आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCH 'B', JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 60/JP/2019
निर्धारण वर्ष/Assessment Years : 2015-16.

Derewala Industries Ltd., E-73, EPIP, Sitapura Industrial Area, Tonk Road, Jaipur.	बनाम Vs.	The Dy. Commissioner of Income-tax, Circle-6, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AACCD 5740 R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Vinod Kumar Gupta (CA)

राजस्व की ओर से/ Revenue by : Shri Karni Dan (JCIT)

सुनवाई की तारीख/ Date of Hearing : 05.08.2019
घोषणा की तारीख/ Date of Pronouncement : 07.08.2019

आदेश/ ORDER

PER VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 10.12.2018 of ld. CIT (Appeals), Ajmer for the assessment year 2015-16. The assessee has raised the following grounds of appeal :-

" 1. Whether CIT (A) right or not, while holding that TDS is required to be deductable irrespective of facts that payment has been made to non-resident person would did not have place of business or business connection in India, in view of explanation 2 to section 195(1).

2. Impugned assessment order passed u/s 143(3) is bad in law and on facts being against the principal of natural justice, perverse and for many more statutory reasons, being based upon wrong presumption of the facts or law.

3. Under the facts and circumstances, ld. A.O. has erred by disallowing the commission of Rs. 5,49,296/- paid to non-resident u/s 40(a)(i) of the Income Tax Act, 1961 and CIT (A) has erred by sustaining the same. The disallowance made and confirmed is unjustified, illegal or excessive.

4. That the appellant craves your indulgence to add, amend or alter all or any grounds of appeal before or at the time of hearing.

Ground No. 2 is general in nature and does not require any specific adjudication.

Ground No. 1 & 3 are regarding disallowance of commission paid to non-resident by invoking the provisions of section 40(a)(i) of the IT Act for want of TDS.

2. We have heard the ld. A/R as well as the ld. D/R and considered the relevant material on record. The AO has disallowed the commission paid by the assessee to the German based non-resident on the ground that the assessee has not deducted tax at source. The assessee challenged the said action of the AO before the ld. CIT (A) and contended that the payment of commission to the non-resident is not chargeable to tax in India as per provisions of IT Act as well as DTAA between India and Germany. The ld. CIT (A) did not accept this contention of the assessee and confirmed the disallowance made by the AO solely on the ground that as per Explanation 2 to section 195, the assessee was under obligation to deduct TDS even in respect of the payment made to non-resident. The ld. A/R has relied upon the decision dated 14th May, 2019 of this Tribunal in case of Satyam Polyplast vs. DCIT in ITA No. 158/JP/2019 and submitted that the Tribunal has considered an identical issue by reproducing the order of the ld. CIT (A) which is identical in case of the assessee. At the outset, we note that the AO as well as the ld. CIT (A) has not

disputed the nature of payment being commission to non-resident and, therefore, the decision of this Tribunal in case of Satyam Ployplast vs. DCIT (supra) is relevant on the facts of the case. In the said case the Tribunal has considered this issue in para 5 as under :-

> "5. We have considered the rival submissions as well as the relevant material on record. The assessee has paid commission to non-resident persons against the service of procuring orders for the assessee. The details of the commission paid by the assessee are as under:-

S. No.	Name of Agent	Address	Commission
1.	Mr. Claudio Haberl A/c	AV. Sesquicentenario 4540 CP1613, Buenos Aires, Argentina	22,06,46,7.00
2.	Md. Habibur Rahman	Kalibarl, Azizabad, Patharghata Barguna	3,31,442.00
3.	Nadia Anwar hasan Ali	AL-Shekh, Othman, Snafer Building Yemen	4,68,120.00
4.	Reinhard Bosse	UND Geschaftskunden Ag, Bahnhofstrabe 17,49525 Lengerich, Germany	7,10,060.00
5.	Shamlan Naseer Ali	Doha, Qatar, YEMEN	1,76,698.00
	Total :		38,92,787.00

> The AO has disallowed the said amount U/s 40(a)(i)on the ground that the assessee has not deducted the tax at source as required U/s 195(1) of the Act. The AO has given much emphasis to explanation-II to Section 195(1) of the Act. The AO also held that the payment in question is Fee for Technical Services (FTS) because the non-residents have rendered the service of managerial in the nature which falls in the ambit of definition of Fee for Technical Services U/s 9a(1)(vii) of the Act. It is pertinent to note that the provisions of Section 40(a)(i) can be applied only respect of sum payable or paid to a non-resident towards interest, royalty or Fee for Technical Services (FTS) or other sum chargeable under this Act which is payable to non-resident. For ready reference we quote the provisions of Section 40(a)(i) of the act as under:-
>
> "chargeable under the head "Profits and gains of business or profession",—
>
> (a) in the case of any assessee—
>
> [(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,—

(A) outside India; or

(B) in India to a non-resident, not being a company or to a foreign company,

on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid 45 [on or before the due date specified in sub-section (1) of section 139] :

[Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.] Explanation.—For the purposes of this sub-clause,—

(A) "royalty" shall have the same meaning as in Explanation2 to clause (vi) of sub-section (1) of section 9;

(B) "fees for technical services" shall have the same meaning as in Explanation2 to clause (vii) of subsection (1) of section 9;”

The payment in question is commission and prima facie not royalty or Fee for Technical Services (FTS). The AO though observed that the payment in the nature of FTS, however the AO has not examined or not given the finding as to how the payment in question is FTS and what is the nature of service rendered by the non-resident. Even otherwise the issue of FTS has to be considered in light of definition provided in respect the DTAA. We find that the ld. CIT(A) for the assessment year 2013-14 has clearly given a finding that the payment in question is not fee for technical services but it is a regular payment to the non-resident in the nature of ordinary course of business. Even otherwise the ld. CIT(A) has upheld the order of the AO only on the ground that as per the explanation-II of Section 195(1) of the Act the assessee was under obligation to deduct the tax at source for making the payment of commission to non-resident. Therefore, the ld. CIT(A) has accepted the nature of payment as commission and not fee for technical service. The relevant finding of the ld. CIT(A) in para 4.3 as under:-

> “4.3 I have gone through the assessment order, statement of facts, grounds of appeal and written submissions carefully. It is seen that the AO after discussing the provisions of Section 195, including the Explanation 2, has concluded that the appellant was required to deduct the tax at source while making the payment of above referred expenses even, to the non-resident persons, whether or not the non-resident person had a residence or place of business or business connection in India or any other presence in any

> manner whatsoever in India. The explanation 2 has been inserted by the Finance Act of 2012 with retrospective effect from 01.04.1962. I am of the considered view that the argument of the appellant that since the non-resident persons whom the payments were made did not have place of business or business connection in India, therefore, the appellant was not required to deduct tax at source on the above referred payments, is not correct. Regarding the second argument of the appellant that the income of the recipients of the above referred expenses was not "sum chargeable under the provisions of income Tax Act, 1961 therefore the provisions of Section 195(1) are not applicable to these payments" the A/R of the appellant was specifically requested to clarify whether any ruling was obtained from the Authority for Advance Ruling u/s 245(2), regarding non taxability of the income of the recipient in India under the Income Tax Act. The A/R submitted that no such ruling was obtained from AAR by the recipients of the above referred expenses. There is no other evidence on record to show that the sum received by the nonresidents in the form of selling commission (Rs. 38,92,787/-) was not chargeable to tax under the Income Tax Act. There is no order or finding by any Income Tax Authority that the above referred sum of Rs. 38,92,787/- was not chargeable to tax under I. T. Act, 1961. Therefore, I am of the considered view that the appellant was required to deduct tax at source while making payment of selling commission (Rs. 38,92,787/-) to non-resident, whether or not the non-resident had a residence or place of business or business connection in India. The decision relied upon by the appellant are applicable only when there is evidence on record to show that the sum paid by the assessee was not chargeable to tax under the Income Tax Act. Therefore, disallowance of Rs. 38,92,787/- made by the AO is hereby confirmed."

Once the payment in question is commission then the provisions of Section 40 (a)(i) of the Act are applicable only if such sum is chargeable to tax under this Act. As per provisions of Section 5(2) of the Act the total income of non-resident includes all income from whatsoever sources derived which is received or deemed to be received in India accrues or arises or is deemed to accrue or arise to him in India during such year. For ready reference we quote to Section 5(2) reproduced as under:-

> "5(2) Subject to 11 the provisions of this Act, the total income 12 of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received 14 or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises 14 or is 14 deemed to accrue or arise to him in India during such year.

> Explanation 1.—Income accruing or arising outside India shall not be deemed to be received 14 in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.
>
> Explanation 2.—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued 15 or arisen 15 or is deemed to have accrued 15 or arisen 15 to him shall not again be so included on the basis that it is received or deemed to be received by him in India.
>
> Therefore, commission paid to non-resident outside India for the services rendered outside India will not fall in the category of the income received for deemed or received in India as well as accrues or arises or is deemed to accrue or arise in India. Thus, the said amount paid to non-resident does not fall in the scope of total income of nonresident and consequently it is not chargeable to tax in India under the provisions of the Act. Even otherwise the said income in the hands of non-resident has to be considered in the light of the provisions of DTAA between India and the Country of the non-resident. In the absence of P.E. of the non-resident in India such business income is not chargeable to tax in India. Accordingly, in the facts and circumstances of the case when the amount paid by the assessee is not chargeable to tax in India then the assessee is not liable to deduct TDS and consequently the provisions of Section 40(a)(i) of the Act cannot be invoked for making the disallowance. In the facts and circumstances of the case the disallowance made by the AO U/s 40(a)(i) of the Act is deleted."

We further note that the finding of the ld. CIT (A) as decided this issue in para 4.3 in the impugned order are as under :-

> *"4.3. I have gone through the assessment order, statement of facts, grounds of appeal and written submission carefully. It is seen that the AO after discussing the provisions of Section 195, including the Explanation 2, has concluded that the appellant was required to deduct the tax at source while making the payment of above referred expenses even, to the non-resident persons, whether or not the non-resident person had a residence or place of business or business connection in India or any other presence in any manner whatsoever in India. The Explanation 2 has been inserted by the Finance Act of 2012 with retrospective effect from 01.04.1962. I am of the considered view that the argument of the appellant that since the non-resident persons whom the payments were made did not have place of business or*

business connection in India, therefore, the appellant was not required to deduct tax at source on the above referred payments, is not correct. Regarding the second argument of the appellant that the income of the recipients of the above referred expenses was not "sum chargeable under the provisions of Income Tax Act, 1961 therefore the provisions of section 195(1) are not applicable to these payments", the A/R of the appellant was specifically requested to clarify whether any ruling was obtained from the Authority for Advance Ruling u/s 245R(2), regarding non taxability of the income of the recipient in India under the Income Tax Act. The A/R submitted that no such ruling was obtained from A/R by the recipients of the above referred expenses. There is no other evidence on record to show that the sum received by the non-residents in the form of selling and purchase commission (Rs. 5,49,246) was not chargeable to tax under the Income Tax Act. There is no order or finding by any Income Tax Authority that the above referred sum of Rs. 5,49,246/- was not chargeable to tax under I.T. Act, 1961. Therefore, I am of the considered view that the appellant was required to deduct tax at source while making payment of selling and purchase commission (Rs. 5,49,246) to non-resident, whether or not the non-residents had a residence or place of lbusiness or business connection in India. The decision relied upon by the appellant are applicable only when there is evidence on record to show that the sum paid by the assessee was not chargeable to tax under the Income Tax Act. Therefore, disallowance of Rs. 5,49,246/- made by the AO is hereby confirmed."

Thus the finding of the ld. CIT (A) in the case of the assessee as well as in case of Satyam Polyplast is identical. Accordingly in view of the decision of the Coordinate Bench in case of Satyam Polyplast vs. DCIT (supra), the addition made by the AO is deleted.

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

Order pronounced in the open court on 07/08/2019.

Sd/-	Sd/-
(विक्रम सिंह यादव)	(विजय पाल रॉव)
(Vikram Singh Yadav)	(VIJAY PAL RAO)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 07/08/2019.
das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant-Derewala Industries Ltd., Jaipur.
2. प्रत्यर्थी / The Respondent- The DCIT, Circle-6, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File {ITA No. 60/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar