

आयकर अपीलीय अधिकरण, 'बी' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL, MUMBAI "B" BENCH
सर्वश्री राजेन्द्र, लेखा सदस्य एवं शक्तिजीत डे, न्यायिक सदस्य
Before S/Sh. Rajendra, Accountant Member & Saktijit Dey, Judicial Member
आयकर अपील सं./ITA No.2503/Mum/2014, निर्धारण वर्ष/Assessment Year-2010-11

ACIT-Range-16(3) Matru Mandir, 2 nd floor Room No.206, Tardeo Road Mumbai-400 007.	Vs	M/s. Beni Impex 237/38, 2 nd floor, New Sonal Link Estate, Bldg. No.2, Link Road, Malad (W) Mumbai-400 044. PAN: AAAFB 1498 D
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(अपीलार्थी / Appellant)

(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : Shri Bhupendra Shah

राजस्व की ओर से/ Revenue by : Shri Samir Tekriwal-DR

सुनवाई की तारीख/ Date of Hearing : 06-10-2015

घोषणा की तारीख / Date of Pronouncement : 09-10-2015

आयकर अधिनियम, 1961 की धारा 254(1) के अन्तर्गत आदेश

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-Challenging the order dated 11.09.2013 of CIT(A)-17, Mumbai, the Assessing Officer(AO) has filed the present appeal.

Assessee-company, engaged in the business of export of general commercial goods, filed its return of income on 19.09.2010, declaring total income of Rs.28.21 lakhs. The AO completed the assessment u/s.143(3) of the Act on 31.10.2013, determining the income of the assessee at Rs. 47.32 lakhs.

2. Effective ground of appeal is about allowing export commission of Rs.19.11 lakhs u/s.40(a)(ia) r.w.s.195(1) of the Act in view of explanation 2 to section 9(1)(vii) and not taking cognisance of the provisions of Article 12 of DTAA. During the assessment proceedings, the AO found that the assessee had paid Rs.19,11,033/- to Mirian FZE, UAE being the export commission, that it did not deduct tax at source for such payment. He held that the payments were chargeable to tax, that the assessee should have deducted tax as per the provisions of section 195 of the Act. Invoking the provisions of section 40(a)(ia), the AO made a disallowance of Rs.19.11 lakhs.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him it was contented that out of the total commissions payment the assessee had paid Rs.2.14 lakhs to the local agents, that it had deducted tax u/s.194H of the Act for the said payment, that provisions of section 195 were not applicable to the facts of the case. In its support the assessee relied upon certain cases.

After considering the submissions of the assessee and the assessment order, he held that payment to the UAE party were in respect of export commission, that Mirian FZE was a resident of Sharjah, that it did not have any permanent establishment in India, that the services were rendered in respect of procurement of export orders outside India, that the assessee was not obliged to deduct tax with regard to such commission payment. With regard to the local commission, he held that AO should verify the claim. Referring to the CBDT circular no.7 dated 22.10.2009 he held

that commission payment of US Dollar 112 on 23.12.2009 was not allowable.He referred to the cases of G E India Technology Center Pvt.ltd.(327 ITR456),Addidas Sourcing Ltd.(28taxmann.267),WNS Global Services(UK)Ltd.(40 taxmann.com.315)and partly allowed the appeal filed by theassessee.

4.Before us,Departmental Representative(DR)supported the order of the AO.The Authorised Representative relied upon the order of the FAA and referred to the case of Indo Industries Limited(ITA/183/Mum/2014-AY.2010-11 dated 14.11.2014) wherein identical issue was deliberated upon.

5.We have heard the rival submissions and perused the material before us.We find that the AO had directed the AO to make verification about the payments made to local agents and allow the deduction only after the verification.He had also disallowed a small portion of commission payment made to foreign agent.We find that in the case of Eon Tech.P.Ltd.(343ITR366)the Hon'ble Delhi High Court has dealt with the issue.Facts of the case were that the assessee was engaged in the business of development and export of software. During the previous year relevant to the AY.2007-08, the assessee paid commission to its parent company in the U. K. on the sales and amounts realized on export contracts procured by it for the assessee. The Assessing Officer held that the U.K.company had a business connection in India and that commission income had accrued and arisen in India when credit entries were made in the books of the assessee in favour of the U. K. company and the income towards commission was received in India.He held that the assessee was liable to deduct tax at source and as there was failure to do so, disallowed the expenditure under section 40(a)(ia) of the Act.The FAA relied upon Circular No. 23, dated July 23, 1969, and Circular No. 786, dated February 7, 2000, issued by the Central Board of Direct Taxes, and held that "business connection" was not established.The Tribunal upheld his decision.Dimssing the appeal filed by the Department,the Hon'ble High Court held as under:

*"the Assessing Officer had not dealt with or examined whether the commission income accrued or arose directly or indirectly from any business connection in India but had merely recorded that the payment made to the U. K. company was taxable in India because of its "business connection". The Assessing Officer did not elaborate or had not discussed on what basis he had come to the conclusion that "business connection" as envisaged under section 9(1)(i) existed. The assessee had submitted that the U. K. company was a non-resident company and did not have any permanent establishment in India. The U. K. company was not rendering any service or performing any activity in India itself. These facts were not and could not be disputed. The stand of the Revenue was contrary to the two circulars issued by the CBDT in which it was clearly held that when a non-resident agent operates outside the country no part of his income arises in India, and since payment was remitted directly abroad, merely because an entry in the books of account was made, it did not mean that the non-resident had received any payment in India. This fact alone did not establish business connection. In Circular No. 786, dated February 7, 2000, it had been stated that in such cases, **the Indian assessee was not liable to deduct tax at source under section 195 of the Act from the commission and other related charges payable to such a non-resident having rendered service outside India.**(emphasis supplied).The Assessing Officer did not make out a case of business connection as stipulated in section 9(1)(i) of the Act. He had not made any foundation or basis for holding that there was business connection and, therefore, section 9(1)(i) of the Act was applicable. The appellate authorities, on the basis of material on record, had rightly held that "business connection" was not established."*

We would also like to refer to the decision of Indo Industries Ltd.(supra) wherein identical issue has been decided in favour of the assessee.

Considering the above,we are of the opinion that the order of the FAA does not suffer from any legal infirmity.So,confirming his order,we decide effective ground of appeal against the AO.

As a result,appeal filed by the AO stands dismissed.

फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है

Order pronounced in the open court on 9th October,2015.

आदेश की घोषणा खुले न्यायालय में दिनांक 9, अक्टूबर,2015 को की गई।

Sd/-

(शक्तिजीत डे / Shaktijit Dey)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई/Mumbai,दिनांक/Date: 09.10.2015

व.नि.स./Jv.Sr.PS.

Sd/-

(राजेन्द्र / RAJENDRA)

लेखा सदस्य / ACCOUNTANT MEMBER

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

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR “ B” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, बी खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.