

IN THE INCOME-TAX APPELLATE TRIBUNAL "I" BENCH MUMBAI

BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND  
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 1147/Mum/2017 (Assessment Year 2010-11)

ITA No. 1148/Mum/2017 (Assessment Year 2011-12)

ACIT-22(1), Room No. 322, 3 <sup>rd</sup> Piramal Chambers, Lalbaug, Parel, Mumbai-400012.	Vs.	M/s Creations by Shangar, 34, Auro Villa, St. Andrews Road, Santacruz (W), Mumbai-400054. <b>PAN: AACFC7957L</b>
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Appellant

Respondent

Appellant by : Shri Manjunath Karkihalli (DR)

Respondent by : Shri Nitesh Joshi (AR)

Date of Hearing : 10.05.2019

Date of Pronouncement : 31.05.2019

**ORDER UNDER SECTION 254(1) OF INCOME TAX ACT**

**PER PAWAN SINGH, JUDICIAL MEMBER;**

1. These two appeal by revenue under section 253 of the Income-tax Act ('the Act') are directed against the order of ld. CIT(A)-34, Mumbai dated 08.11.2016 & 10.11.2016 for Assessment Year 2010-11 & 2011-12 respectively. In both the appeals, the revenue has raised the identical grounds of appeal except variation of figures of disallowance/addition under section 40(a)(i) of the Act, therefore, both the appeals were clubbed, heard and are decided by common order. With the consent of parties, the appeal for Assessment Year 2010-11 is treated as lead case. The assessee has raised the following grounds of appeal:

“1. On the facts and circumstances of the case and in-law, the learned CIT(Appeal) erred in deleting the addition made by the AO on export commission of Rs. 978,66,610/- paid to non-resident agents u/s 40(a)(i) of the Act on the ground that payments to such non-resident agents were liable to tax and the assessee has failed to deduct tax thereon.”

2. The appellant, prays that the order of the CIT(A) on the above ground be set aside and that of the AO be restored.

2. At the outset of hearing, the Id. Authorized Representative (AR) of the assessee submits that grounds of appeal raised by revenue are covered by the decision of Hon'ble Bombay High Court in CIT vs. Gujarat Reclaim and Rubber Products Ltd. (ITA No. 2116 of 2013 & 169 of 2014 dated 08.12.2015, wherein it was held that commission paid to non-resident agent outside India for the services rendered were not chargeable to tax in India. The Id AR for the assessee also furnished the copy of the decision of Bombay High Court in CIT vs. Gujarat Reclaim and Rubber Products Ltd. (supra).
3. On the other hand, the Id. Departmental Representative (DR) for the revenue strongly relied upon the order of Assessing Officer.
4. We have considered the rival submission of the parties and have gone through the orders of authorities below.
5. Brief facts of the case leading to the disallowance of Commission payments are that the assessee is in the business of manufacturing of embroidered fabrics and allied products, filed its return of income declaring income from Business & Profession of Rs. 2,16,98,891/-. During the assessment, the Assessing Officer noted that assessee has paid commission of Rs. 97,66,610/-

on which no tax was deducted at source. The Assessing Officer further noted that assessee paid commission to those parties, who were the residents of country where the India entered into Double Taxation Avoidance Agreement (DTAA). The assessee was show-caused as to why the provision of section 195 of the Act should not be made applicable as the parties to whom the commissions were paid were rendering the services in the nature of consultancy, technical/customer relationship services. The assessee filed its reply. The assessee stated that none of the parties to whom the assessee has remitted commission payment/paid commission payment had any Permanent Establishment in India. Therefore, they are not liable to tax in India. The explanation furnished by assessee was not accepted by Assessing Officer holding that as per Explanation to section 9(2) of Finance Act, 2007, the income of non-resident shall be deemed to accrue in India and shall be included in total income whether or not the non-resident has a residents or place of business connection in India or non-resident has rendered services in India. The Assessing Officer by referring Circular No. 7 of 2009 dated 20.10.2009 disallowed the commission payment paid to non-resident holding that no tax was deducted thereon.

6. On appeal before the Id. CIT(A), the entire addition/disallowance was deleted holding that there is no dispute that the services are rendered by non-resident outside India for procuring export orders from customer outside India. The payment to such non-resident is made outside India on account of sale

percentage. The non-resident does not have any geographical or Permanent Establishment in India. Tax Treaty exists with the country of residents of non-resident, residents of non-resident, residents of Italy, France & Japan. The Id. CIT(A) further concluded that perusal of the agreements with the non-residents agent disclosed that the agents were procured order from customer based on the price given by the assessee and pass such order to assessee for a fixed percentage of commission payable to the agent at the FOB value of the invoice and foreign currency after the fully payment has been received from the customers. From the term of agreement, it is clear that nature of services rendered by non-residents agent was for procuring by them. The payments made to them are in the nature of commission as is also specifically mentioned in the agreement. Therefore, the finding of Assessing Officer that services provided by commission agent falls in the category of managerial or consultancy as defined by Explanation 2 to section 9(i)(vii). Being aggrieved, the revenue has filed the present appeal before us.

7. As noted above, the Id. DR for the revenue relied upon the order of Assessing Officer and the Id. AR of the assessee submitted that the commission was paid outside India or services rendered by the commission agent outside India and also relied on the decision of Hon'ble Bombay High Court in CIT vs. Gujarat Reclaim and Rubber Products Ltd.(supra).
8. We have considered the submission of both the parties and have gone through the orders of authorities below. There is no dispute that the assessee

appointed commission agent outside India. The Assessing Officer failed to bring any material on record to show that the services provider has any business place in India or the services were not rendered outside India by those commission agents. The Hon'ble Bombay High Court in CIT vs. Gujarat Reclaim and Rubber Products Ltd. (supra) held that commission earned by non-resident agent who carried on the business of selling Indian goods outside India cannot be said to have deemed to be income which has accrued or arise in India. The Hon'ble jurisdictional High Court followed the decision of Hon'ble Supreme Court in CIT vs. Toshoku Ltd. (158 ITR 525) on identical facts held that commission earned by non-resident who carried business of selling Indian goods outside India cannot be said to have deemed income which has accrued or arising in India. Considering the fact and the legal position as discussed above, we affirm the order of Id. CIT(A). Non contrary facts or law is brought to our notice to take other view.

9. In the result, appeal of Revenue for Assessment Year 2010-11 is dismissed.

**ITA No. 1148/Mum/2017 for A.Y. 2011-12**

10. As we have noted above the revenue have raised identical grounds of appeal.

The facts of the case are under consideration is that identical grounds except variation of figures of disallowance, therefore, considering the principle of consistency, the appeal for Assessment Year 2011-12 is also dismissed with similar observation.

11. In the result, both the appeals of the revenue are dismissed.

Order pronounced in the open court on 31/05/2019.

**Sd/-**  
**G.S. PANNU,**  
**VICE-PRESIDENT**

Mumbai, Date: 31.05.2019

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**Copy of the Order forwarded to :**

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "I" Bench, ITAT, Mumbai
6. Guard File

**Sd/-**  
**PAWAN SINGH**  
**JUDICIAL MEMBER**

**BY ORDER,**

**Dy./Asst. Registrar**  
**ITAT, Mumbai**