

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH, CHENNAI
श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं ए. मोहन अलंकामणी, लेखा सदस्य के समक्ष
BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A.MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A.No.1572 & 1573/Chny/2017
(निर्धारण वर्ष / Assessment Year: 2010-11 & 2011-12)

M/s. Evolv Clothing Company Pvt. Ltd., (formerly known as Isex Fashions P Ltd), 471, MKN Road, Alandur, Chennai – 600 016.	Vs	The ACIT, Corporate Circle 2(1), Chennai – 34.
PAN: AAACI0900L		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by	:	Shri Saroj Kumar Parida, Advocate
प्रत्यर्थी की ओर से/Respondent by	:	Ms. Paruna Sundri, CIT

सुनवाई की तारीख/Date of hearing	:	28.06.2018
घोषणा की तारीख /Date of Pronouncement	:	23.07.2018

आदेश / ORDER

Per A. Mohan Alankamony, AM:-

These appeals by the assessee are directed against the common order passed by the learned Commissioner of Income Tax(Appeals)-6, Chennai, dated 10.04.2017 in ITA No.189 & 188/CIT(A)-6/2013-14 for the assessment years 2010-11 & 2011-12 passed U/s. 250(6) r.w.s. 143(3) of the Act.

2. The assessee has raised several identical grounds in its appeals and the cruxes of the issues are that

(i) The Ld.CIT(A) has erred in confirming the order of Ld.AO with respect to the addition made by invoking Section 40(a)(ia) of the Act, being payment made to overseas entity towards fees for technical services without deduction of tax U/s.195 of the Act amounting to Rs.4,42,30,697/- & Rs.2,55,18,179/- for the assessment years 2010-11 & 2011-12 respectively.

(ii) The Ld.CIT(A) has erred in confirming the order of the Ld.AO with respect to addition made by invoking Rule 14A r.w.r. 8D(iii) of the Rules amounting to Rs.68,512/- for the assessment year 2010-11.

3. The brief facts of the case are that the assessee is a company engaged in the manufacturing of textile garments, filed its return of income electronically for the assessment years 2010-11 & 2011-12 on 26.09.2010 & 28.09.2011 admitting total income of Rs.4,98,65,250/- & Rs.10,16,00,710/- respectively. Subsequently revised return was filed for the assessment year 2011-12 on 26.04.2012 declaring total income of Rs.8,96,18,170/-.The cases

were selected for scrutiny under CASS and notice U/s.143(2) of the Act was issued on 25.08.2011 & 13.08.2013 for the assessment years 2010-11 & 2011-12 respectively. Finally assessment order was passed U/s.143(3) of the Act on 11.03.2013 & 21.02.2014 for the assessment years 2010-11 & 2011-12 respectively wherein the Ld.AO made several additions amongst which additions were made invoking the provisions of Section 40(a)(ia) and 14A r.w.r. 8D of the Rules.

4. Ground No.: 2(i): Invoking Section 40(a)(ia) of the Act towards commission paid to foreign agents for marketing, procurement of orders and systematic market research without deducting tax at source U/s.195 of the Act:-

During the course of scrutiny assessment proceedings, it was observed by the Ld.AO that the assessee has paid commission to foreign agents during both the assessment years for marketing, procurement of orders and systematic market research for their products amounting to Rs.4,42,30,697/- & Rs.2,55,18,179/- for the assessment years 2010-11 & 2011-12 respectively. The Ld.AO was of the view that the income arising out of such payment is deemed to be taxable in India as per Section 9(1)(vii) of the Act,

hence provisions of Section 195 would be attracted and the assessee is bound to deduct tax at source for the payment made to foreign agents. Since the assessee had not deducted tax at source towards these payments, the Ld.AO invoked the provisions of Section 40(a)(ia) of the Act and thereby disallowed the expenditure. On appeal, the Ld.CIT(A) relying on the order of the Tribunal for the assessment year 2009-10 reported in 142 ITD 0618 in the assessee's own case on the same issue confirmed the order of the Ld.AO.

4.1 After the date of the hearing, it was brought to our notice that the Hon'ble Jurisdiction Madras High Court, in the assessee's own case in Tax Appeal No. 572 of 2013 in M.P.No.1 of 2013 for the assessment year 2009-10, on the identical issue held the issue in favour of the assessee reversing the Order of the Tribunal. The relevant portion of the order of the Hon'ble Jurisdiction Madras High Court is extracted herein below for reference:-

“26. Having found that the payments were for marketing the products of the assessee company, for procuring of orders for the assessee company and for systematic research with regard to the demand for the products of the assessee. The Assessing Officer erred in arriving at the conclusion that payments made by the appellant assessee could not be said to have been made for the purpose of overseas commission. The Assessing Officer as also the learned Tribunal misinterpreted the Explanation 2 of Section 9(1)(vii) of the IT Act, whereunder “fee for technical services” means any managerial, technical or consultancy services. It is nobody's case that the service rendered by the overseas agent was either managerial or technical. As held

by the Appellate Commissioner, payment for research with regard to need for products was incidental to the job of procuring orders on commission basis. Consultancy services contemplate comprehensive expert technical advisory services based on technical expertise and research, of business and marketing strategies as a whole, including adoption of cost effective measures, organizational and infrastructural requirements, business management, personnel management and other strategies, for business efficacy of a business entity as a whole and not mere market survey of the need for any particular product. The amendment with retrospective effect from 1.6.1976 by insertion of Explanation to Section 9(2) can only apply to income by way of interest, by way of royalty and by way of fees for technical services and not to brokerage or job wise commission on activities incidental to procurement of orders.

27. The Assessing Officer, in effect, held that income could be deemed to accrue or arise in India under Section 9(1)(vii) of the IT Act even if the non-resident did not have place of business or business connection in India or had not rendered services in India. The exceptions provided under Section 9(1)(vi)(b) / 9(1)(vii)(b) of the IT Act, which apply to utilization of services of business outside India, did not cover the assessee's case.

28. The Assessing Officer had also taken note of withdrawal of two circulars: (i) Circular No.786, dated 7.2.2000, dealing with payment of export commission, opining that withdrawal, being procedural in nature, would apply to proceedings pending; and (ii) Circular No.23 of 1969, which exhaustively dealt with subject of "Nonresidents Income accruing or arising through or from business connection in India – Liability to tax – Section 9 of the Income Tax Act, 1961".

29. From the Service Agreement with the agents abroad, it is clear that the service rendered is essentially brokerage service. The very first clause of the agreement states "to procure orders". The reference to market research abroad or co-ordination with the supplier or to ensure timely payment or making available its office space for visit by the suppliers, were ordinarily things which any agent or broker undertook incidental to brokerage service.

30. There is no finding that any of the commission agents had any place of business in India. Explanation 1 to Section 9(1)(i) of the IT Act would attract liability to Indian tax for a non-resident with business connections in India, only in respect of income attributable to his operations in India. In this case, there is nothing which shows that the income in question was attributable to operations in India. That was not even the factual finding of the Assessing Officer. The Assessing Officer proceeded on the basis that the situs of the rendering of services was not relevant. It was only the situs of the payer and the situs of the utilization of services which determine taxability of such services in India.

31. Section 195 of the IT Act attracts tax only on chargeable income, if any, paid to a non-resident. Where there is no liability, the question of tax

deduction does not arise. Where no part of the income is chargeable in India, even clearance under Section 195(2) or 195(3) of the IT Act is not necessary. The decision of the Karnataka High Court in Commissioner of Income Tax (International Taxation) v. Samsung Electronics Co. Ltd. reported in (2010) 320 ITR 209 (Kar), has been overruled by the Supreme Court in GE India Technology Centre P. Ltd. v CIT, reported in (2010) 327 ITR 456 (SC). The Supreme Court held as under:

“This reasoning flows from the words 'sum chargeable under the provisions of the Act' in Section 195(1). The fact that the Revenue had not obtained any information per se cannot be a ground to construe Section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read Section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression “sum chargeable under the provisions of the Act” from Section 195(1).”

32. Where there is no liability in India, there can be no question of disallowance under Section 40(a)(i) or Section 40(a)(ia) of the IT Act on the ground of non-deduction of tax at source. Moreover, where a non-resident has no permanent establishment in India, there can be no liability either under the domestic law or under Double Taxation Avoidance Agreement. In any case, even if a non-resident Indian did have a permanent establishment, but income was earned without availing of such permanent establishment, the income for services rendered abroad could not have been liable for tax deduction at source.

33. Under Section 9(1)(vii)(b), income by way of fees for technical services payable by a person, who is a resident, is taxable income except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India. In view of Explanation (2) to Section 9(1)(vii), technical services means any consideration, including lumpsum consideration, for rendering of any managerial, technical or consultancy services, including the provision of services of technical or other personnel, but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient. Service of market survey only to ascertain the demand for the product in the market is incidental to the function of a commission agent of procuring orders and is, in any case, not managerial, technical or consultancy service.

34. In GE India Technology Centre P. Ltd., supra, the Supreme Court clearly held that no tax is deductible under Section 195 of the IT Act on commission payments and consequently the expenditure on export commission payable to non-residents for services rendered outside India

becomes allowable expenditure. In Toshoku Ltd., supra, the Supreme Court held that payments to agents for performance of services outside India are not liable to be taxed in India.

35. In Commissioner of Income Tax, Delhi-IV, New Delhi v. EON Technology (P) Ltd., (2011) 15 Taxmann.com 391 (Delhi), the High Court of Delhi held that payment of sales commission to non-resident who operates outside the country would not attract tax, if payment was remitted abroad directly. Merely because an entry had been made in the books of accounts of the appellant/assessee, that would not mean that the non-resident agent had received payment in India and, therefore, disallowance under Section 40(a)(i) of the IT Act was found uncalled for.

36. The expression “fees for technical services” has been defined in Explanation (2) of Section 9(1)(vii) of the Income Tax Act to mean any consideration (including any lumpsum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personal) but does not include consideration for any construction assembly, mining or like project undertaken by the recipient or consideration, which would be income of the recipient chargeable under the head salaries. Explanation (B) to Section 40(a)(i) provides that the expression “fees for technical services” in Section 40(a)(i) shall have the same meaning as in Explanation 2 to Clause (vii) of sub-section (1) of Section 9.

37. On a reading of Explanation (2) to Section 9(1)(vii), fees for technical services means consideration, including lumpsum consideration for rendering any managerial, technical or consultancy services.

38. In the instant case, the Assessing Officer has, in the assessment order, accepted that the appellant assessee has paid commission charges to overseas agents. It is not the case of the Assessing Officer that any lumpsum consideration has been made for any specific managerial, technical or consultancy services.

39. On a overall reading of the Explanation, it is apparent that fees for technical services does not contemplate commission which is order specific and computable at a small percentage of the order value. Section 40(a)(i) does not contemplate order wise commission based on the order value.

40. For the reasons discussed above, the appeal is allowed and the questions framed are answered in favour of the assessee against the Revenue. No costs. Consequently, connected miscellaneous petition is closed.”

Respectfully following the order of the Hon'ble Jurisdiction Madras High Court in the assessee's own case on the identical issue cited

supra, we hereby hold that in the case of the assessee for the relevant assessment years 2010-11 & 2011-12 payment made towards commission to foreign agents for marketing, procurement of orders and systematic market research amounting to Rs.4,42,30,697/- & Rs.2,55,18,179/- respectively, provisions of Section 195 of the Act will not be applicable and consequently provisions of Section 40(a)(ia) of the Act cannot be invoked. Therefore we hereby direct the Ld.AO to delete the addition made by invoking the provisions of Section 40(a)(ia) of the Act for the amount of Rs.4,42,30,697/- & Rs.2,55,18,179/- for the assessment years 2010-11 & 2011-12 respectively.

5. Ground No.2(ii) : Addition of Rs.68,512/- by invoking Rule 14A r.w.r. 8D(iii) of the Rules for the assessment year 2010-11:-

At the outset, we find that neither the Ld.AO nor Ld.CIT(A) had extensively examined the actual expenditure incurred by the assessee towards earning dividend income which is exempt from tax. On the very same issue on an earlier occasion we have held as follows in the case in ITA Nos.1729 & 1730/Chny/2016, M/s. Sthithi Insurance Services Pvt. Ltd., vide order dated 18.06.2018, :-

“5.2 We have heard the rival submissions and carefully perused the materials on record. It is apparent from the facts of the case, that the assessee has made huge investments in shares which earn dividend income exempt from tax. According to Section 14A of the Act the expenditure incurred towards earning exempt income cannot allowed as deduction from the taxable income of the assessee. In the case of the assessee, it is evident that for the process of decision making as to which shares the assessee has to invest, dis-invested, and at what point of time etc., will involve cost. Such expenditures incurred towards earning dividend income which is exempt from tax cannot be claimed as deduction from the taxable profit of the assessee company. As per the provisions of the Act, the assessee is bound to compute the actual expenses incurred by it towards investment that would earn exempt income and disallow the same. In the case of the assessee, such computation is neither made nor the expenditure towards earning exempt disallowed by the assessee. Therefore we are of the view that the Ld.AO was right in his realm to invoke the provisions of Section 14A r.w.r.8D of the Rules. Further it is pertinent to mention that there is no correlation between the dividend income earned by the assessee and the expenditure incurred by the assessee towards investment that earns exempt income. For example:- during a particular year the assessee would not have earned any dividend income though it has made heavy investments during the previous year or the earlier years, but the assessee is bound to incur cost for acquiring / maintaining /dis-investing such investments. Hence it cannot be inferred that the dividend income would be directly proportional to the expenditure incurred on the investment earning exempt income. Therefore we do not find any merit in the order of the Ld.CIT(A) for having restricted the disallowance U/s.14A of the Act to the extent of exempt income earned by the assessee. However since the assessee has not computed its actual expenditure incurred towards the investment that earns exempt income, in the interest of justice, we remit back the matter to the file of Ld.AO for both the assessment years thereby affording one more opportunity to the assessee to work out the actual expenditure incurred by it towards the investment that

earn exempt income and disallow the same. We further hereby direct the Ld.AO to verify the computation submitted by the assessee for both the assessment years and thereafter decide the matter in accordance with law and merit.”

Following the same ratio we hereby remit back the matter to the file of Ld.AO with similar directions.

6. In the result the appeal of the assessee for the assessment year 2010-11 is partly allowed for statistical purposes as indicated herein above and for the assessment year 2011-12 is allowed.

Order pronounced on the 23rd July, 2018 at Chennai.

Sd/-

(एन.आर.एस. गणेशन)
(N.R.S. Ganesan)

न्यायिक सदस्य/Judicial Member

Sd/-

(ए. मोहन अलंकामणी)
(A. Mohan Alankamony)

लेखा सदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated 23rd July, 2018

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF |