

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI**

**BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

I.T.A. No. 3757/DEL/2016 (A.Y 2011-12)

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| The Income Tax Officer, Ward - 40(5), New Delhi. (APPELLANT) | Vs | M/s. D. R. Exports International, 603, Gopal Heights, Netaji Subhash Place, Pitampura, Delhi - 110 034. (PAN : AAafd 3992 N) (RESPONDENT) |
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| Appellant by | Shri Shailesh Kumar, Sr. D.R. |
| Respondent by | Dr. Rakesh Gupta, Adv., Shri Deepesh Garg, Adv. Shri Rakesh Kumar Khiwani, C.A. |

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| Date of Hearing | 02.01.2020 |
| Date of Pronouncement | 07.01.2020 |

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the Revenue against the order of the Commissioner of Income Tax [Appeals]-16, New Delhi dated 01.03.2016 for Assessment Year 2011-12.

2. The Grounds of appeal are as under:-

On the facts and circumstances of the case and in law CIT(A) has erred in~

1. *Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) is justified in deleting the addition of Rs. 2,97,70,427/- made by the Assessing Officer (AO) on account of disallowance of loss on rate settlement (Contracts) by accepting additional evidence without giving*

opportunity to the AO, which is in contravention of provisions of Rule 46A of IT Rule, 1962.

2. *On the facts and circumstances of the case & in law, the Ld. CIT (A) has erred in not appreciating the facts that the assessee could not establish whether any dispute arose because of the failure on the part of the assessee to fulfill contractual terms resulting in the arbitration award.*
3. *Whether on the facts & circumstances of the case & in law, the Ld. CIT (A) is justified in deleting the addition of Rs. 56,05,298/- made by the AO under section 40a(i) of the Act for violation of section 195 of the Act?.*
4. *The appellant craves the right to add, alter or amend any ground of appeal before or during the course of the hearing of the appeal."*

3. Return of income declaring total income of Rs.97,05,780/- was filed on 30.09.2011. During the previous year, the assessee derived income from business and profession (processing trading & export of food products and processing of mustard oil cakes and trading in commodities). The case was processed u/s 143(1) of the Income Tax Act, 1961. Statutory notice u/s 143(2) was issued on 01.08.2012. Subsequently, notice u/s 142(1) dated 12.09.2013 was issued. In compliance to the statutory notices authority representative attended the assessment proceedings and produced necessary details before the Assessing Officer. During the course of assessment proceeding, the assessee was asked to provide the details of commission paid to the foreign agents and was further asked why the said payments of Rs.56,05,297.57/- should not be disallowed as no TDS has been deducted on these payments. The assessee filed reply dated 09.12.2013. The Assessing Officer observed that from the combined reason of Clause 9(1)(i) & (vii)(b) an explanation to provides that any consideration whether lump sum otherwise paid by a person is resident in India to non-resident for running any managerial services would fall within the ambit of "income deemed to accrue or arise in India". Therefore, provisions of marketing commission paid to the foreign agents which is paid by the assessee company would be chargeable to Income tax. The Assessing Officer further held that the assessee has not deducted TDS on commission paid to non-resident, which is covered by section 195 dealing with TDS for payment to non-resident.

There is no provision in the Act for making payment to non-resident without deduction of TDS in absence of any decision/no objection certificate from the assessing authorities u/s 195(2) of the Act. The Assessing Officer further made disallowance on rate of difference of Rs.2,97,70,427/- as claimed by the expenses. Thus, the Assessing Officer made addition to the extent of Rs.4,52,10,530/-.

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

5. The Ld. DR submitted that the Assessing Officer has rightly made a disallowance of Rs.2,97,70,427/- on account of loss on rate settlement (contracts) as there was no evidence produced before the Assessing Officer. As regards an addition of Rs.56,05,298/- u/s 40(a)(ia), the Ld. DR submitted that the Assessing Officer was right in making addition as commission paid to the foreign agent by the assessee firm is covered u/s 195 dealing with TDS for payment to non-resident.

6. The Ld. AR submitted that as regards Ground No.1 & 2, the issue is already decided and is remanded back to the file of the Assessing Officer in A.Y. 2010-11 (ITA No.2876/Del/2016 order dated 20.03.2019).

7. As regards Ground No.3, the Ld. AR submitted that the CIT(A) was right in deleting the said addition as the record shown that such non-residents have a PE and Back Office in India and that is not the case of the Assessing Officer. Therefore, the Ld. AR submitted that commission paid to non-resident was rightly deleted.

8. We have heard both the parties and perused all the relevant materials available on record. As regards Ground No.1 and 2, the issue is identical to

that of A.Y. 2010-11 (ITA No. 2876/Del/2016 order dated 20.03.2019). In the present assessment year as well the additional evidence was before the CIT(A) and no remand report was called by the CIT(A). Thus, the CIT(A) has not followed Rule 46A of the Income Tax Rule, 1962 and has not called for remand report from the Assessing Officer to prove the revenue's case. Therefore, it will be appropriate to restore this issue to the file of the Assessing Officer and assessee is directed to furnish all the necessary evidences before the Assessing Officer which the Assessing Officer will verify and decide the issue afresh. Needless to say the assessee be given opportunity of hearing by following principles of natural justice. Ground No.1 and 2 are partly allowed for statistical purposes.

9. As regards Ground No.3, it can be seen from the Assessment Order that the Assessing Officer has not brought on record to show that such non-residents have a PE or not, in India. In fact, the services of the foreign agents are rendered by the assessee not to use in India but are used for sales outside India. Thus, the commission paid to the foreign agents for rendering services outside India does not come under the purview of Section 195 of the Income Tax Act, 1961. Thus, the CIT(A) was right in deleting the addition of Rs.56,05,298/- made u/s 40(a)(ia) of the Income Tax Act, 1961. There is no need to interfere with the findings of the CIT(A). Hence, Ground No.3 is dismissed.

10. In result, appeal of the Revenue is partly allowed for statistical purposes.

Order pronounced in the Open Court on 7th day of January, 2020.

Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 07/01/2020
*Priti Yadav, Sr. PS **

Copy forwarded to:

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

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| Date of dictation | 02.01.2020 |
| Date on which the typed draft is placed before the dictating Member | 03.01.2020 |
| Date on which the typed draft is placed before the Other Member | 07.01.2020 |
| Date on which the approved draft comes to the Sr. PS/PS | 07.01.2020 |
| Date on which the fair order is placed before the Dictating Member for pronouncement | 07.01.2020 |
| Date on which the fair order comes back to the Sr. PS/PS | 07.01.2020 |
| Date on which the final order is uploaded on the website of ITAT | 07.01.2020 |
| Date on which the file goes to the Bench Clerk | 07.01.2020 |
| Date on which the file goes to the Head Clerk | |