

**IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA Nos. 541 to 543/VIZ/2018
(Asst. Year : 2012-13 to 2014-15)**

The ACIT, Circle-2(1), vs. M/s. NSL Textiles Ltd.,
Guntur. 3rd Floor, Emgee House,
4th Lane, Ring Road,
Chandramouli Nagar,
Guntur.

(Appellant) PAN No. AABCJ 1299 A
(Respondent)

**C.O.Nos. 11 to 13/VIZ/2019
(Arising out of ITA Nos. 541 to 543/VIZ/2018)
(Asst. Year : 2012-13 to 2014-15)**

M/s. NSL Textiles Ltd., vs. The ACIT, Circle-2(1),
3rd Floor, Emgee House, Guntur.
4th Lane, Ring Road,
Chandramouli Nagar,
Guntur.

PAN No. AABCJ 1299 A (Applicant) (Respondent)

Assessee by : Shri G.V.N. Hari – Advocate.
Department By : Smt. Suman Malik – Sr.DR

Date of hearing : 09/04/2019.
Date of pronouncement : 30/04/2019.

ORDER**PER V. DURGA RAO, JUDICIAL MEMBER**

These appeals by the Revenue and the cross objections by the assessee are directed against the separate orders of Commissioner of Income Tax (Appeals)-1, Guntur, all dated 09/08/2018 for the Assessment Years 2012-13 to 2014-15. Since issues and facts involved in these appeals are common, clubbed and heard together and disposed of by way of this consolidated order.

ITA No. 541/VIZ/2018 (A.Y. 2012-13)

2. Facts of the case, in brief, are that the assessee-company M/s. NSL Textiles Ltd., engaged in the business of manufacturing of grey fabric & dyeing, yarn, ginning & pressing of cotton and garments trading, filed its return of income for the A.Y. 2012-13 on 27/09/2012 admitting total loss of Rs. 168,14,97,811/- under the normal provisions of the Act. The book loss under section 115JB was admitted at Rs. 115,41,39,731/-. Subsequently, case of the assessee was selected for scrutiny and after following due process, assessment was completed under section 143(3) of the Act, dated 23/03/2015. In the assessment order, the Assessing

Officer on going through the profit & loss account, it is noticed that the assessee has not deducted TDS on commission paid to foreign agents of Rs.1,60,62,998/-. The Assessing Officer asked the assessee-company to furnish the details and note on its allowability. The AR of the assessee has submitted vide its letter dated 18/03/2015 that the company paid commission of Rs.1,60,62,998/- to the foreign agents and no tax was deducted at source. By considering the reply, the Assessing Officer has disallowed an amount of Rs. 1,60,62,998/- under section 40(a)(ia) of the Act.

3. On appeal, Id. CIT(A) deleted the addition made by the Assessing Officer by observing as under:-

"During the course of appellate proceedings, the appellant was asked to submit the details of agreement entered, if any, by the appellant with the non-resident agents. It was also requested to furnish the nature of service rendered and relation between export commission and service rendered vis-à-vis turnover. In this connection, the appellant submitted the details of commission payment, agent's name, export invoice, party to whom sale was made, etc. for the year. Randomly, the bills/invoices were also submitted including the Customs Shipping Bill for export etc. for verification. The documents/information has been called for by this office to verify the nature of service and justification for such payment in relation to the exports made. This has been done as per section 250(4) of the IT Act and these documents are not produced by the appellant on its own. Hence cannot be treated as additional evidence or new evidence. Ongoing through the material available and the submissions made by the appellant, it is clear that the commission agents rendered service outside India and do not have any permanent establishment in India. The

commission was charged on the exports made hence, the nexus proved. The debit notes raised by the agents clearly prove the fact that the parties to whom the exports were made upon the persuasion by the agents. All the decisions relied upon by the appellant has been perused and found that they are in favour of the appellant and held that no TDS should be done to the payments made to non-residents on account of commission paid for the services rendered outside India.

On identical facts, the Hon'ble ITAT, Hyderabad in the case of Priyadarshini Spinning Mills (P.) Ltd. (25 taxmann.com 574) held that commission paid to foreign agents who acted as selling agents of assessee outside India would not be liable to tax deduction under section 195. The relevant para of the order is as under:

"14. In the case of Hyderabad Industries Ltd. (supra) also ITAT, Hyderabad Bench held the similar view. In the present case, the AO has failed to bring any material on record on the basis of which it could be concluded that commission paid to foreign agents is chargeable to tax in India. Unless the income is chargeable to tax in India, then tax is not required to be deducted u/s 195(1). From the facts and materials available on record, no definite conclusion can be made that the commission paid to foreign agents is chargeable to tax in India. Therefore, the disallowance made u/s 40(a)(i) is not sustainable. Hence, there is no reason to interfere with the finding of the CIT(A) on this issue. The grounds raised by the revenue are rejected."

The Hon'ble ITAT, Hyderabad in the case of Avon Organics Ltd. (28 taxmann.com 170) held that where assessee pays commission to foreign agents for their services (rendered outside India) as facilitators of exports, income to such foreign agents cannot be deemed to have been arisen in India merely on fact that such payments were made to bank accounts of agents by telegraphic transfer through banks in India. The relevant part of the order is reproduced hereunder, wherein it was held that income does not accrue or arise in India unless there is permanent establishment in India for the non-resident and no disallowance can be made u/s. 40(a)(i) of the Act.

"6. We have heard rival submissions and perused the material on record. As revealed from the assessment order, the AO has

come to the conclusion that the commission payments were deemed to have been received in India only because the telegraphic transfer of the remittances towards commission was made from a bank in India. Apart from these things, the AO has got no other material on record to show that the foreign agents either rendered any services in India or have any permanent establishment in India. Only because the remittances towards commission were telegraphically transferred to the foreign agents from the banks in Hyderabad will not lead to the inference that the income to the foreign agents accrued or arose in India in terms of section 5(2)(a) of the Act. The ITAT, Hyderabad Bench in the case of Dr. Reddy's Laboratories (*supra*) took note of the decision of the Hon 'ble Supreme Court in the case of Transmission Corpn. of A.P (*supra*) and held in the following manner:-

"In the case of Transmission Corporation (*supra*), the facts were that the assessee had entered into certain agreements with certain foreign parties for supply of equipments. Another set of contracts entered into were for assembling, erection, testing and commissioning of the equipment. Pursuant to these contracts, payments were made by the assessee to the foreign parties without deducting tax under s. 195 of the Act; The contention of the assessee was that s. 195 would be applicable only where the payment to the non-resident is wholly income chargeable to tax as it provides that any person responsible for paying to a non resident 'any sum chargeable under the provisions of this Act', shall, at the time of payment, deduct income tax thereon at the rates in force. In other words, the contention was that when the payments made to the non-resident were not entirely income, but a trading receipt, there is no question of deduction of income tax at the source as the section does not provide for it. To this contention, the Supreme Court answered that the assessee who made the payments to the non residents was under an obligation to deduct tax at source u/s 195 of the Act in respect of the sums paid to them under the contracts entered into. It further held that the obligation of the assessee to deduct tax u/s 195 is limited only to the appropriate proportion of income chargeable under the Act. Thus, it can be seen that the said judgment in fact helps the assessee. The second question answered by the Supreme Court can be understood to mean that the obligation of the assessee to deduct tax u/s 195 is not there when the payment made to the non-resident does not contain any proportion of income therein. In our view, right from the beginning, not only on the basis of the circulars of the Board, but also on the basis of the decision of the Tribunal in its own case, the assessee firmly believed that no part of the income paid to the foreign agent was taxable in India. Therefore, there was no question of

deducting any tax at source on any proportion of the payment made to the non-residents. Thus, the judgment in the case of Transmission Corporation (supra) does not advance the case of the department in the present appeal. Finally, it may be pertinent to note that Circular No. 786 doted 7-2-2000 i.e., the some has been issued after the judgment was rendered in the case of Transmission Corporation (supra) i.e., on 17-8-1999. The facts in the assessee's case remain governed by the Board Circular and hence, in the final analysis, respectfully following the earlier order of the Tribunal in the assessee's own case, we uphold the order of the CIT (A) deleting the disallowance."

7. *In case of Divis Laboratories Ltd. (supra), the ITAT, Hyderabad Bench while interpreting the provisions contained under s. 195 held that unless the income is liable to tax in India, there is no obligation to deduct tax. In order to determine whether the income can be deemed to accrue or arise in India, it has to be consistent in the context of section 9. As per section 9, the basic criteria provided in the section is about accrual of or arising of income In India by virtue of connection with the property in India or control or management vested in India. Unless these conditions were satisfied, it cannot be held that income has accrued or arisen in India. This Tribunal further held that section 195 has to be read along with charging sections 4, 5 and 9 of the Act. The provisions contained u/s 195 were not meant that the moment there is a remittance, the obligation to deduct TDS automatically arise. Considering the fact that the AO has not brought any material on record to show that the foreign agents have rendered any part of the services in India or have a permanent establishment and business connection in India, it cannot be said that any part of the commission payment made to them accrued or arisen in India requiring deduction of tax u/s 195(1) of the Act. We are also fortified by the decision of the ITAT Bombay Bench discussed above. In the aforesaid view of the matter, we fully agree with the finding of the CIT (A) that no disallowance u/s 40(a)(i) could be made. We therefore uphold the order of the CIT (A) and dismiss the ground raised by the department."*

The Hon'ble ITAT, Chennai in the case of Capricorn Food Products India Ltd. (38 taxmann.com 158) considering circular nos. 786/2000, 7/2009 and 23/69 and also sec. 195 of the IT Act held that sum paid to non-resident for canvassing business abroad is not taxable in India even after amendment to section 9(2) by Finance Act, 2010. The relevant para of the order is as under:

"7. We have perused the orders and heard the rival submissions. The A.O. had made disallowance under Section 40a(i) for a reason that assessee could not take benefit of Circular No. 786 dated 7.2.2000. However, the subsequent Circular No. 712009 dated 22.10.2009, which allegedly withdrew the benefits given to an assessee under Circular No.786 dated 7.2.2000 and Circular No.23 dated 23.7.1969, were not there, when assessee made payments to non-resident agents since the relevant previous year was 2007-08. Assessee therefore was definitely saved by the doctrine of promissory estoppel. At the time when it had effected the payments to foreign agents, it could reasonably have held the bonafide belief that such payments were not income of the non-residents, exigible for tax in India. Once assessee held a bonafide belief that the payments made to non-residents, were not taxable in India, then it could not be fastened with a liability to deduct tax under Section 195 of the Act. In any case, Assessing Officer has not given any finding that the non-residents had rendered any services which were in the nature of technical services. There is nothing on record to show that any technical knowledge was made available to the assessee through the services rendered by the non-residents, which assessee could make use of in future. In any case, sub-clause (b) of clause (vii) of Section 9(1) of the Act clearly mentions that fees paid in respect of services utilized in a business or profession carried on by such person outside India or for the purpose of making or earning income from any source outside India, would not come within the purview of income by way of fees for technical services. Addition of Explanation to sub-section (2) to Section 9 through Finance Act, 2010 with retrospective effect from 1.6.1976 will therefore have no effect on taxability of income earned by nonresident outside India in the course of his business or profession carried out outside India by him. There is no case for the Revenue that the foreign agents were not engaged in a business of earning commission by canvassing market overseas. We are, therefore, of the opinion that Id. CIT(Appeals) was justified in deleting the disallowance. No interference is required."

The Hon'ble ITAT, Kolkata in the case of Bengal Tea & Fabrics Ltd. (91 taxmann.com 38) held that where assessee paid commission to foreign agents on account of export made to parties referred by them, in view of fact that those agents received income abroad for rendering services in their respective countries and, moreover, it was not case of revenue that payment was made by assessee

on account of technical services rendered by foreign agents, it could be concluded that income did not accrue or arise in India and, therefore, assessee was not liable to deduct tax at source while making payments in question.

The Hon'ble ITAT, Delhi in the case of Divya Creation (86 taxmann.com 276) held that where assessee-firm made payments of commission to those agents, since those agents had their offices situated abroad and, moreover, services were also rendered by them outside India, assessee was not required to deduct tax at source while making payments in question. The relevant para is reproduced as under:

"20. We find identical issue had come up before the Ahmedabad Bench of the Tribunal in the case of Welspun Corpn. 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)."

The Hon'ble ITAT, Hyderabad in the case of IVAX Paper Chemicals Ltd. (44 taxmann.com 173) held that where assessee-company made payment of sales commission to a foreign party by direct remittance for services rendered outside India, amount in question not being chargeable to tax in India, assessee was not required to deduct tax at source while making said payments and where in support of claim of deduction for sales commission paid to foreign party, assessee brought on record commission bills which clearly substantiated services rendered by foreign party, claim in question could not be rejected.

Respectfully following the above decisions and having regard to the material facts on the issue, it is felt that provisions of sec. 195 of the Act are not applicable to the commission payment made to the non-residents for the services rendered such as getting export orders, expediting the bill payments, liaising with parties, etc. outside India and who do not have any permanent establishment in India. Consequent to the same disallowance u/s. 40(a)(i) of the Act is also incorrect. The above decisions extensively

discussed the provisions of law on the subject, hence, the addition made by the AO is hereby deleted and the ground raised is allowed."

4. Ld. Departmental Representative has submitted that the assessee has not filed any details in respect of commission paid to the foreign agents and therefore the Assessing Officer has rightly disallowed by invoking section 40(a)(ia) of the Act. Even before the Id. CIT(A), the assessee has not filed any agreement and the Id. CIT(A) without calling remand report, simply allowed the ground raised by the assessee and submitted that the issue may be remitted back to the Assessing Officer for fresh consideration.

5. Ld. counsel for the assessee has supported the order passed by the Id. CIT(A).

6. We have heard both the sides, perused the material available on record and orders of the authorities below.

7. The only issue involved in this appeal is in respect of commission payment made to the foreign agents. During the course of assessment proceedings, the assessee has not filed copy of agreement and the details in respect of commission payment, therefore, the Assessing Officer disallowed by invoking section 40(a)(ia) of the Act. Even before the Id. CIT(A), the assessee has not filed the agreement entered into by the assessee with the

foreign agents, however, the Id. CIT(A) only considered the random bills and invoices, names of the agents and export invoices, allowed the ground raised by the assessee. We find that when the assessee has not filed written agreement entered into by the assessee with the foreign agents, which is very much necessary to decide the genuineness of the payment made to the foreign agents, the Id. CIT(A) ought to have called the remand report in respect of other details filed before him. Instead that, he simply considered the details filed by the assessee and allowed the ground raised by the assessee, in our opinion, the order passed by the Id. CIT(A) cannot survive. Therefore, the order of the Id.CIT(A) is set aside and remit the matter back to the file of the Assessing Officer to examine the genuineness of the payments made to the foreign agents and other relevant details and pass necessary orders in accordance with law after giving affordable opportunity of hearing to the assessee.

8. So far as Assessment Years 2013-14 & 2014-15 are concerned, facts and issues are similar, therefore in view of our decision above, the orders passed by the Id. CIT(A) are set aside and directed the Assessing Officer to re-adjudicate the issue in the lines as indicated in the A.Y. 2012-13.

9. So far as Cross Objections filed by the assessee are concerned, these are only supportive to the orders of the Id.CIT(A). As the assessee has no grievance against the orders of Id. CIT(A), the Cross Objections filed by the assessee have become infructuous and are dismissed accordingly.

10. In the result, appeals filed by the Revenue are allowed for statistical purposes and the cross objections filed by the assessee are dismissed.

Order Pronounced in open Court on this 30th day of April, 2019.

Sd/-
(D.S. SUNDER SINGH)
Accountant Member

sd/-
(V. DURGA RAO)
Judicial Member

Dated: 30th April, 2019.

vr/-

Copy to:

1. The Assessee- M/s. NSL Textiles Ltd., 3rd Floor, Emgee House, 4th Lane, Ring Road, Chandramouli Nagar, Guntur.
2. The Revenue - ACIT, Circle-2(1), Guntur.
3. The Pr.CIT, Guntur.
4. The CIT(A)-1, Guntur.
5. The D.R., Visakhapatnam
6. Guard file.

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.