INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B": NEW DELHI

BEFORE SHRI S.K. YADAV, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA Nos.2726, 2727/Del/2015
Asstt. Years: 2006-07, 2011-12

ACIT Circle-44(1), Room No. 1908, E-2, Civic Centre, Minto Road New Delhi – 110 002	Vs.	Smt. Sangeeta Khanna RZ/A-4, Dwarka Puri, Palam Road, New Delhi-110 045 PAN ABAPK9156E
(Appellant)		**(Respondent)**

Department by:	Ms. Ashima Neb, Sr. DR
Assessee by :	Shri Ajay Sabharwal, CA
Date of Hearing	15/11/2018
Date of pronouncement	16/11/2018

O R D E R

PER O.P. KANT, A.M.

These two appeals by the Revenue are directed against two separate orders dated 23/02/2015 and 18/02/2015 passed by the Ld. Commissioner of Income-tax (Appeals)-15, Delhi[in short the Ld. CIT(A)] for assessment year 2006-07 and 2011-12 respectively. In both these appeals identical grounds have been raised in similar set of circumstances, and hence both appeals were heard together and disposed off by way of this consolidated order.

2. The grounds of appeal raised in ITA No. 2726/del/2015 for assessment year 2006-07 are reproduced as under:

"On the facts and circumstances of the case, the Ld. CIT(A) erred in-

1. *Deleting the disallowance of Rs 1,87,00,000/- u/s 40(a)(ia) read with section 195 of the IT ACT on account of non deduction of TDS on payment of foreign commission.*

2. *Deleting disallowance merely on the basis that one of the six commission agents not resident vide order 4.7.2013 by Addl Commissioner (International Taxation: Range-3, New Delhi.*

3. *Ignoring the Board's circular No. 7/2009 dated 22.10.2009 and order of AAR in Appeal No. 983 and 984 of 2010 dated 22.2.2012in the case of SKF Boilers and Driers Pvt. Ltd and other judgements stated in the assessment order of A.0.*

4. *Ignoring explanation 2 of the Section 195 of the Income Tax Act.*

5. *The appellant craves leave for reserving the right to add, alter, modify, amend or forego any ground(s) of appeal at any time before or during the hearing of this appeal."*

3. Briefly stated facts of the case are that in the assessment completed under section 143(3)/147 of the Income Tax Act, 1961 (in short the 'Act') on 26/03/2014, the Assessing Officer disallowed commission paid of Rs. 1, 87,00,000/-under section 40(a)(i) of the Act for non-deduction of tax at source to following commission agents :

"Name of Party Total Amount debited in P & L Account(Rs.)

1. *CLAUDIO BAGANTE, VIA BELTRAHE, 7,098,719 +2,283,753 =9,382,472.91*
   9/B 35100, PADOVA,ITALY

2. *OSCAR STUDIO DI CAVALLIN OSCAR, 5,429,522.05+580,063.52 =6,009,585.57*
   VIA MATTEOTTI, 5/A 30039 STRA(VE)ITALY

3. *LINEA MODA DI RITA CARAVITA, 2,450,913.29+399,088.67 =2850001.96*
   VIA SOTTOFIUME BONC. 4048012
   BAGNACAVALLO, ITALY"

4. The Assessing Officer held that the ratio in the case of Commissioner of Income Tax vs. Eon Technology Ltd (2012) 343 ITR 366 Delhi was not applicable on the facts of the instant case as in the said judgement reference has been made to the CBDT Circular No. 786 and Circular No. 23 and both these circulars have been withdrawn by the CBDT vide Circular No. 7/2009 dated 22/10/2009. The Ld. Assessing Officer on the other hand relied on the decision of the Authority for Advance Ruling (AAR) in the case of SKF Boilers and Drives Private Limited. Aggrieved, the assessee filed appeal before the Ld. CIT(A), who deleted the addition and allowed the appeal of the assessee. Aggrieved, the Revenue is in appeal before the Tribunal raising the grounds as reproduced above.

5. Before us, the Ld. DR relying on the order of the Assessing Officer submitted that in view of the circular No. 786 and circular No. 23 of the CBDT withdrawn by way of circular No. 7/2009 dated 22/10/2009, the payments made were liable for deduction of tax at source. She further referred to RBI circular dated 19/07/2007 directing Authorised Dealer banks and Authorised banks to obtain an undertaking from the remitter of foreign exchange and Chartered

Accountant's certificate in format prescribed by the CBDT at the time of making of the remittances of foreign exchange including remittances which are in the nature of the trade transaction such as import payments. The Ld. DR further submitted that according to the provisions of section 195(2) and 195(3) if the payer or payee of the said sum are of the view that said sum would not be income chargeable in the hand of the recipient, nor she may make an application to the Assessing Officer for non-deduction of tax at source. According to her, in the instant case no such certificate has been obtained either by the payer or the payee of the commission. In view of the above arguments, according to her the assessee was liable to deduct tax at source and failure into do so, the disallowance under section 40(a)(i) of the Act has rightly been made by the Assessing Officer.

6. On the contrary, the Ld. Counsel of the assessee submitted that expenditure has been incurred for procuring export orders from foreign countries using services of the foreign agents in foreign countries. No part of the services have been rendered in India. According to him, the foreign agents are not having any permanent establishment in India and, therefore , sum of foreign commission paid to them is not chargeable to tax in India and accordingly the assessee is not liable to deduct tax at source in terms of section 195 of the Act and consequently no disallowance can be made under section 40(a)(i) of the Act in respect of the expenditure on foreign commission. The Ld. Counsel submitted that identical addition was made in assessment year 2010-11 in similar set of the circumstances by the Assessing Officer, which has been deleted by the Tribunal in ITA No. 1522/del/2014. Accordingly, he submitted that issue in dispute is squarely covered in favour of the assessee by the above order of the Tribunal.

7. We have heard the rival submission and perused the relevant metal on record. We find that the Ld. CIT(A) in the instant case has also followed finding of his predecessor in assessment year 2010-11. Relevant finding of the Ld. CIT(A) on the issue in dispute is reproduced as under:

> *"8.5 I have carefully considered the facts of the case, submissions made by the appellant and the issue already decided by Ld. CIT(A)-XXIV, New Delhib in the appellant's case for AY 2010-11 vide Appeal No. 55/13-14 dated 18.12. 2013. It is observed that all the concerns of the AO have been addressed in the appellate order and since the facts are the same, I fully endorse the same. The following conclusion has been drawn in appellant's case for AY 2010-11 :*
>
> *"5.10 On the basis of above mentioned facts and circumstances of the case, I am of the considered opinion that Commission payments to non-resident commission agents for export by M/s Kiwi Enterprises does not represent income which is chargeable to tax under section 195 of IT. Act when analyzed under the framework of provisions of the Indian 1T.Act or under most Treaties. Hence, in my view, tax deduction at source was not required for said commission payments to non-resident agents and hence this expenses could not be disallowed u/s 40(a)(ia) of the Income Tax Act, 1961. "*
>
> *8.6. The appellant was also asked to produce the copies of agreement, if any, held with these foreign agents regarding the payment of commission to them. It was emphasized by the Ld. AR of the appellant that these agents were working with the appellant since 1996. However, no written agreement was signed by the appellant with them. It was pointed out that there is no requirement of the agreement with the agents to be in writing as held by the Delhi Bench*

of Hon'ble ITAT in the case of DCIT vs. Angelique International Ltd. (2013) 55 SOT 226 (Del). It was, however, submitted that the appellant's business was taken over by M/s Kiwi Enterprises Pvt. Ltd., and the same commission agents are working for the company floated by the appellant. In the company's case, commission agreement have been entered into and the appellant has produced the copies of such agreement as sample of similar terms and conditions held by the appellant with them during the year under consideration. It has further been pointed out that the ITO(TDS) himself has granted exemption to M/s Kiwi Enterprises (P) Ltd. in respect of withholding of tax U/S 195(2) of the Act in respect of payments of commission to M/s Sarl Oren of France (vide orders dt. 04.07.2013 and 09.05.2014) and MIs Linea Moda Di Rita Caravita (vide order dt. 09.05.2014) certifying that such income would be taxable only in France.

8.7. On considering the details filed by the appellant, it is observed that the activities undertaken by the foreign agents precisely related to facilitate the sale of the appellant. The decisions of Hon'ble Jurisdictional High Court of Delhi in the case of CIT Vs. Eon Technology (P) Ltd (supra) and other decisions as discussed by Ld. CIT(A)-XXIV, in appellant's case for AY 2010-11, are directly applicable in appellant's case, which are not being repeated here for the sake of brevity. The services are not technical in nature and these services are rendered by the agents for procurement of export order and they cannot be characterized as 'managerial', 'technical' or 'consultancy services'. Thus, the payment of commission to foreign agents made by the

appellant neither comes in the purview of section 9 of the Act as the same is not a fee for technical services nor such payment of commission comes under the category of "sum chargeable to tax under the provisions for Act" as stipulated in section 195 of the Act. Therefore, TDS provisions are not applicable in the appellant's case on payment of such commission. Consequently, no disallowance U/S 40(a)(i) of the Act could be made as there is no violation of TDS provisions. The disallowance of Rs. 2,03, 15,895/- made by the AO is, therefore, not justified. The same is directed to be deleted. Thus, Ground No.4 of appeal is partly allowed.

8.8. So far as the AO's concern of withdrawal of earlier circulars is concerned, it is clarified that instead of general immunity from deduction of tax on payments to non residents, each case has to be examined not only in respect of PE or business connection but in respect of nature of services rendered by the foreign agents. However, position of law remained unchanged as such determination was prior to withdrawal of circular and after the withdrawal is based on the provisions of section 5, 7, 9 and 195 of the Act which remained unchanged. This aspect of withdrawal of circular and its effect on the allowability of foreign commission has been explained by Hon'ble Bangalore Bench of Tribunal in the case of Exotic Fruits Pvt. Ltd. vs. ITO [in ITA 1008 to 1013/Bang./2012, Date of order 04-10-2013], according to which even after the withdrawal of the said circulars, foreign agents' commissions paid in the above circumstances do not become income chargeable to tax in India. In this judgment Hon'ble bench has considered a crucial fact about the withdrawal of circular by the Central

Board of Direct Taxes (CBDT) i.e. Circular No. 23 dated 23-07-1969 and even after the withdrawal it was held that TDS was not required to be deducted on the payments of commission made to foreign agents abroad. Relevant Para is reproduced below for ready reference:-

Para 7.5: "The CBDT vide Circular No.7 of 2009 dtd. 22.10.2009 has withdrawn the Circular No. 23/1969 with retrospective effect. In the Circular No. 23 of 1969, CBDT clarified that the payment made to non-resident commission agents was not liable to income-tax in India. Such clarification of CBDT was based on the provisions of sections 5,7,9, 195 and other relevant provisions of the Act. The question for consideration is when there is no relevant change in sections 5,7,9, 195 then as to how the withdrawal of Circular No. 23 of 1969 of CBDT will make the commission paid to such non-resident commission agents taxable in India. I am of the considered view that even after the withdrawal of Circular No. 23 of 1969, the position will remain the same i.e., the commission paid to non-resident agents is not liable to tax under the provisions of I T. Act when the services were rendered outside India, services were used outside India, payments were made outside India and there was no permanent establishment or business' connection in India. It cannot be accepted that by virtue of CBDT Circular No. 23/1969, the commission paid to 'non-resident agents become not liable to income-tax in India and on such withdrawal of Circular by the CBDT, such commission paid to non-resident agents become liable to income-tax in India. Irrespective of Circular issued by CBDT, the question of taxability of such commission to income tax has to be decided as per the provisions of section 9(1) of the Act. I am of considered view that the provisions of sec. 9(1) are not applicable to the commission paid to such non-resident agents. Such income (commission) in the hands of non-resident commission agents did not accrue or arise directly or indirectly, through or from any business connection in India. Such income to the non-resident commission agents did not accrue or arise in India through or from any property in India or through the transfer of capital asset situated in India. In facts and circumstances the provisions of sec. 9(1) were not applicable to such

payment of commission by appellant to non-resident agents....”

Thus, the AO’s interpretation that withdrawal of earlier circulars has changed the law position is not as per the legal position of the issue.”

8. We also note that in assessment year 2010-11 the grounds raised by the assessee in appeal filed before the Tribunal in ITA No. 1552/Del/2014 are identical to the grounds raised in the year under consideration. In the identical set of circumstances the Tribunal has held as under:

> *7. “In view of the decision rendered by the Hon’ble Delhi High Court in Eon Technology P. Ltd. (supra) on the basis of decision rendered by Hon’ble Supreme Court in case cited as CIT vs. Toshoku Limited – (1980) 125 ITR 525 (SC), we are of the considered view that when it is not in dispute that the commission payment on export has been made to a non-resident Indian by the assessee for services rendered abroad and no part of said income has arisen in India, TDS was not required to be deductible at source and disallowance u/s 40(a)(i) is not sutainable in the eyes of law.*
>
> *8. Moreover, the Ld. CIT(A) has meticulously relied upon the provisions contained u/s 90(2) of the Act and Article 7(1) of the Double Taxation Avoidance Agreement (DTAA) entered into between India and Italy, France, Germany and UK vide which existence of Permanent Establishment (PE) in India is necessary for subjecting to tax business of any entity in India. Since M/s. Sari Oren of France is admittedly a non-resident*

having no PE in India, the Provisions contained u/s 40(a)(ia) are not applicable in this case. Hence, we find no illegality or perversity in the impugned order passed by Ld. CIT(A). Consequently, the appeal filed by the Revenue is hereby dismissed."

9. Thus respectfully following the above finding of the Tribunal , the sum paid to the foreign agents for commission is not chargeable to tax in their hands in India and accordingly said expenditure is not liable to deduction of tax at source. Hence, in our opinion order of the Ld. CIT(A) on the issue in dispute is well reasoned and we do not find any error in the same . The disallowance made under section 40(a)(i) is thus accordingly directed to be deleted. The grounds raised by the Revenue are accordingly dismissed.

10. In the result, the appeal filed by the Revenues is dismissed.

11. The grounds raised in ITA No. 2727/del/2015 for assessment year 2011-12 are reproduced as under:

"On the facts and circumstances of the case, the Ld. CIT(A) erred in -

1. *Deleting the disallowance of Rs. 2,03,15,895/- u/s 40(a)9ia) read with section 195 of the IT Act on account of non deduction of TDS on payment of foreign commission*

2. *Deleting disallowance merely on the basis that one of the six commission agents not resident vide order 4.7.2013 by Addl Commissioner (International Taxation) Range-3, New Delhi.*

3. *Ignoring the Board's circular No. 7/2009 dated 22.10.2009 and order of AAR in Appeal No. 983 and 984 of 2010 dated*

22.2.2012 in the case of SKF Boilers and Driers Pvt. Ltd. and other judgments stated in the assessment order of AO.

4. *Ignoring explanation 2 of the Section 195 of the Income Tax Act.*

5. *The appellant craves leave for reserving the right to add, alter, modify, amend or forego any ground(s) of appeal at any time before or during the hearing of this appeal."*

12. As the facts and circumstances and the grounds are identical with the facts and circumstances and grounds raised in assessment year 2006-07 except the sum of disallowance involved in the appeals. Thus, to have consistency in our decision, following the decision in ITA No. 2726/del/2015, the grounds of appeal in the year under consideration are also dismissed. Accordingly the appeal of the Revenue for assessment year 2011-12 is dismissed.

13. In the result, both the appeals of the Revenue are dismissed.

This decision was pronounced in the Open Court on 16th November, 2018.

sd/-	sd/-
(S.K. YADAV)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 16/11/2018

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi