IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'B' NEW DELHI

BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

I.T.A. No. 4205/DEL/2016 (A.Y 2011-12)

Central Electronics Ltd. 4, Industrial Area, Sahibabad Uttar Pradesh AAACC1261G **(APPELLANT)**	Vs	ACIT Circle-3(1), 3rd Floor, C. R. Building New Delhi **(RESPONDENT)**

Appellant by	**Sh. R. S. Singhvi, CA. Sh. Satyajeet Goel, CA**
Respondent by	**Ms. Ashima Neb, Sr. DR**

Date of Hearing	**18.02.2019**
Date of Pronouncement	**26.02.2019**

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 23/3/2016 passed by CIT (A)-2, New Delhi for Assessment Year 2011-12.

2. The grounds of appeal are as under:-

1. *"That the Ld.CIT(A) erred in law and on facts in confirming the A.O;s action of disallowing Rs.6,82,121/- being the commission paid to Foreign national outside India u/s 40(a)(ia) of the Act by wrongly rejecting the assessee's contention.*

2. *That the Ld.CIT(A) erred in law and on facts in confirming the A.O;s action of disallowing Rs.9,60,182/- being the additional depreciation claimed on plant u/s 32 (iia) of the Act by wrongly rejecting the assessee's contention.*

3. *That the Ld.CIT(A) wrongly rejected the assessee's submissions filed during assessment proceedings and appeal proceedings in support of the*

claimed deductions."

3. The assessee is a 100% own Government Company under Department of Scientific and Industrial Research. It has been incorporated for developing and producing various electronic materials, components and sophisticated system for which know-how on a laboratory scale has been generated in the capital CSIR Laboratories. The Company is engaged in the production of Solar Photovoltaic Cells, Modules & Systems, Railway Electronics, Piezo Electro material for Defence and various Government Departments, agencies like DOT, ONGC, MNES etc. The Government has classified company as High Technology Company and national importance. The assessee company filed its return for the Assessment Year 2011-12 declaring taxable income at Rs. 3,10,64,000/- AAA. The Assessing Officer completed the assessment u/s 143(3) on total income of Rs.3,80,52,056/- vide order dated 18/2/2014. The Assessing Officer made the following additions and disallowances to the return income of the assessee:-

(i) Prior period expenses - Rs. 12,80,184/-
(ii) Additions u/s 40(a) (ia) - Rs. 6,82,121/-
(iii) Provisions for non modeling assets (Stock inventory) - Rs. 22,63,734/-
(iv) Additional depreciation on AC Plant - Rs.9,60,182/-
(v) Income from other sources - Rs. 18,00,947/-

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT (A). The CIT (A) partly allowed the appeal of the assessee.

5. The Ld. AR submitted that as regards Ground No.1, the Ld. AR submitted that the Assessing Officer wrongly made disallowance of Rs. 6,82,121/- being the commission paid to Foreign national outside India u/s 40(a)(ia) of the Income Tax Act, 1961. The Ld. AR submitted that the assessee remitted the amount of Rs. 6,82,181/- to non tax resident for helping the assessee in operating business order from that country and as such is not

subject to tax u/s 195 of the Act. The non tax resident has no business establishment/connection in India. The assessee is not under any objection to deduct tax from such payment to a non resident foreign agent receiving commissions from the assessee, as no part of this income arose in India. The Ld. AR further relied upon the CBDT Circular No. 786 dated 7/2/2000. The relevant Circular held that deduction of tax at source assessed only if the payment is chargeable to tax in India. Where the non resident agent of a customer operates outside the country and the payment is remitted directly abroad, no part of this income arises in India. Therefore, no tax is deductable u/s 195 of the Act. The Assessing Officer rejected the assessee's contention on the ground that the said Circular is withdrawn by the Board in 2009. The Ld. AR submitted that the clarification still prevails in view of the fact that provisions of Section 9 have not undergone any change in this regard. No tax is, therefore, deductable u/s 195 from export commission payable to non-resident. For services rendered outside in India. The Assessing Officer wrongly considered the payment of brokerage as fees for technical services. The Ld. AR relied upon the decision of the Hon'ble Apex Court in case of GE India Technology Centre Vs. CIT(A) 327 ITR 456 (S.C.) wherein it is held that tax deduction at source obligations u/s 195(1) arise only if the payment is chargeable to tax in the hands of nonresident recipients. Therefore, merely because a person has not deducted tax at source from a remittance abroad it cannot be inferred that person making the remittance has committed a failure in discharging tax withholding obligations because such obligations come into existence only when a recipients has a tax liability in India. The Ld. AR also relied upon the decision of the Tribunal in assessee's own case being ITA No. 207/Del/2014 dated 24/2/2016 for A.Y. 2010-11.

6. The Ld. DR relied upon the order of the CIT(A) and assessment order.

7. We have heard both the parties and perused the material available on record. Tribunal in assessee's own case being ITA No. 207/Del/2014 dated

24/2/2016 for A.Y. 2010-11 held as under:-

"3.3 We have heard the rival submissions and perused the material on record. The assessee has obtained services of foreign tax residents for getting export order in a foreign country. The services of procuring export orders for the assessee has arose income in the hands of foreign agent. The only issue in dispute is whether those services are liable for tax deduction at source. In the case of Angelique International Ltd. (supra), the Hon'ble High Court after considering the Circulars issued by the CBDT and judgments of various High Courts and Supreme Court, held as under:

"..... In the light of the judgments of the Supreme Court in Commissioner of Income Tax Vs. Eli Lilly and Co. (India) P. Ltd. [2009], 312 ITR 225 (SC) and GE India Technology Centre P. Ltd. Vs. Commissioner of Income Tax [2010] 327 ITR 456 (SC), once the income was not exigible or chargeable to tax, TDS was not required to be deducted. Money paid to the third parties, who did not have any office or permanent establishment in India, was exempt and not chargeable to tax. Thus, on the said payments or income, TDS was not required to be deducted. We also note that the payments in question were made prior to Circular No. 7 of 2009. On this aspect, there is no dispute. We, therefore, no not find any reason to interfere with the order passed by the Tribunal deleting the addition made by the Assessing Officer under Section 40a(i) of the Act. The appeal, being devoid of merit, is dismissed."

3.4 Further, in the case of EON Technology Pvt. Ltd. (supra), the Hon'ble Delhi High Court has discussed all the relevant provisions and Circulars issued by the CBDT and held as under:

"5. The scope and ambit of Section 195 of the Act has been explained by the Supreme Court in GE India Techonology Centre (P) Ltd. vs. CIT (2010) 327 ITR 456. In the said case the expression "any other sum chargeable under the provisions of the Act" in Section 195 of the Act was elucidated and explained. It was held that if payment is made in respect of the amount which is not chargeable to tax under the provisions of Act, tax at source (TDS, for short) is not liable to be deducted. Decision of Supreme Court in Transmission Corporation of Andhra Pradesh vs. CIT, (1999) 239 ITR 587 (SC), operates and is applicable when the sum or payment is chargeable to tax under the provisions of the Act. In such cases, TDS has to be deducted on the gross amount of payment made and not merely on the taxable income included in the gross amount. ***The said decision would not apply in case payment is made but the said sum in entirety is not chargeable or exigible to tax under the provisions of the Act. The said distinction has been rightly understood by the***

first appellate authority and the ITAT and correctly applied by them." (emphasis supplied)

3.5 Further in the case of M/s. Northern Tannery (supra), wherein also non-resident was appointed as commission agent for sale of products, the Tribunal held that since the assessee had simply procured export orders through commission agent for which the commission was paid, the assessee was not required to deduct tax at source on the commission paid to the foreign agent.

3.6 In view of the above ratios of the Courts and Tribunal, we are of the view that the tax at source under Section 195 of the Act is deductible only, if the case of the assessee falls under the expression 'any other sum chargeable under the provisions of the Act. We find from the facts of the case that the foreign commission agent has rendered services in a foreign country for procuring export orders for the assessee and no income accrued or arose to the assessee in India; therefore, no sum is chargeable to tax in India. It is not material that where the agreement was signed or where the place of arbitration was fixed, but what is material is, that where the service were rendered. The Revenue has failed to establish that between the assessee and the non-resident there existed any business or professional connection in India and thus no income accrued or arose to the non-resident in India. Further we find that in the case of the assessee, the entire sum was not chargeable to tax and thus the judgment of the Transmission Corporation of Andhra Pradesh vs. CIT (supra) is not applicable to the facts of the assessee as held by the jurisdictional High Court in the case of EON Technology Pvt. Ltd. (supra). We find that the facts of the case are identical to the facts of the case of M/s. Northern Tannery (supra), therefore, respectfully following the decisions of the Tribunal in said case , we are of the opinion that no tax was required to be deducted on the commission expenditure towards procuring export orders by the assessee. Therefore, we hold that no disallowance can be sustained under Section 40(a)(i) of the Act. Accordingly, this ground of the assessee is allowed."

Thus, the issue in the present assessment year is identical to A.Y. 2010-11. The Ld. DR could not distinguish the factual aspect of the present case. Therefore, this issue is squarely covered in favour of the assessee. Ground No. 1 is allowed.

8. As regards Ground No.2 relating to additional depreciation claimed on plant u/s 32 (iia) of the Act, the Ld. AR submitted that the axle Counters are safety devices and undergo a number of temporary testing for obtaining RDSO approval. For getting the product to meet such requirements, at the time of production also the temperature is controlled and dust free environment is required which has the basic requirement of air conditioned assembly and testing set ups. Dust if not controlled lead to try soldering systems may no longer passed the above tests. The Ld. AR submitted that the assessee's claim for additional depreciation u/s 32 (iia) of the Act on the Central AC Plant permanently installed in production area for safety signaling systems of Indian Railway is proper. The Air conditioner is an integral part of bottle plant and machinery. The Ld. AR relied upon the decision of the Tribunal in case of DCIT Vs. M/s Bikanerwala Foods Pvt. Ltd. being ITA No. 4139/Del/2014 A.Y. 2010-11 order dated 4/5/2018.

9. The Ld. DR relied upon the assessment order and the order of the CIT(A).

10. We have heard both the parties and perused the material available on record. It is pertinent to note here that the axle Counters are safety devices and undergo a number of temporary testing for obtaining RDSO approval. For getting the product to meet such requirements, at the time of production also the temperature is controlled and dust free environment is required which has the basic requirement of air conditioned assembly and testing set ups. Dust if not controlled lead to try soldering systems may no longer passed the above tests. Thus, it is part of plant and machinery of axle counters and not that of office premises. Thus, the proviso to Section 32(1)(i) of the Act will not be applicable in the present case and additional depreciation has to be allowed. Hence Ground No. 2 is allowed.

11. In result, the appeal of the assessee is allowed.

Order pronounced in the Open Court on 26th FEBRUARY, 2019.

Sd/- Sd/-
(N. K. BILLAIYA) **(SUCHITRA KAMBLE)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Dated: 26/02/2019
*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	19.02.2019
Date on which the typed draft is placed before the dictating Member	19.02.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	26 .02.2019
Date on which the final order is uploaded on the website of ITAT	26 .02.2019
Date on which the file goes to the Bench Clerk	26 .02.2019
Date on which the file goes to the Head Clerk	