

**IN THE INCOME TAX APPELLATE TRIBUNAL
JABALPUR BENCH, JABALPUR**

**BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND SHRI SANJAY ARORA, ACCOUNTANT MEMBER**

ITA No.155& 156/JAB/2015
F.Ys.:2009-10 & 2010-11
Assessment Years 2010-11 & 2011-12

J.P. Tobacco Products Pvt. Ltd., Patharia Phatak, Damoh. (M.P.) [TAN:JBPJ00523F]	vs.	Dy. Commissioner of Income Tax (TDS), Jabalpur
(Appellant)		(Respondent)

Appellant by	Shri G.N. Purohit, Senior Advocate And Shri Abhijit Srivastava, Advocate
Respondent by	Shri I.B. Khandel, Senior DR
Date of hearing	11/12/2019
Date of pronouncement	20/12/2019

ORDER

PER SANJAY ARORA, AM:

This is set of two appeals by the Assessee, i.e., for two consecutive years, being financial years (f.ys.) 2009-10 and 2010-11, agitating the common Order by the Commissioner of Income Tax (Appeals)-1, Jabalpur '(CIT(A))' for short) dated 04.2.2015, partly allowing the assessee's appeals contesting its' assessments for the relevant years under section 201(1) and 201(1A) of the Income Tax Act, 1961 (hereinafter referred as 'the Act'), per a common order dated 07.5.2013.

2. The short question arising in these appeals is the exigibility to deduction of tax at source by the assessee-company on the commission paid

by it to its' intending agent, Sh.Ketan Malhotra, a resident of Canada. The assessee's case, claimed before us as covered by the Hon'ble Apex Court in *G.E. India Technology Centre Pvt. Ltd. vs. CIT* [2010] 327 ITR 456 (SC), as well as the Board's Circular No.786 dated 07/02/2000 (PB page 16), is that s. 195(1) is not applicable as no part of the said commission was chargeable to tax under the Act in as much as no services were rendered by him in India. The Revenue's case, on the other hand, is that the obligation for deduction of tax at source u/s. 195(1) is, in view of *Explanation 2* to section 195(2), brought on the statute-book by the Finance Act, 2012 with retrospective effect from 01.4.1962, applicable irrespective of the place of residence or place of business of the payee/s. The assessee-company is in any case required to make an application to the Assessing Officer (AO) u/s. 195(2) of the Act, and which has admittedly not been, so that it is deemed to be in default for the tax deductible at source, i.e., Rs.80,183/- and Rs.2,11,567/- for f.y. 2009-10 and f.y.2010-11 respectively u/s. 201(1), besides liable for interest u/s. 201(1A). A Board's Circular cannot override the provisions of the Act, as clarified by the Apex Court per its' decisions in *State Bank of Travancore v. CIT* [1986] 158 ITR 102 (SC) and *Kerala Financial Corporation v. CIT* [1994] 210 ITR 129 (SC). The Board's Circular supra, as well as Circular No. 23, dated 23.7.1969, which the former reiterates, and Circular No.163, dated 29.5.1975, stand withdrawn by Circular No.7/2009, dated 22.10.2009, so that reliance thereon is not apposite; rather misleading and unfortunate.

3. We have heard the parties, and perused the material on record.

3.1 Section 195, in its relevant part, reads as under:

‘**195(1)** Any person responsible for paying to a non- resident, not being a company, or to a foreign company, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a

cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:

Provided.....

Provided further.....

Explanation 1.- For the purposes of this section, where any interest or other sum as aforesaid to credited to any account, whether called “Interest payable Account” or “Suspense Account” or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation 2.-For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section(1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

- (i) a residence or place of business or business connection in India; or
- (ii) any other presence in any manner what so ever in India.’

3.2 The Apex Court in *G.E. India Technology Centre Pvt. Ltd.* (supra) has clarified that the charge to tax in India is a *sine qua non* for the application of section 195(1). The moot question that, therefore, arises is if any part of the commission allowed to its’ non-residential agent by the assessee can be said to accrue or deemed to accrue or arise in India or in fact even received (or deemed to be received) in India (s. 5(2)). This is as in either case income becomes chargeable to tax in India, attracting section 195(1). The retrospective amendment to section 195, by way of *Explanation 2* there to, in our view, only the removes the consideration of residence or place of business or business connection or presence in any manner, of a non-resident payee, in India, for determining the chargeability of the sum paid to him under the provisions of the Act - nothing less and nothing more. The same would not by itself make section 195(1) applicable to the commission amount under reference. The said *Explanationis* to be read in conjunction with *Explanation* below section 9(2) which, reading as under, deems the income of a non-

resident by way of interest, royalty, or fee for technical services, to accrue or arise in India irrespective, similarly, of the place of his residence or place of business or business connection, or even that of rendering services, in India:

*‘Explanation.-*For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not, --

- (i) the non-resident has a residence or place of business or business connection in India; or
- (ii) the non-resident has rendered services in India.’

3.3 The payment in the instant case being ‘commission’, i.e., neither ‘interest’ nor ‘royalty’ nor ‘fee for technical services’, the said deeming shall not apply thereto. That is, the argument that the non-resident agent has no permanent establishment (PE) or place of business, etc., in India, would not, in the context of the present case, *per se* operate to make the commission paid/allowed to him as chargeable to tax under the Act. Nor, again, would so the admitted fact that he is the assessee’s agent for procuring orders for export of goods to Canada or out of India. How, then, or on what basis, one wonders, the commission paid to him is regarded as taxable in India and, thus, liable for tax deduction at source u/s. 195(1)? There is no finding of the service – for which commission is allowed, having been rendered in India for the income to be said to accrue or arise in India.

3.4 One could understand if the Revenue had required the assessee to demonstrate the stated position of the services to the assessee by its’ non-resident agent having been rendered, i.e., in whole, outside India, and of the assessee failing to do so, so that the Revenue adopted an adverse view. There is no whisper of any such claim by the Revenue in its’ orders. The assessee is categorical of the non-resident having not carried any business activity in

India and, further, of the payment to him having been made direct through the banking channels. The transmission of the supply orders procured by its' non-resident agent to the assessee in India, or the follow-up thereof by him with the assessee, could not by itself be possibly regarded as a business activity in India. Rather, as it appears to us, the agent has an independent status.

3.5 The obligation to apply to the AO u/s. 195(2) would, again, arise only on the applicability of section 195(1) to at least a part of the sum paid. That is, the said obligation is not independent of the applicability of section 195(1), no basis for the application of which has been stated or found.

4. We are, in view of the foregoing, wholly unimpressed by the Revenue's claim of the commission amount as representing income liable for tax deduction at source u/s. 195(1). The assessee, accordingly, has not contravened the said section so as to be treated as in default *qua* the commission amount under reference. We decide accordingly.

5. In the result, the assessee's appeals are allowed.

Order pronounced in the open court on December 20, 2019

Sd/-
(BHAVNESH SAINI)
Judicial Member

Sd/-
(SANJAY ARORA)
Accountant Member

Dated: 20/12/2019

Aks/-

Copy of the order forwarded to :

1. The Appellant: J.P. Tobacco Products Pvt. Ltd., Patharia Phatak, Damoh (M.P.)
2. The Respondent: DCIT(TDS), Jabalpur
3. Concerned CIT/Pr. CIT
4. The CIT(A)-1, Jabalpur
5. D.R., I.T.A.T.