IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'E' BENCH, NEW DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER, AND SHRI T.S. KAPOOR, ACCOUNTANT MEMBER,

ITA Nos. 5293 & 5294/DEL/2017
[Assessment Year: 2013-14 & 2014-15]

ACIT, CIRCLE-46(1), Room No.106, Drum Shap Building, New Delhi-110002	M/s Maharani Enterprises, 20-A, Gadodia Market, Khari Baoli, Delhi-110006
	PAN-AAMFM4846Q
Appellant	Respondent

Revenue by	Smt. Rinku Singh
Assessee by	Shri S.K. Gupta

Date of Hearing	**05/08/2019**
Date of Pronouncement	**06/08/2019**

ORDER

PER T. S. KAPOOR, ACCOUNTANT MEMBER,

These are two appeals filed by the Revenue preferred against the separate order of the Ld. CIT(A)-X16, New Delhi, both dated 16/06/2017, pertaining to Assessment Years 2013-14 & 2014-15.

2. The Revenue has taken similar grounds of appeal in these cases, which were heard together and for the sake of convenience, these are being disposed of by this common and consolidated order. For the sake of completness, the grounds of appeal taken by the Revenue in ITA No.5293/Del/2017 are reproduced hereunder:-

"1. On the facts and circumstances of the case the ld. CIT(A) has erred in deleting the addition of Rs.4,13,48,057/- made by the AO on account of non-deduction of TDS u/s 40(a)(ia) of the Act on commission."

3. At the outset, the ld. AR submitted that these are covered cases in favour of the assessee as on similar issue, the Hon'ble ITAT in the case of assessee itself in AY 2012-13, vide order dated 09/10/2018 had decided the issue in favour of the assessee and in this respect filed a copy of the order of the Tribunal.

4. The ld. DR fairly admitted that the cases were covered in favour of the assessee by the earlier order of the Tribunal, however, she placed her reliance on the order of the Assessing Officer.

5. We have heard rival parties and gone through the orders of the authorities below as well as the order of the Tribunal. The brief, facts of the case are that the assessee was making export to various parties situated in gulf countries and the assessee had made payments on account of commission to Mr. Sanjay Mehta, for providing various services to the assessee. We find that during the Assessment Year 2012-13 also, the assessee had made similar payments to Mr. Sanjay Mehta and the Hon'ble ITAT vide order dated 09/10/2018 had decided the issue in favour of the assessee by following the order of the Tribunal in the case of assessee itself for AY 2011-12. We find that the Hon'ble Tribunal has

decided the issue vide para 7 onwards in ITA No.3575/Del/2015, which for the sake of completeness is reproduced below:-

"7. We have heard the rival submissions and have also perused the material on record. As facts in the present year are similar to the facts in earlier year decided by the co-ordinate bench in ITA no. 5806/D/2014 whereby the Tribunal in Paragraph 8 has recorded as under :-

"8. We have heard both the parties and perused the material available on record. It is noted that the CIT(A) has given a detailed finding as to why the amount of RS. 1,19,51,774/- has to be deleted. To arrive at this finding, the CIT(A) has taken a cognizance of RBI's guidelines as well as CBDT Circular. At the time of hearing, it was pointed out by Ld. AR that the said Circular was withdrawn by the Department. All these aspects have been taken into consideration by the CIT(A). Besides this, the issue is also dealt by us in case of Divya Creation wherein we have held as under:-

19. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer made addition of Rs. 62,19,609/- u/s 40(a)(i) on the ground that assessee has not deducted tax from the foreign agency commission paid as per the provisions of section 195 of the I. T. Act. While doing so, the Assessing Officer relied on the decision of the AAR in the case of SKF Boilers and Driers Pvt. Ltd. (supra) and the decision in the case of Rajiv Malhotra (supra). We find the Id. CIT(A) while upholding the action of the Assessing Officer held that income arising to the agent on account of export commission very much falls within the ambit of provisions contained in section 5(2)(b) of the I.T. Act as the income has accrued in India when the right to receive the same came into existence. According to him although the non-resident agent has rendered services and procured orders abroad but the right to receive the commission certainly arise in India when the order gets executed by the assessee. According to him, the mere fact that the agent is to render services ITA No. 5603/Del/2014 abroad and the commission is to be remitted to him abroad are wholly irrelevant for the purpose of determining the income since income is from a source in India.

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

21. We find the ITon'ble Allahabad High Court in the case of Model Exims (supra) has held that failure to deduct tax at source from payment to nonresident agents, who has their own offices in foreign country, cannot be disallowed, since the agreement for procuring orders did not involve any managerial services. It was held that the Explanation to section 9(2) is not applicable. It was further held that the situation contemplated or clarified in the Explanation added by the Finance Act, 2010 was not applicable to the case of the assessee as the agents appointed by the assessee had their offices situated in the foreign country and that they did not provide any managerial services to the assessee. Section 9(l)(vii) deal with technical services and has to be read in that ITA No.5603/Del/2014 context. The agreement of procuring orders would not involve any managerial services. The agreement did not show the applicability or requirement of any technical expertise as functioning as selling agent, designer or any other technical services.

22. We find the Hon'ble Supreme Court in the case of Toshoku Ltd. (supra) has observed as under :-

"During the previous year relevant to the assessment year 1962-63, B, a dealer in tobacco in India, purchased tobacco and exported it to Japan and France through non-resident sales agents, a Japanese company and a French business house respectively. Under the terms of the agreement, the Japanese company, which was appointed as exclusive sales agent in Japan for tobacco exported by B, was entitled to a commission of 3 per cent, of the invoice amount. The sale price received on the sale in Japan was remitted wholly to B in India and B debited his commission account and credited the amount of commission payable to the Japanese company in his account books and later remitted the amount to the Japanese company. There was a similar agreement with the French business house in relation to the corresponding area and similar credit and debit entries and subsequent remittance of the commission were made. The question was whether the commission earned by the non-resident sales agents could be taxed in India, treating B as representative assessee under s. 161 of the l.T. Act, 1961:

Held, (i) that it could not be said that the making of the entries in the books of B amounted to receipt, actual or constructive, by the non-resident sales agents as the amounts so credited in their favour were not at their disposal or control; they could not, therefore, be charged to tax on the basis of receipt of income, actual or constructive, in the taxable territories.

(ii) That'the non-residents did not carry on any business operation in the taxable territories : they acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to the remitted by the purchasers from abroad did not amount to an operation carried out by the non-residents in India as contemplated by cl. (a) of the Explanation to s. 9(l)(i) of the I.T. Act, 1961. The commission amounts which were earned by the non-residents for services rendered outside India could not be deemed to be income which had either accrued or arisen in India.

A credit balance, without more, only represents a debt and a mere book entry in the debtor's own books does not constitute payment which will source a discharge from the debt."

> 23. Similar view has been taken by the Hon'ble Madras High Court in the case of Kikani Exports Pvt. Ltd. (supra) and Faizan Shoes Pvt. Ltd. (supra). ITA No.5603/Del/2014 The Hon'ble Delhi High Court in the case of EON Technology P. Ltd. (supra) has also taken similar view where it has been held that non-resident commission agents based outside India rendering services of procuring orders cannot be said to have a business connection in India and the commission payments to them cannot be said to have been either accrued or arisen in India. In view of the decisions cited above (supra), we are of the considered opinion that the assessee is not liable to deduct tax under the provisions of section 195 of the I.T. Act on account of foreign agency commission paid outside India for promotion of export sales outside India. Accordingly, the order of the CIT(A) is set-aside and the grounds raised by the assessee are allowed."

Thus, both the issues involved in appeal and in cross objections are covered in favour of the assessee. Therefore, the appeal of the Revenue is dismissed and Cross- Objection of the assessee is allowed.

8. Respectfully following the decision of the Co-ordinate bench in the case of the assessee for the earlier year, we dismiss the appeal filed by the revenue.

9. In the result, appeal of the revenue is dismissed.

6. The ld. CIT(A) has also allowed the relief to the assessee on the basis of his predecessors decisions in the case of assessee itself. Therefore, by following the judicial precedents in the case of assessee itself, the appeals filed by the Revenue are dismissed.

7. Finally, the appeals filed by the Revenue are dismissed.

The order is pronounced in the open court on 06/08/2019.

Sd/-	**Sd/-**
[BHAVNESH SAINI]	**[T.S. KAPOOR]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Delhi; Dated: 06/08/2019.

Shekhar, Sr. P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi