

आयकर अपीलीय अधिकरण " सी " न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH, CHENNAI
श्री महावीर सिंह, उपाध्यक्ष एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE-PRESIDENT
AND SHRI G.MANJUNATHA, ACCOUNTANT MEMBER

आयकरअपीलसं./I.T.A.No 3018/Chny/2018

(निर्धारणवर्ष / Assessment Year: 2009-10)

M/s. EL Forge Limited, 21E, A.R.K. Colony, Eldams Road, Alwarpet, Chennai-600 018.	Vs	The Deputy Commissioner of Income Tax, Corporate Circle-2(1), Chennai-600 034.
PAN:AAACE 1706C		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Mr. S.Sridhar, Advocate
प्रत्यर्थीकीओरसे/Respondentby	:	Ms. R. Anitha, JCIT

सुनवाईकीतारीख/Date of hearing	:	09.11.2020
घोषणाकीतारीख /Date of Pronouncement	:	09.11.2020

आदेश / ORDER

PER G.MANJUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals)-6, Chennai dated 25.09.2018 and it pertains to assessment year 2009-10.

2. The assessee has raised the following grounds of appeal:-

"1. The order of Commissioner of Incometax (Appeals) dated 25.09.2018 is contrary to law, facts and in the circumstances of the case.

2. The Commissioner of Incometax (Appeals) has erred in confirming the disallowance of foreign agents commission on the application of section 195 r.w.s 40(a)(i) of the Act in the computation of taxable total income without assigning proper reason and justification.

3. The Commissioner of Incometax (Appeals) failed to appreciate the provisions of section 195 of the Act had no application to the facts of the case and consequently ought to have appreciated that disallowance of the commission in the computation of taxable total income was wrong, erroneous, unjustified, incorrect and not sustainable in law.

4. The learned CIT(A) failed to appreciate that the decisions cited to support the stand on the non-applicability of the provisions of section 195 of the Act were completely overlooked and further ought to have appreciated that having not examined the nature of transaction while unnecessarily harping upon production of documentation, the findings in para 4.3.4 of the impugned order consequently were not correct and improper.

5. The Commissioner of Income tax (Appeals) failed to appreciate that there was no proper opportunity given before passing of the impugned order and any order passed in violation of the principles of natural justice would be nullity in law.”

3. Brief facts of the case are that the assessee company is engaged in the business of manufacturing of rough steel forgings has filed its return of income for the assessment year 2009-10 on 29.09.2009 declaring loss of ₹ 22,85,77,935/-. The case was selected for scrutiny and assessment has been completed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) on 16.12.2011 and determined total loss at ₹ 22,38,83,013/- by making additions towards disallowance of overseas commission u/s.40(a)(i) of the Act, for non-deduction of tax at source u/s.195 of the Act. The assessee carried the matter in

appeal before the first appellate authority, but could not succeed. The learned CIT(A), for the detailed reasons recorded in his appellate order dated 25.09.2018, confirmed the additions made by the Assessing Officer towards disallowance of overseas commission u/s.40(a)(i) of the Act, for non-deduction of TDS u/s.195 of the Act, on the ground that the assessee has not furnished any details with regard to the nature of services rendered by the non-resident payee to whom commission was paid. Further, no copy of agreement was furnished to show that the assessee has entered into any agreement specifying the nature of services to be rendered by non-resident agent. In the absence of aforesaid basic data and details, the assessee's claim that commission paid was not chargeable to tax in India is not established. Therefore, the Assessing Officer was right in disallowing the overseas commission u/s.40(a)(i) of the Act, for non-deduction of TDS u/s.195 of the Act. Aggrieved by the learned CIT(A) order, the assessee in appeal before us.

4. The learned AR for the assessee submitted that learned CIT(A) has erred in confirming the disallowance of overseas commission paid to foreign agents u/s.40(a)(i) of the Act, for non-deduction of TDS u/s.195 of the Act, without appreciating the fact that

commission payment to non-resident agents having no permanent establishment in India are not liable to tax in India on their income and consequently, the question of deduction of TDS u/s.195 of the Act does not arise. The learned CIT(A) without appreciating these facts has confirmed the additions made by the Assessing Officer by holding that no details have been filed, but the fact remains that the assessee has submitted necessary details to prove that commission has been paid for rendering services in connection with export sales and the percentage of commission and the consequential amounts are specified in the export invoice itself.

5. The learned DR, on the other hand, submitted that the Assessing Officer as well as learned CIT(A) have brought out clear facts to the effect that the assessee has failed to furnish even basic details to prove that rendering of services by non-resident payee to establish the fact that the nature of payments made to non-resident agents are outside the scope of taxation in Indian tax laws. Therefore, the Assessing Officer as well as learned CIT(A) have rightly disallowed the overseas commission paid to non-resident agents u/s.40(a)(i) of the Act, for non-deduction of TDS u/s.195 of the Act. Although, the assessee has relied upon various decisions

including the decision of the Hon'ble Supreme Court in the case of G.E. India Technology Centre Pvt. Ltd. Vs.CIT (2010) 327 ITR 356 (SC), but those case laws are rendered under peculiar facts of the said case and cannot be universally applied to each and every case to decide whether the payment made to non-resident payee are liable for TDS u/s.195 of the Act.

6. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. It is a well settled principles of law that any payment made to non-resident which is not in the nature of royalty or fees for technical services as defined u/s.9(1)(vii) of the Act are not liable to tax in India, in case, the non-resident do not have permanent establishment in India or no business connection in India. This principle is well settled and laid down by the Hon'ble Supreme Court in the case of G.E. India Technology Centre Pvt. Ltd. Vs.CIT (supra), where the Hon'ble Court after considering the relevant provisions of section 195 of the Act clearly held that payments made to the foreign software suppliers was not in the nature of royalty and the same did not give rise to any income taxable in India and therefore, the assessee was not liable to deduct any tax at source.

The Jurisdictional High Court of Madras in the case of M/s. Faizan Shoes Pvt.Ltd (2014) 367 ITR 155 has considered an identical issue and held that export commission paid to non-resident agents for rendering services outside India is not liable to tax in India, if such non-resident agents do not have any permanent establishment or business connection in India and consequently withholding tax as per section 195 of the Act have no application and hence, no expenditure should be disallowed u/s.40(a)(i) of the Act. In this case, although the lower authorities disallowed the overseas commission paid to non-resident agents for rendering services outside India on the ground that no basic details have been filed to prove rendering of services by non-resident agents, but the fact remains that the assessee has filed necessary details including percentage of commission and consequential amounts paid to them by filing export invoices, where the rate of commission and amount has been specified. The assessee has also filed necessary details to prove that services rendered by non-resident agents are not liable to tax in India because they do not have any permanent establishment or business connection in India. Therefore, we are of the considered view when overseas commission payment made to

non-resident agents for rendering services outside India is not liable to tax India under the provisions of Section 9(1)(vii) of the Act, then the question of deduction of TDS on the said payment u/s.195 of the Act does not arise and hence, the commission payment to the said non-resident agents cannot be disallowed u/s.40(a)(i) of the Act for failure to deduct TDS. The Assessing Officer as well as the learned CIT(A), without appreciating the facts simply disallowed the overseas commission payments made to non-resident agents u/s.40(a)(i) of the Act. Hence, we direct the Assessing Officer to delete the addition made towards disallowance of overseas commission paid to non-resident agents u/s.40(a)(i) of the Act.

7. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 9th November, 2020

Sd/-
(महावीरसिंह)
(Mahavir Singh)
उपाध्यक्ष/ Vice-President

Sd/-
(जी.मंजुनाथ)
(G. Manjunatha)
लेखा सदस्य / Accountant Member

चेन्नई/Chennai,
दिनांक/Dated 9th November, 2020
DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Appellant
2. Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.