IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E' : NEW DELHI)

BEFORE SHRI R.S.SYAL, HON'BLE VICE PRESIDENT
AND
SHRI LALIET KUMAR, JUDICIAL MEMBER

ITA No.3575/Del./2015
(ASSESSMENT YEAR : 2012-13)

ACIT, Circle -46 (1), New Delhi. (APPELLANT)	vs.	Maharani Enterprises 20-A, Gadodia Market, Khari Baoli Delhi **(PAN : AAMFM4846Q)** (RESPONDENT)

ASSESSEE BY : Sh. Suresh Gupta, CA.
REVENUE BY : Shri Manoj Kumar Mahar, Sr. DR

Date of Hearing : 09.10.2018
Date of Order : 09.10.2018

O R D E R

PER LALIET KUMAR, JUDICIAL MEMBER :

1. The present appeal is filed by the revenue on the following grounds :-

"1. On the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 1,28,09,361/- made by AO on account of non-deduction of TDS u/s 40(a)(ia) of the I.T.Act, on commission."

2. During the assessment year under consideration, the assessee is engaged in as exporter and importer of sanitary wares & tiles and also wholesale trading of dry fruits and kirana items. The case was selected for scrutiny assessment and subsequently notice u/s 142(1) of the Act was issued on 10.12.2013. It was noticed by the Assessing Officer that

during the assessment year the assessee had paid an amount of Rs. 12,809,361/- towards the commission to Shri Sanjay Mehata who was staying in Dubai. The Assessing Officer , after considering the reply of the assessee, had disallowed the commission paid by the assessee Shri Sanjay Mehata. On the pretext that TDS was not deducted by the assessed, at the tune of payment.

3. Being aggrieved by the order passed by the Assessing Officer, the assessee preferred the appeal before the Ld. CIT(A). The CIT(A) vide the impugned order allowed the claim of the assessee and recorded the finding as under :

> *"Thus having regard to the above facts and circumstances of the case and on an analysis and comprehensive consideration of the entire factual matrix obtaining in this case, I am of the considered view that neither section 5 nor section 9 of the Act provide any scope for taxing any such payments whose genesis was outside India. Merely by virtue of connection with the appellant in India the commission agent Sh. Sanjay Mehta did not become liable to income tax in India and thereby u/s 40(a)(ia) of the Act as is clear from the reasons indicated in the foregoing paragraphs.*
>
> *For all the aforesaid reasons discussed hereinabove, the ground of appeal no. 2 is allowed and the addition of Rs. 1,28,09,361/- made by the AO is deleted."*

4. Feeling aggrieved by the order of the Ld. CIT(A), the revenue is in appeal before us. On the above mentioned grounds.

5. At the outset, the Ld. AR for the assessee has drawn our attention to the order passed by the Tribunal in the case in ITA No. 5806/Del/2014 for assessment year 2011-12 wherein the Tribunal in identical facts have decided the issue in favour of the assessee and dismiss the appeal of the revenue.

6. Ld. DR, per contra, relied upon the decision passed by the Assessing Officer.

7. We have heard the rival submissions and have also perused the material on record. As facts in the present year are similar to the facts in earlier year decided by the co-ordinate bench in ITA no. 5806/D/2014 whereby the Tribunal in Paragraph 8 has recorded as under :-

> "*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 Id. 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 ITon'ble Allahabad High Court in the case of Model Exims (supra) has held that failure to deduct tax at source from payment to nonresident 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(l)(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 l.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 the 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(l)(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. Respectfully following the decision of the Co-ordinate bench in the case of the assessee for the earlier year, we dismiss the appeal filed by the revenue.

9. In the result, appeal of the revenue is dismissed.

Order pronounced in open court on this 09th October, 2018.

Sd/-	**Sd/-**
(R.S.SYAL)	**(LALIET KUMAR)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated 09/10/ 2018

BR

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)-XXVI, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.

Date of dictation	09.10.2018
Date on which the typed draft is placed before the dictating Member	09 .10.2018
Date on which the typed draft is placed before the Other Member	09 .10.2018
Date on which the approved draft comes to the Sr. PS/PS	09.10.2018
Date on which the fair order is placed before the Dictating Member for pronouncement	09.10.2018
Date on which the fair order comes back to the Sr. PS/PS	.10.2018
Date on which the final order is uploaded on the website of ITAT	.10.2018
Date on which the file goes to the Bench Clerk	.10.2018
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	