

IN THE INCOME TAX APPELLATE TRIBUNAL  
 DELHI BENCH: 'SMC-1', NEW DELHI  
 BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER  
 AND  
 SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
 (THROUGH VIDEO CONFERENCE)

ITA NO. 6622/DEL/2019

A.Y. : 2016-17

M/S STERLING ORNAMENTS PVT. LTD., B-3, SECOND FLOOR, CHIRAG ENCLAVE, NEW DELHI - 110 048 (PAN: AAICS9774J)	Vs.	ACIT, CIRCLE 24(2), NEW DELHI
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by	Sh. Piyush Kaushik, Advocate
Department by	Sh. R.K. Gupta, Sr. DR.

**ORDER**

**PER H.S. SIDHU, JM:**

This appeal filed by the Assessee is directed against the impugned order dated 10.06.2019 passed by the Ld. CIT(A)-8, New Delhi in relation to assessment year 2016-17 on the following grounds:-

1. That on the facts and circumstances of the case and in the law, the lower authorities have grossly erred in holding that payment of agency commission of Rs. 8,06,155/- outside India for

promotion of export sales outside India is subject to tax withholding u/s. 195.

2. That on the facts and circumstances of the case and in the law, the lower authorities have grossly erred in confirming disallowance of Rs. 8,06,155/- on account of agency commission u/s. 40(a)(i) on the same premise that it was subject to the requirement of tax withholding u/s. 195.
3. That on the facts and circumstances of the case and in the assessee's claim of allowability of foreign agency commission without any requirement of tax withholding u/s. 195 is squarely covered by the order of the division bench of ITAT in assessee's own case for ASSESSMENT YEAR 2011-12 in ITA no. 4395/Del/2014 dated 27.6.2018.

That the appellant craves leave to add to and / or amend, modify or withdraw the grounds outlined above before or at the time of hearing of the appeal.

3. Facts narrated by the Revenue Authorities are not disputed by both the parties, therefore, no need to repeat the same for the sake of convenience.
4. At the time of hearing, Ld. Counsel for the assessee draw our attention towards ground no. 3 and stated that the issue

involved in the present appeal is squarely covered in favour of the assessee by the order of the Division Bench of ITAT in assessee's own case for A.Y. 2011-12 in ITA no. 4395/Del/2014 dated 27.6.2018. Hence, respectfully following the same ratio, the appeal of the assessee may be allowed.

5. On the contrary, Ld. DR relied upon the orders of the authorities below.

6. We have heard both the parties and perused the records, especially the order dated 27.6.2018 of the Division Bench, ITAT, passed in assessee's own case for A.Y. 2011-12 in ITA No. 4395/Del/2014 as mentioned in the ground no. 3 raised by the assessee. No contrary decision has been produced before us by the Ld. DR. However, for the sake of convenience, the relevant portion of the Tribunal's order dated 27.6.2018 as stated above, are reproduced as under:-

*"7. We have heard both the parties and perused the relevant records available with us, especially the impugned order as well as the case laws cited by the Ld. Counsel of the assessee, as aforesaid. We find that Ld. CIT(A) on the same issue has rightly deleted the addition in dispute by following the various case laws as well as following the Ld. CIT(A)-XII, New Delhi Order dated 12.6.2012 passed in assessment year 2009-10. We also note that Ld. CIT(A)-XII, New Delhi vide his order*

*dated 12.6.2012 in the assessment year 2009-10 has discussed the issue in dispute elaborately at page no. 8 to 9. For the sake of convenience, we are reproducing hereunder the relevant findings of the Ld. CIT(A) for the assessment year 2009-10 as under:-*

*"I have perused the facts stated in the assessment order as well as assessee's reply. The assessee in his submission has stated that the Assessing Officer has taken the commission payment under the term "fees for Technical Services" and as per Explanation 2 to section 9(1)(vii) of the Act has held that the payment made by the assessee company to the overseas agents is the income accrue/arises to them in India and hence the assessee company is liable to deduct tax at source as per the provision of section 195(1) of the Act. Since tax at source has not been deducted, the Assessing Officer has made disallowance of Rs. 32,48,174/- u/s 40(a)(i) of the Act. The assessee in support of his claim has given the following case laws:-*

1) *DCIT vs. Divi's Laboratories Ltd reported in 2011 TII 182 (2011) 12 Taxmann. Com 103,*

2) *Eon Technologies (P) Ltd vs. DCIT 11 Taxmann.com 53 (Del).*

4) *Hon'ble ITAT Chennai Bench in the case of DCIT vs. M/s Mainetti (India) p. Ltd. 138/20, Florida Towers, 3rd Floor, Chennai.*

*The assessee in his submission has clearly stated that payment made to foreign agent is clearly commission paid and according to section 195(1) of the act, the payment directly made to the overseas agent at their places was not accrue or arises to the overseas agent in India is not chargeable to tax under the provisions of Income Tax Act.*

*"Section 195 of the Act has to be read alongwith the charging Section 4,5 and 9 of the Act. One should not read Section 195 of the Act to mean that the moment there is a remittance, the obligation to*

*deduct tax automatically arises. Section 195 of the Act clearly provides that unless the income is chargeable to tax in India, there is no obligation to withhold tax. In order to determine whether the income could be deemed to accrue or arise in India, section 9 of the Act is the basis.*

*The taxpayer paid commission to non-resident agents for services rendered outside India.*

*The taxpayer had not deducted tax on these payments on the ground that the overseas agents operated in their own country and no part of their income had accrued in India".*

*Keeping in view of the above facts and following the case laws cited above,*

*I am of the opinion that the assessee company is not liable to deduct tax at source. Hence, the appeal is allowed on these grounds.*

*In result the appeal of the assessee is allowed.”*

*7.1 After perusing the aforesaid finding of the Ld. CIT(A) for the assessment year 2009-10 in assessee's own case, we find that the issue involved in the assessment year i.e. 2011-12 is squarely covered by the Ld. CIT(A)'s order dated 12.6.2012 passed in assessment year 2009-10 in assessee's own case as the facts and circumstances are similar and therefore, the Ld. CIT(A) has followed the same precedence in the assessment year 2011-12 and rightly allowed the appeal of the assessee by deleting the addition in dispute. We further find that Ld. CIT(A) in the assessment year 2009-10 has respectfully followed the following decisions:-*

1) *DCIT vs. Divi's Laboratories Ltd reported in 2011 TII 182 (2011) 12 Taxmann. Com 103,*

2) *Eon Technologies (P) Ltd vs. DCIT 11 Taxmann.com 53 (Del).*

3) *Hon'ble ITAT Chennai Bench in the case of DCIT vs. M/s Mainetti (India) p. Ltd. 138/20, Florida Towers, 3rd Floor, Chennai.*

7.2 We also find that on the anvil of the following decisions, the assessee is not liable to deduct tax at source:-

i) *Decision of the Coordinate Bench of ITAT in the case of DCIT (International Taxation), Ahmedabad vs. Welspun Corporation Ltd. (2017) 77 taxmann.com 165, wherein it was observed (Heads Note only) that payments made by assessee for services rendered by non-resident agents could not be held to be fees for payment for technical services, these payments were in nature of commission earned from services rendered outside India which had no tax implications in India.*

- ii) *Decision of Hon'ble Madras High Court in the case of CIT vs. Kikani Exports Pvt. Ltd. (2014) 369 ITR 96 wherein it was held that the services rendered by the non-resident agent could at best be called as a service for completion of the export commitment and would not fall within the definition of "fees for technical services" and, therefore, section 9 was not applicable and, consequently, section 195 did not come into play. Therefore, the disallowance made by the AO towards export commission paid by the assessee to the non-resident was rightly deleted.*
- iii) *Hon'ble Allahabad High Court in the case of CIT vs. Model Exims (2014) 363 ITR 66 (All.) has observed (Heads Notes) that Business Expenditure – Disallowance – Payments to non-resident – Failure to deduct tax at source – Assessee's agents had their own offices in foreign country – Agreement for procuring orders not involving any managerial services – Explanation to Section (2) not applicable – No disallowance of commission payments can be made –*

*Income Tax Act, 1961 ss. 9(1)(vii), 40(a)(i), 195.*

- iv) Decision of Hon'ble Delhi High Court in the case of CIT vs. EON Technology P. Ltd. 343 ITR 366 (Del.) wherein it has been held that non-resident commission agents based outside India rendering services of procuring orders cannot be said to have a business connection in India and the commission payments to them cannot be said to have been either accrued or arisen in India.*
- v) Decision of Delhi ITAT in the case of Divya Creation vs. CIT (2017) 86 taxmann.com 276 wherein it has been observed that (Heads Note) where assessee-firm made payments of commission to those agents, since those agents had their offices situated abroad and, moreover, services were also rendered by them outside India, assessee was not required to deduct tax at source while making payments in question.*

*7.3 In the background of the aforesaid discussions and respectfully following the precedents, as aforesaid, we hold that assessee company is not liable to deduct tax at source,*

*hence, we uphold the order of the Ld. CIT(A) on this issue in dispute and dismiss the grounds raised by the Revenue.*

*8. In the result, the Appeal filed by the Revenue stands dismissed."*

6.1 After perusing the aforesaid finding of the Tribunal in assessee's own case for the assessment year 2011-12 as reproduced above, we are of the considered view that the issue involved in the present appeal is squarely covered by the aforesaid Tribunal's decision, hence, respectfully following the same, the addition in dispute is deleted and appeal of the assessee is allowed.

7. In the result, the Assessee's Appeal is allowed.

The decision is pronounced on 09.11.2020.

Sd/-  
**(PRASHANT MAHARISHI)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(H.S. SIDHU)**  
**JUDICIAL MEMBER**

"SRB"

**Copy forwarded to:**

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi