

आयकर अपीलीय अधिकरण

मुंबई पीठ "डी"

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCH "D", MUMBAI

श्री विकास अवस्थी, न्यायिक सदस्य एवं

श्री राजेशकुमार, लेखा सदस्य के समक्ष

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

आअसं. 2173/मुं/2019 (नि. व.2012-13)

ITA NO. 2173/MUM/2019 (A.Y.2012-13)

The ACIT 28(2),

Room No.307, 3<sup>rd</sup> Floor, Tower No.6,

Vashi Railway Station Complex,

Vashi, Navi Mumbai 400 703

..... अपीलार्थी /Appellant

बनाम Vs.

Shri Riyaz Abdul Kader

Mark International,

31, Mafco APMC Yard,

Sector – 18, Vashi, Navi Mumbai

PAN: AGFPK 3284R

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Akhtar H. Ansari

प्रतिवादी द्वारा/Respondent by : None

सुनवाई की तिथि/ Date of hearing : 01/10/2020

घोषणा की तिथि/ Date of pronouncement : 09/10/2020

आदेश/ ORDER

**PER VIKAS AWASTHY, JM:**

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-26, Mumbai (in short 'the CIT(A)') dated 25/01/2019 for the assessment year 2012-13.

2. The Revenue in appeal has assailed the order of CIT(A) by raising following grounds:-

1. *"Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance u/s 195 r.w.s 40(a)(i) of the Act made by A.O. by holding that no such income is chargeable in India and hence no tax was deductible?"*
2. *"Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in ignoring the Explanation 2 to sub section (1) of section 195 of the Act which is inserted by Finance Act 2012 with retrospective effect from 01.04.1962?"*
3. *The appellant prays that the order of Ld.CIT(A) on the above grounds be reversed and that of the Assessing Officer be restored?"*

3. Shri Akhtar H. Ansari, representing the Department submitted that the assessee has failed to deduct tax at source under the mandatory provisions of the Income Tax Act, 1961 ('the Act') on the commission paid to overseas agents. The Id. Departmental Representative submitted that the CIT(A) has erred in holding that the commission income has not accrued to the foreign agents in India. The Id. Departmental Representative vehemently, defended the assessment order and prayed for reversing the findings of CIT(A).

4. We have heard the submissions made by Id. Departmental Representative and have examined the orders of authorities below. The assessee is a proprietor of M/s. Mark International engaged in export of agro based food products from India. Ostensibly, the assessee has entered into agreement with overseas agents for procuring orders for supply of assessee's products abroad. During the financial year relevant to the assessment year under appeal, the assessee paid export commission to the following non-resident parties:-

Name	Territory	Amount (Rs.)
Tvalabeishvili Leila	Georgia	5,25,067.00
Lukhutashvili Tamaz	Armenia	14,89,939.24
Besarian Gauga	UAE	10,11,110.00
Liana Saneblidge	Georgia	5,27,208.00
Prodg. Geo Ltd.	British Virgin Island	2,88,14,590.00
Total		3,23,97,914.24

During scrutiny assessment proceedings, the Assessing Officer held that the assessee ought to have deducted tax at source on the payment of commission to the aforesaid parties/agents. The Assessing Officer disallowed payment of aforesaid commission invoking the provisions of section 195 r.w.s. 40(a)(i) of the Act. Aggrieved against assessment order dated 26/03/2015, the assessee filed appeal before the CIT(A). The first appellate authority deleting the above addition in full by observing as under:-

*“6.2 Ground No.2 is against addition of Rs.3,23,97,9147- paid as export commission on which the appellant had not deducted TDS. I have gone through the contention of the appellant as well as that of the AO. I have perused the order of the AO and find that the AO has disallowed the claim of the appellant merely because the circular No.23 of 1969 was withdrawn and as such according to the AO the appellant was required to deduct the tax from the payment made to the agents abroad. It is not a case of the AO that any of those agents had any PE in India or for that matter any establishment in India, to which such commission was attributable to. Further, it is also not a case of the AO that the payment was made for any fees for professional or technical services rendered by such agents and therefore, in absence of any such findings, it cannot be said that incomes to those agents accrued or arisen or deemed to have accrued or arisen in India, and since the same is not a case and since the amount in question was business receipts, the amount in question was not chargeable to tax in India. Hence as per the apex Court ruling in case of G.E. Electronics reported in 327 ITR, no tax was deductible in India. Further, the Hon'ble ITAT Mumbai in the case of Gujarat Reclaim & Rubber Products Ltd. Vs Addl. CIT (2013) 35 taxmann.com 587 as well as ITAT Bangalore in case of Exotic Fruits Pvt. Ltd reported in 40 Taxmann.com 348, has held that such income is not chargeable in*

*India, and hence no tax was deductible and accordingly no disallowance was called for. In appellant's own case for AY 2011-12 then CIT(A)-33, Mumbai has allowed in favour of the appellant vide order dated 24-05-2014. Respectfully following the aforesaid judgments the addition made by AO is deleted and the ground of appeal is 'Allowed'. "*

5. The Revenue has failed to rebut the contentions of assessee that:
- Overseas agents have no permanent establishment in India;
  - The services were rendered by non-resident agents outside India and the commission was paid outside India in foreign currency on the export orders procured by the agents;
  - The payments made to overseas agents were not in the nature of fees for professional or technical services; and
  - Income to the overseas agents has not accrued/arisen deemed to have been accrued or arisen in India.

The Id. Departmental Representative could not controvert the findings of the CIT(A) either.

6. The Hon'ble Supreme Court of India in the case of G.E. India Technology Centre vs. CIT 327 ITR 456 (SC) has held:

*"If the contention of the Department that the moment there is remittance the obligation to deduct TAS arises is to be accepted then we are obliterating the words "chargeable under the provisions of the Act" in section 195(1). The said expression in section 195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. The payer is bound to deduct TAS only if the tax is assessable in India. If tax is not so assessable, there is no question of TAS being deducted."*

In other words, the provisions of Section 195 get attracted only if in the first instance it is established that the overseas payment made to non-resident has accrued/arisen or deemed to have accrued or arisen in India within the meaning of section 9 of the Act.

In the instant case, the Revenue has not been able to substantiate that the commission paid to overseas agents is liable to tax in India. Once it is held that commission is not taxable in India, there is no question of deducting tax at source on payment of commission to overseas agents.

7. We further observe that the CIT(A) in the immediately preceding assessment year i.e. assessment year 2011-12 has granted relief to the assessee on the similar addition made by the Assessing Officer. The Revenue has not brought to our notice any appeal filed by the Department against the said order of the CIT(A). After considering entire gamut of the case, we find no infirmity in the impugned order. The same is upheld and the appeal of the Revenue is dismissed sans-merit.

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

Order pronounced in open Court on **Friday** the **09<sup>th</sup>** day of October, 2020.

Sd/-

(RAJESH KUMAR)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 09/10/2020

Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

**प्रतिलिपि अग्रेषितCopy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,  
Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**