driers Pvt. Ltd. (supra) and the decision in the case of Rajiv Malhotra (supra). We find the ld. CIT(A) while upholding the action of the Assessing Officer held that income arising to the agent on account of export commission very much falls within the ambit of provisions contained in section 5(2)(b) of the I.T. Act as the income has accrued in India when the right to receive the same came into existence. According to him although the non- resident agent has rendered services and procured orders abroad but the right to receive the commission certainly arise in India when the order gets executed by the assessee. According to him, the mere fact that the agent is to render services ITA No.5603/Del/2014 abroad and the commission is to be remitted to him abroad are wholly irrelevant for the purpose of determining the income since income is from a source in India.

20. We find identical issue had come up before the Ahmedabad Bench of the Tribunal in the case of Welspun Corporation Ltd. (supra). The Tribunal in the said decision has held that the payments made by the assessee for services

rendered by non-resident agents could not be held to be fees for payment for technical services. These payments were in nature of commission earned from services rendered outside India which had no tax implications in India. The Tribunal while deciding the issue has also considered the two decisions of the AAR which has been relied on by the Assessing Officer as well as the CIT(A).

21. We find the Hon'ble Allahabad High Court in the case of Model Exims (supra) has held that failure to deduct tax at source from payment to non-resident agents, who has their own offices in foreign country, cannot be disallowed, since the agreement for procuring orders did not involve any managerial services. It was held that the Explanation to section 9(2) is not applicable. It was further held that the situation contemplated or clarified in the Explanation added by the Finance Act, 2010 was not applicable to the case of the assessee as the agents appointed by the assessee had their offices situated in the foreign country and that they did not provide any managerial services to the assessee. Section 9(1)(vii) deal with technical services and has to be read in that ITA No.5603/Del/2014 context. The agreement of procuring orders would not involve any managerial services. The agreement did not show the applicability or requirement of any technical expertise as functioning as selling agent, designer or any other technical services.

22. We find the Hon'ble Supreme Court in the case of Toshoku Ltd. (supra) has observed as under :-

"During the previous year relevant to the assessment year 1962-63, B, a dealer in tobacco in India, purchased tobacco and exported it to Japan and France through non-resident sales agents, a Japanese company and a French business house respectively. Under the terms of the agreement, the Japanese company, which was appointed as exclusive sales agent in Japan for tobacco exported by B, was entitled to a commission of 3 per cent. of the invoice amount. The sale price received on the sale in Japan was remitted wholly to B in India and B debited his commission account and credited the amount of commission payable to the Japanese company in his account books and later remitted the amount to the Japanese company. There was a similar agreement with the French business house in relation to the corresponding area and similar credit and debit entries and subsequent remittance of the commission were made. The question was whether the commission earned by the non-resident sales agents

could be taxed in India, treating B as representative assessee under s. 161 of the I.T. Act, 1961:

Held, (i) that it could not be said that the making of the entries in the books of B amounted to receipt, actual or constructive, by the non-resident sales agents as the amounts so credited in their favour were not at their disposal or control; they could not, therefore, be charged to tax on the basis of receipt of income, actual or constructive, in the taxable territories.

(ii) That the non-residents did not carry on any business operation 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 did not amount to an operation carried out by the non-residents in India as contemplated by cl. (a) of the Explanation to s. 9(1)(i) of the I.T. Act, 1961. The commission amounts which were earned by the non-residents for services rendered outside India could not be deemed to be income which had either accrued or arisen in India.

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 source a discharge from the debt."

23. Similar view has been taken by the Hon'ble Madras High Court in the case of Kikani Exports Pvt. Ltd. (supra) and Faizan Shoes Pvt. Ltd. (supra). ITA No.5603/Del/2014 The Hon'ble Delhi High Court in the case of EON Technology P. Ltd. (supra) has also taken similar view where it has been held that non-resident commission agents based outside India rendering services of procuring orders cannot be said to have a business connection in India and the commission payments to them cannot be said to have been either accrued or arisen in India. In view of the decisions cited above (supra), we are of the considered opinion that the assessee is not liable to deduct tax under the provisions of section 195 of the I.T. Act on account of foreign agency commission paid outside India for promotion of export sales outside India. Accordingly, the order of the CIT(A) is set-aside and the grounds raised by the assessee are allowed."

Thus, both the issues involved in appeal and in cross objections are covered in favour of the assessee. Therefore, the appeal of the Revenue is dismissed and Cross- Objection of the assessee is allowed.

8. In result, the appeal filed by the Revenue is dismissed and Cross-Objection filed by the assessee is allowed.

Order pronounced in the Open Court on 24th July, 2018.

Sd/-

(R. K. PANDA)
ACCOUNTANT MEMBER

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 24/07/2018
*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	23.07.2018
Date on which the typed draft is placed before the dictating Member	23.07.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	24.07.2018
Date on which the final order is uploaded on the website of ITAT	25.07.2018
Date on which the file goes to the Bench Clerk	25 .07.2018
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	