

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "H", MUMBAI**

**Before Shri Shamim Yahya, Accountant Member and
Shri Ravish Sood, Judicial Member and**

**ITA No.1556/Mum/2018
Assessment Year-2013-14**

ITO-17(2)(2), 1 st Floor, R. No.123B, Aayakar Bhavan, M. K. Road, Mumbai-400020	बनाम/ Vs.	M/s Khimji Vishram & Sons, 21, Mittal Chamber, 228, Nariman Point, Mumbai-400021
		PAN No. AAAPK4773G
(राजस्व /Revenue)		(निर्धारिती /Assessee)

राजस्व की ओर से / Revenue by	Shri Manoj Kumar Singh
निर्धारिती की ओर से / Assessee by	Shri Kishore Dalal

सुनवाई की तारीख / Date of Hearing :	24/04/2019
देश की तारीख / Date of Order:	30/04/2019

देश / ORDER

Per Shamim Yahya, Accountant Member

This appeal by the revenue is directed against order's of learned CIT(A)-57, Mumbai, dated 19/12/2017 and pertain to Assessment Year 2013-14. The grounds of appeal read as under:-

1) "Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) was justified in holding that the payment made by the assessee to the non resident is in the nature of commission without appreciating the fact that the payment made by the assessee was in the nature of fees for technical services as per Explanation 2 to clause (vii) of sub-section (1) of section 9 of the Act."

2) "Whether on the facts and circumstances of the case & in law, the Ld. C 11(A) was justified in holding that the income of the payee made by the assessee is not taxable in India without appreciating that such payment is liable to tax under the provision of section 9 of the Act."

3) "Whether on the facts and circumstances of the case & in law, the Ld. C 11(A) was justified in deleting the addition made u/s 40(a)(ia) of the Act without appreciating that the assessee had not deducted tax at source from the payment made by the assessee to non residents which is in the nature of fees for technical services under Explanation 2 to clause (vii) of sub-section (1) of section 9 and is liable to tax deduction at source under section 195."

2. The brief facts of the case are as under :-

The appellant is a partnership firm engaged in the business of trading in cotton, textiles, yarn, commission agent, exports and imports. The assessee has filed the return of income on 30/09/2013 declaring total income at Rs.NIL. The AO u/s 143(3) of the I.T. Act, 1961 order dated 07/03/2016 added back an amount of Rs.1,13,69,151/ to the total income of the assessee firm as brokerage and commission. The learned Assessing Officer disallowed commission on export paid to foreign agents of Rs.1,13,69,151/- under section 40(a)(ia) of the Income Tax Act, 1961.

3. Against above order assessee appealed before the learned CIT(A). It was inter-alia submitted that the issue is covered in favour of the assessee by the decisions of ITAT in assessee sown case. Learned CIT(A) decided the issue in favour of assessee by holding as under:-

I have carefully considered the matter and perused the assessment order, submissions of the appellant as well as the order of the Hon'ble Bombay High Court in the case of DIT(FF) vs. Credit Lyonnais. The only ground of appeal is against the disallowance of foreign commission paid of Rs.1,13,69,15 1/-.

6.1 The controversy has arisen because the AO has classified the commission paid to foreign residents as fees for managerial and technical services and thereby invoked sec 9. On facts, I find that the payments made to foreign residents are plain commission and brokerage and not fees for managerial and technical services. The appellant is able to link the commission paid to various foreign residents to the sales affected through them. The details are filed in pages 1 to 27 of the Paper Book before me. Therein the appellant has filed details of the commission paid party wise and the foreign customer of the appellant. I find that the commission is being paid @ 0.25% to 1% of each invoice value. Hence the commission is based on each invoice and not lump sum or any other basis. On this issue then, I find that the decision of the Hon'ble Bombay High Court in the case of DIT (IT) vs. Credit Lyonnais-TS143-HC-2016 (Born) is revealing and covers the matter squarely in favor of the appellant. In that case, the issue was identical on facts.

It was held that Section 195 obliges a person responsible for paying to non-resident any sum chargeable to tax under the Act, to deduct tax at the time of payment or at the time of credit to such non-resident. In terms of section 5, a non-resident is chargeable to tax received or deemed to be received in India or accrued or arising in India.

6.2 The facts and issue in the present appeal is identical to the case before the Hon'ble Bombay High Court. Respectfully following the decision of the Hon'ble Bombay High Court I hold that the commission and brokerage paid to foreign residents is not liable for TDS u/s 195 as the same has not accrued or arisen in India. This conclusion draws authority from the explanatory notes to the Finance Act 2012 in respect of the amendment to sec 195 wherein Expl 2 to that section was introduced. The said explanation is reported at 342 ITR (SI.) 266 and is reproduced below:-

"Section 195 of the Income Tax Act requires any person to deduct tax at source before making payments to a non resident if the income of such a non resident is chargeable to tax in India." Person" here would take its meaning from sec 2 and would include all persons whether resident or non resident. Therefore a non resident person is also required to deduct tax at source before making payments to another non resident, if the payment represents income of the payee non resident, chargeable to tax in India. There are no other conditions specified in the Act and if the income of the payee non resident is chargeable to tax, then tax has to be deducted at source whether the payment is made by a resident or a non resident."

From the above, it is clear that the explanation 2 inserted vide Finance Act 2012 would render all payments made to foreign residents liable for TDS u/s 195 only if the income of the payee nonresident is chargeable to tax in India. In the present case, the facts indicate the opposite that the commission has been paid to non residents for services rendered abroad and therefore the said Commission income cannot be said to accrue or arise to them in India.

There is therefore no requirement for withholding tax u/s 195. In any case, the case of the appellant is covered on identical facts by the decision of the Hon'ble Bombay High Court cited supra I therefore delete the disallowance of Rs.1,13,69,151/- on this count.”

4. Against above order revenue/assesee is in appeal before us.

5. Learned counsel of the assessee submitted that the issue is squarely covered in favour of the assessee by the decisions of ITAT in assessee's own case.

6. Per Contra learned departmental representative could not dispute the proposition that the issue is covered in favour of the assessee by the decision of ITAT in assessee's own case.

7. We have carefully considered the submission and perused the records .Up on careful consideration we find that the impugned issue is squarely covered in favour of the assessee by the decisions of ITAT in assessee's own case as under:-

Case No.	Assessment Year	Order dated
ITA No.9054/Mum/2010	2007-08	08/10/2014
ITA No.904/Mum/2015	2008-09	17/04/2017

8. It is not the case that the Hon'ble Bombay High Court has reversed these decisions. We may here refer para 6 of ITAT order for AY 2008-09:-

“We have heard the rival contentions of both the parties. The Tribunal has held that payment of sales commission will not fall in category of fees for technical services as defined section 9(1)(vii) of the Income Tax Act. Therefore, the assessee has

made payment to non-residence overseas agent for the purpose of procuring order is not in nature of technical services, the income of non-residence overseas agent do not fall within the purview of section 9(1)(vii) of the Income Tax Act, 1961.”

9. Accordingly respectfully following the precedent as above we do not find any infirmity in the order of learned CIT-A accordingly we uphold the same.

10. In the result, this appeal by the revenue is dismissed
Order pronounced in the Open Court on 30/04/2019.

**Sd/-
(Ravish Sood)**

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 30/04/2019

Shekhar, P.S.नि.स.

**Sd/-
(Shamim Yahya)**

लेखा सदस्य / ACCOUNTANT MEMBER

□ देश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

□ देशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

□ यकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai