# आयकर अपीलीय अधिकरण,सुरत न्यायपीठ, सुरत
# IN THE INCOME TAX APPELLATE TRIBUNAL
# SURAT BENCH, SURAT

श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष

**BEFORE SHRI C.M.GARG, JUDICIAL MEMBER**
**AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

| आ.अ.सं./I.T.A No. 2999/Ahd/2014 निर्धारण वर्ष/A.Y.:2010-11 |
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| **Assistant Commissioner of Income Tax, Bharuch Circle - Bharuch** | **Vs.** | **M/s. Ramdev Chemical Industries, 3441-B, GIDC, Industrial Estate Ankleshwar PAN: AACFR3839A** |
| अपीलार्थी **Appellant** | | प्रत्यर्थी/**Respondent** |

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| निर्धारिती की ओर से/**Assessee by** | **Shri Mukund Bakshi CA, written submissions filed** |
| राजस्व की ओर से /**Revenue by** | **Ms. Smitha Nair, Sr. D.R.** |

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| सुनवाई की तारीख/ Date of hearing: | 1510.2018 |
| उद्घोषणा की तारीख/Pronouncement on | 15.10.2018 |

## आदेश /O R D E R

**PER O. P. MEENA, ACCOUTANT MEMBER:**

**1.** This appeal filed by the Revenue is directed against the order of Learned Commissioner of Income-tax (Appeals)- VI Baroda [in short "the CIT(A)"] dated 01.08.2014 pertaining to

Assessment Year 20110-11, which in turn has arisen from the order dated 22.03.2013 passed by the Adll. CIT Bharuch Range Bharuch (in short "the AO" ) under section 143 (3) of Income Tax Act,1961 ( in short 'the Act').

**2.** Ground no. 1to 3 are against the deletion of Rs.50,41,238 made disallowance under section 40(a)(ia) of the Act ignoring the facts the assessee did not apply for non deduction of tax under section 195 before the AO.

**3.** The assessee company has paid commission of Rs. 50,41,238 as common to various parties residing outside India on which no TDs was deducted as the agents were not having any business connection in India. However, the AO referred the provisions of section 9 (1) (i) of the Act, according to which income accrue on arising directly or indirectly through or from any business connection in India or source of income in India shall be deemed to accrue on arising in India. No doubt that the agents rendered

services abroad and solicited orders, but the right to receive the commission arises in India when the order is executed by the exporter's in India. Therefore, the AO held that income arising on account of commission payable to the agents is deemed to have accrued and arised in India and is taxable under the I. T. Act in view of the specific provision of section 5 (2) (b) read with section 9(1)(i) of the Act. Since the assessee has failed to deduct TDS thereon as per provisions of section 195 of the Act. Therefore, the AO disallowed the amount of Rs.50,41,238 as per provisions of section 40 (a) (ia) of the Act.

**4.** Being aggrieved, the assessee filed an appeal before the ld. CIT (A). It was claimed before the CIT (A) that section 5 (2) (b) is wrongly invoked by the AO as this section provides for charging of income which accrues or arises in India. The assessee has also referred Circular No. 786 dtd. 07. 02. 2000 of CBDT. The position and the taxability of income and by a non-resident's for

of obtaining orders for export for residents outside India was all along clarified to be not a liable to tax in India by the these Circulars. However, CIT (A) was of the view that the assessee does not have a PE in India and all services are rendered out side India, hence, income is not taxable in India. The CIT(A) therefore observed that none of the recipients has any place of Establishment in India and therefore, even in accordance of the provisions of the treaties, such income is not liable to be taxed in India. Though the source of payment of the recipients, the commission agents, is in India, but the services have been rendered by them in Europe i.e. outside India and these recipients do not have any place of Establishment in India. Therefore, after considering the various case laws including CIT v. R D Agarwal [1965] 56 ITR 20 (SC) and submission of the assessee the CIT(A) deleted the addition of Rs.50,41,238 made by the AO.

**5.** Being aggrieved, the Revenue has filed this appeal before the Tribunal. The learned Sr. D.R. submitted that the CIT(A) was not justified in deleting the disallowance as the assessee did not give details of services rendered by agents. The Ld. Sr. D.R. further submitted that income which is accruing were arising in India is to be taxed in in in India irrespective of place of payments. Further, the CIT(A) is failed to examine the case of the assessee inasmuch as the assessee has applied before the AO for non-deduction of tax within the ambit of provisions of section 195 (1) of the Act.

**6.** The learned counsel for the assessee vide written submissions submitted issue is covered against the Revenue by decision of Tribunal in I.T.A.No. 1256/Ahd/2016 dated 22.03.200 ( copy filed ) and facts of this year are also same .

**7.** We have heard the rival submissions and perused the relevant material on record. We find that the issue is duly covered against the Revenue decision of Tribunal in I.T.A.No.

1256/Ahd/2016 for the assessment year 2011-12 dated 22.03.2018 in which par 10 Tribunal observed as under:

> "10.We have heard the rival submissions and perused the relevant material on record. We find that the commission payment has been paid for the service rendered by the non-resident agents outside India. The service is rendered by them out side India as the orders for exports of goods for the assessee have been solicited outside India. These agents are not having any Permanent Establishment in India. In such a scenario the source of income accrued to the agents is out side India as the service rendered by them was out side India. The question under consideration is as to whether the payment of commission to the non- resident commission agents was covered by the provisions of section 195 of the Act. As per provisions of section 195, any person responsible for paying to a non-resident any interest or any other sum chargeable under the provisions of this Act to deduct Income-tax thereon at the rates enforced. The payment made by appellant was admittedly not on account of any interest payment. Consequently, it has to be examined whether the commission paid by the assessee is covered by the term "any other sum chargeable under the provision of this Act" as provided in section 195 of the Act. It is worth to mention here that for the purpose of applicability of section 195 any other sum must be chargeable under the provisions of the Act. Further section 5 of the I.T. Act deals with the "scope of total income". As per sub-section (2) of section 5, the total income of a person who is not resident includes all income from whatever sources derived which is received or deemed to be received in India in such year by or on behalf of such person or accrue or arise or is deemed to accrue or arise to him in India during such year. Section 7 explains the income

deemed to be received. Section 9 further explained/defined the income deemed to accrue or arise in India. As per section 9(1)(i) , the income shall be deemed to accrue or arise in India in case of all income accruing or arising whether directly or indirectly, through or from any business connection in India, or through any property in India, or from any asset or sources of income in India, or through the transfer of capital asset situated in India. In the case of payment of commission by appellant to its non-resident commission agents, such commission income to such non-resident commission agents was not received in India or was not accruing or arising in India whether directly or indirectly. Such income was also not accruing or arising to non-resident through or from any business connection in India since these commission agents were rendering services outside India and the payments were also made outside India. In the facts and circumstances, we are of the view that it could not be said that these commission agents were having any business connection in India particularly when these non-resident commission agents were having no permanent establishment in India. Therefore, income in the form of commission paid by the assessee was also not arise or accrued to those non-resident through or from any asset or sources of income in India or through transfer of capital asset situated in India. In the facts and circumstances, we are of considered view that provisions of section 9(1)(i) were not applicable in the case of payment of commission to those non-resident commission agents. This view is further supported by the decision of ITAT, Mumbai in the case of *DIT* v. *Ardeshi B. Cursetjee & Sons Ltd.* 115 ITJ 916 wherein it was held that commission paid to non-resident agents outside India for services rendered outside India were not chargeable to tax in India. The learned counsel for the assessee relied in the case of ITO v. Trident Exports 44 taxmann.com 297( Chennai-Trib), ACIT v. Indo

Industries 53 taxmann.com 458 (Mum-Trib) and which also supports the case of the assessee. In the facts and circumstances, in our considered opinion, commission paid by appellant to the non resident commission agent was not chargeable under the provisions of Income Tax Act,1961. Such payment of commission was not chargeable to tax as the conditions specified in section 9(1)(i) were not attracted. Sub Clause (iii), (iv), (v), (vi) & (vii) of sec.9(1) were also not applicable in the case under consideration. The Explanation to section 9(2) inserted by Finance Act, 2010 with retrospective effect (01.06.1996) was also not applicable since the said explanation was not applicable to sub clause (i) of section 9 of the Act. The learned counsel for the assessee relied in the case of Welspring Universal v. JCIT [2015] 56 taxmann.com 174 (Del-Trib)wherein the Co-ordinate Bench has held that Where commission paid by assessee to non-resident agent for procuring export orders was not chargeable to tax in hands of said agents, hence, the assessee was not liable to deduct tax at source. It may also be noted that Circular No. 23 dtd. 23.07.1969 has clarified that no part of the income of a foreign agent of Indian exporter arises in India and hence such an agent is not liable to income-tax in India on the commission. Then Circular No. 786 Dated 07.02.2000 has further elaborated the consequence of Circular no. 23 by stating that since such commission income of foreign agent is not liable to tax in India, no tax is therefore, deductible at source under section 195 and consequently the export commission payable to a non-resident for services rendered outside India is not disallowable u/s 40(a)(i) of the Act. Thereafter, Circular no. 7 dated 22/10/2009 was issued withdrawing, *inter alia,* the above two circular nos. 23 and 786. The legal position contained in section 5(2) read with section 9, as discussed above about the scope of total income

of a non-resident subsisting before the issuance of circular nos. 23 and 786 or after the issuance of Circular No. 786 has not undergone any change. It is not as if the export commission income of a foreign agent for soliciting export orders in countries outside India was earlier chargeable to tax, which was exempted by the CBDT through the above circulars and now with the withdrawal of such circulars, the hitherto income not chargeable to tax, has become taxable. The legal position remains the same *de hors* any circular inasmuch as such income of a non-resident agent is not chargeable to tax in India because it neither arises in India nor is received by him in India nor any deeming provision of receipt or accrual is attracted. It is further relevant to note that the latter Circular simply withdraws the earlier circular, thereby throwing the issue once again open for consideration and does not state that either the export commission income has now become chargeable to tax in the hands of the recipients. In view of the foregoing discussion, it is apparent that the commission income in the hands of the non-resident can neither be considered as received or deemed to be received in India or accruing or arising or deemed to accrue or arise to him in India in terms of section 5(2) of the Act. Once it is held that the commission income of a non-resident for rendering services outside India does not fall within the scope of his total income, it automatically implies that the same is not chargeable to tax in his hands. Therefore, we do not find any infirmity in the order of CIT (A). Accordingly, same is upheld. Ex-consequenti, appeal of Revenue on this ground is dismissed.

**8.** Since the facts of this year are identical and issue duly covered by aforesaid decision in the case of the assessee. We

also find that the service are rendered abroad and there is no PE of the recipient hence, the assessee was not required to deduct TDS on commission payments so made. Respectively following the above decision and facts of the case, we do not find any infirmity in the order of CIT (A), accordingly, same is upheld. This grounds of appeal of revenue is therefore, dismissed.

**9.** In the result, the appeal of the Revenue is dismissed.

**10.** Order pronounced in open court on 15.10.2018.

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| Sd/- | Sd/- |
| **(C.M. GARG)** | **(O.P.MEENA)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Surat: Dated: 15 October 2018/opm
Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

**By order**

/ / **TRUE COPY** / /

**Assistant Registrar, Surat**