IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C", NEW DELHI

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SH. PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.5880/Del/2016
Assessment Year : 2010-11

ACIT, Circle-30(1), New Delhi.	**Vs.**	Ishman International, W-71, Greater Kailash-II, New Delhi-110048. PAN-AAAFI7620L
(Appellant)		**(Respondent)**
Appellant by	Sh. Amit Katoch, Sr.DR	
Respondent by	Sh. Suresh Anand, CA	
Date of hearing	**05.08.2019**	
Date of pronouncement	**22.08.2019**	

O R D E R

PER SUCHITRA KAMBLE, J.M:

This appeal by the Revenue is directed against the order dated 30.08.2016 passed by the CIT(A)-10, New Delhi in relation to assessment year 2010-11 on the following grounds:-

1. *"On the facts and in the circumstances of the case, Ld. CIT(A) has erred in deleting the addition of Rs.97,41,665/- made by the AO on account of export commission paid to foreign parties u/s 40(a)(ia) of the Income Tax Act, 1961 due to non-deduction of TDS as per provisions of section 195".*
2. *"On the facts and in the circumstances of the case, the Ld. C1T(A) failed in establishing as to how the cases of SKF Boilers & Driers of AAR and Rajiv Malhotra, mentioned in the assessment order are not*

applicable in the case of assessee as the reasons given for doing so were not found to be cogent and convincing. Further, the Ld. CIT(A) has also failed to take note of the factum of withdrawal of Board's Circular No.7/2009".

3. On the fact and in the circumstance of the case, the Ld C1T(A) has erred in relying upon the decisions in the case of AC1T, Circle-29(1), New Delhi Vs. Nidhi Exports in 1TA No.626/Del/2012 and Wellspring Universal Vs JC1T (2015) where the facts of the case were found to be different".

4. "The Ld. C1T(A) has failed to appreciate the import of section 9 which lays down that any income of non-resident shall be deemed to accrue on arise in India whose source of income is in India as is in the instant case".

5. "The appellant craves leave to add, alter or amend any of the grounds of appeal before or during the course of hearing of the appeal."

It is prayed that the order of the Ld. C1T(A)-10, New Delhi being contrary to the facts on record and the settled position of law, be set aside and that of the Assessing Officer be restored."

2. The assessee firm was engaged in business of manufacturing and export of readymade garments. Return declaring total income of Rs.9,91,97,680/- was e-filed on 03.10.2010 which was processed u/s. 143(1) and subsequently, it was selected for scrutiny. Accordingly, the Assessing Officer issued statutory notices u/s. 143(2) and 142(1) of the Act which were complied with by the assessee. The Assessing Officer observed that a sum of Rs.98,32,149/- was debited to the profit & loss account under the head commission on export sale by the assessee. The Assessing Officer asked for the details in respect of

incurrence of commission expenses indicating party-wise details, purpose, compliance of TDS etc. In response to the same, the AR of the assessee submitted that during the year there was total export turnover of Rs.116 crores in spite of recession in the market. The Assessing Officer completed the assessment by making disallowance and computed the income at Rs.10,96,76,860/-.

3. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

4. The Ld. DR submitted that the CIT(A) erred in deleting the addition of Rs.97,41,665/- made by the Assessing Officer on account of export commission paid to foreign parties u/s. 40(a)(ia) of the Income-tax Act, 1961 due to non deduction of TDS as per provisions of section 195. The Ld. DR further submitted that the CIT(A) failed in establishing as to how the cases of SKF Boilers and Driers Pvt. Ltd. of AAR and Rajeev Malhotra , 284 ITR 564 mentioned in the assessment order are not applicable in the case of the assessee, as the reasons given in doing so were not found to be convincing. The CIT(A) also

failed to take note of the factum of withdrawal of Board's Circular No. 07/2009. The Ld. DR further submitted that the CIT(A) failed to appreciate the import of section 9 which lays down that any income of non-resident shall be deemed to accrue and arose in India whose source of income is in India as is in the instant case.

5. The Ld. AR relied upon the order of the CIT(A) and further submitted that the CIT(A) categorically mentioned that the foreign agents were resident of India and they rendered services outside India. The CIT(A) further observed that the commission was paid on the basis of order secured through them and they did not have any PE in India and have no business connection in any way in India, they were independently carrying on the business outside India, commission received from the assessee firm was their profit which ws taxable as per DTAA with India and France and UAE, no part of their income arise in India. The Ld. AR further submitted that the Ld. CIT(A) has rightly relied on the case of SKF Boilers and Driers Pvt. Ltd. and in the case of Rajeev Malhotra.

6. We have heard both the parties and perused all the material available on record. The CIT(A) has held as follows :

> *"4.1 Perusal of assessment order reveals that A.O. made the disallowance in respect of commission paid to foreign agents on which TDS was not deducted by the appellant. For making disallowance, A.O. relied upon the decisions of AAR in the case of SKF Boilers and Driers P. Ltd. and Rajiv Malhotra and provisions of section 5 of the IT Act holding that commission paid to foreign agents is deemed to accrue or arise in India. Reliance has also been placed by the AO on the Board's circular No. 7/2009 by which the earlier circulars i.e. Circular No. 786 dated 07.02.2000 and Circular No. 23 dated 23.07.1969 were withdrawn. Therefore, it was held by the AO that assessee failed to comply with the provisions of section 195 of the Act. Accordingly, commission payment of Rs.97,41,655/- was disallowed as per provisions of Section 40(a)(i) of the Act.*
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> *4.1.1 I have carefully considered the facts of the case and arguments forwarded by the appellant on AO's inference drawn in the assessment order. There is no dispute that there is no permanent establishment of the agent in India and also the commission was paid outside India in foreign currency. Therefore, before going further, it is important to understand the provision of section 5(2)(b) and applicability of section 9(1)(i), in this regard, there is a recent decision of the Hon'ble H-Bench of the Income Tax Appellate Tribunal, New Delhi in the case Welspring Universal vs. JCIT (2015) in ITA No. 4761/Del/2014 A.Y. 2011-12 has dealt with the issue of allowability of deduction u/s. 40(a)(i) of the Income Tax Act, 1961 in respect of the amount of commission income for rendering services in procuring export orders outside India without deduction of tax at source u/s. 195 of the Act. In this case, the Hon'ble Bench has held that "the amount of commission*

income for rendering services in procuring export orders outside India is not chargeable to tax in the hands of the non-resident agent and hence no tax is deductible u/s. 195 on such payment of the payer. Resultantly, no disallowance is called for u/s. 40(a)(i) of the Act. ....

4.1.5 Thus, Section 9(1)(i) provides that income arising out of 'business connection' is chargeable to tax in India only to the extent of income reasonably attributable to the operations carried out in India. It may be noted that for invoking Section 9(1)(i), existence of business connection/Permanent Establishment is a sine qua non and inevitable. It also appears that in the aforesaid ruling, the earlier ruling of the Hon'ble AAR in the case of Spahi Projects, 315 ITR 374 has not been considered and also the decision of the Hon'ble Supreme Court in the case of CIT vs. Toshuku, 125 ITR 525 has also been not considered, and therefore the case of SKF Boilers and Driers P. Ltd. is to be treated as per incuriam. Therefore, the finding of the AO that right to receive commission arises in India when the order is executed by the person resident in India is not correct since the mere fact that payment is made by a person resident in India or the order is executed by a person resident in India does not result in establishment of business connection of the non-resident payee. It is further noticed that the ruling of the Hon'ble AAR in SKF Boilers is based on the ruling in the case of Rajiv Malhotra, [(2006) 284 ITR 564 (AAR)]. According to the Ld. Assessing Officer, the said decisions lay down that tax deduction was mandatory on export Commission since Commission was deemed to accrue or arise in India. However, it is observed that the facts of the above ruling are entirely different from those of the appellant. In the case of Rajiv Malhotra, the Commission was payable to non-resident agent for soliciting foreign participants abroad for a trade exhibition to be held in India. Therefore in view of specific provisions of s. 5(2) (b)

r/w s. 9(1)(i) as the right to receive the Commission under the terms of the agency agreement had arisen in India, the Commission was held be taxable in India under the provisions of the Act. But in the Appellant's case, the facts are entirely different. In this case, the Appellant has paid foreign Commission to Non-Resident for Commission due on export orders procured by it, i.e. the Non-Resident. This foreign Commission Agent is not resident in India. This agent operates its activities outside India in its own country and no part of its activities arises in India. It was paid Commission which relates to services provided to the appellant from outside India The relation between Appellant and the Agent are principal to principal. This Agent did not have Permanent Establishment or permanent place of business place In India. The Commission was remitted directly to this Agent directly outside India and not received by it or on it behalf in India by any third party (or by it). Moreover, the Hon'ble AAR in the case of Ind Telesoft P. Ltd. 267 ITR 725 have held that tax was not required to be deducted out of foreign Agent's Commission. In that view of the matter, the decision of the AAR in SKF Boilers cannot be said to be a binding precedent. …… …… …… ……
…… …… …… …… …… ……

4.1.7 In the present case, there is no business connection at all of the agent in India - real or intimate from which income has arisen directly or indirectly. Thus, in the light of ratio of above judgments, the activity of foreign agent rendering services to exporter in India can be best described as income accruing from business connection u/s. 9(1)(i), thus carrying on some activity in India is must for making their foreign commission taxable in India as also held by the Hon'ble Supreme Court in the case CIT vs. Toshoku. Thus, in the absence of any services rendered in India, foreign commission paid to non-resident for services rendered outside India is not taxable in India and hence, no liability to deduct TDS u/s. 195.

4.1.8 Regarding the applicability of provision of section 195 of the Act, again the Hon'ble Court has referred the decision of Hon'ble Supreme Court as under :

> *"17. After referring to Eli Lilly & Co. India (P.) Ltd. (Supra) in GE India Technology Centre (P) Ltd. (Supra), it has been held:*
>
> *"17. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in CIT vs. Eli Lilly & Co. (P.) Ltd. the provisions for deduction of TAS which is in chapter XVII dealing with collection of taxes and the charging provisions of the IT Act from one single integral, inseparable code and, therefore, the provisions relating to TDS applies only to those sums which are inseparable code and, therefore, the provisions relating to TDS applies only to those sums which are 'chargeable to tax' under the IT Act. It is true that the judgment of Eli Lilly was confined to section 192 of the IT Act. However, there is some similarity between the two. If one looks at section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head "salaries"". Similarly, section 195 imposes a statutory obligation on any person responsible for paying to a non-resident any sum "chargeable under the provisions of the Act", which expression, as stated above, does not find place in other sections of Chapter XVII. It is in this sense that we hold that the IT Act constitutes one single integral inseparable code. Hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the IT Act. "*

4.1.9 Apart from the above, I also place reliance on the decision of Hon'ble Delhi ITAT, Delhi Bench-E, New Delhi in the case ACIT

Circle 29(1), New Delhi Vs. M/s Nidhi Exports in ITA No. 626/Del/2012 for the Asstt. Year 2008-09 wherein the deletion of addition made by the AO on account of commission payment without deducting TDS u/s 40(a)(i) of the IT Act was challenged by the Department against the order of the Id. CIT(A). However the Hon'ble ITAT upheld the order passed by the Id. CIT(A) holding that the basis and reasoning given by the CIT(A) in deleting the impugned addition made by the AO are sound and convincing in the light of the case law relied upon. The facts and circumstances of the present case are similar and identical to the above case, hence the same are found to be squarely applicable in the appellant's case.

Therefore, keeping in view the entirety of the facts and the circumstances, judicial pronouncement relied upon by the Ld. AR, referred to above, I find considerable merit in the submissions of the appellant that the payment of commission are made to non-resident overseas agents who have no PE or business activities in India and the services are also rendered outside India as such no income is arising to the non-resident commission agent in India and as such no TDS is deductible u/s 194-H which is applicable for resident Indians only. On the basis of above discussion, I am of the considered view that commission payment to the non-resident does not represent income which is chargeable to tax u/s. 195 of IT Act, 1961 when examined and analysed under the framework of provisions of Income Tax Act, 1961. It is therefore held that TDS was not required for commission payment which was paid to non-residents. As such the mischief of section 40(a)(i) for the disallowance is not warranted. Consequently, no disallowance u/s. 40(a)(i) of the Act could be made as there is no violation of TDS provisions. The disallowance of Rs.97,41,655/- made by the AO is, therefore, held to be not justified. The same is directed to be deleted. Thus, appellant gets relief in respect of this ground of Appeal raised by him."

Thus, the CIT(A) rightly observed that the payment of commission are made to non-resident overseas agents who have no PE or business activities in India and the services are also rendered outside India as such no income is arising to the non-resident commission agent in India and as such no TDS is deductible u/s 194-H which is applicable for resident Indians only. Thus, there is no need to interfere with the findings of the CIT(A). The appeal of the Revenue is dismissed.

7. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 22nd day of August, 2019.

Sd/-	**Sd/-**
(PRASHANT MAHARISHI)	**(SUCHITRA KAMBLE)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 22 .08.2019
** Amit Kumar**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI