

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD**

(Convened through Virtual Court)

**BEFORE HON'BLE MR. JUSTICE P. P. BHATT, PRESIDENT
& SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 756/Ahd/2019

(निर्धारण वर्ष / Assessment Year : 2015-16)

Dy. Commissioner of Income-tax Circle-1(1)(2), Vadodara	बनाम/ Vs.	Inox India Private Limited 9 th Floor, K. P. Platina, Race Course, Baroda- 390007
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACI4416P		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Shri S. S. Shukla, Sr.D.R.
प्रत्यर्थी की ओर से / Respondent by :	Shri Bhavin Marfatia & Shri Nirmitt Mehta, A.Rs.

सुनवाई की तारीख / Date of Hearing	29/12/2020
घोषणा की तारीख /Date of Pronouncement	11/01/2021

आदेश/ORDER

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the Revenue against the order of the Commissioner of Income Tax (Appeals)-1, Vadodara ('CIT(A)' in short), dated 11.02.2019 arising in the assessment order dated 22.12.2017 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2015-16.

2. The grounds of appeal raised by Revenue read hereunder:

“1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in law and fact in deleting the addition made on account of non deduction of TDS on the amount of Rs.78,90,570/- without appreciating the findings of Assessing Officer in the assessment order and in view of circular No.7 of 2009 of the Board.”

3. The AO in the instant case disallowed claim towards commission expenses on export sales to the extent of Rs.78,90,570/- (being 30% of total commission claimed amounting to Rs.2,63,01,900/-) in the course of the assessment carried out under s.143(3) of the Act on the ground that the assessee has defaulted in deduction of tax at source under s.195(1) of the Act. As a consequence of alleged default, provisions of Section 40(a)(i) of the Act was invoked and expenses incurred were disallowed to the extent of 30% of such expenses. While doing so, the AO also observed that the expenses incurred are in the nature of ‘fee for technical services’ and thus falls within the sweep of Section 9(1)(vii) r.w. Explanation (2) thereto as against the claim of the assessee that commission payments are business expenses without involvement of any managerial, technical or consultancy services.

4. Aggrieved by the disallowance, the assessee preferred appeal before the CIT(A).

5. The CIT(A) took note of the decision of the Tribunal in assessee’s own case concerning AY 2010-11 in ITA No.1391/Ahd/2015 order dated 25.09.2017 and reversed the action of the AO. The relevant operative para of the order of CIT(A) is reproduced hereunder:

“5. I have carefully considered the facts on record, observations of the AO and the written submission of the appellant.

5.1 Ground No. 1 and 2 relate to disallowance u/s 40(a)(i) of the Act amounting to Rs. 78,90,570/- on the ground of non-deduction of tax u/s 195 against commission payment made to Non-Resident outside India. At the outset, the Ld. AR informed that the same issue arose in AY 2010-11 wherein an order u/s 263 was passed by the Hon'ble Pr. CIT disallowing entire foreign commission payment made without complying the provisions of Section 40(a)(ia). The Tribunal in ITA No. 1391/AHD/2015 did not concur the view of the ld. CIT and quashed the order passed u/s 263 of the Act. Key findings are as under:

- i) Commission payments made to Non-Resident agents did not have any taxability in India, even under the-provision of domestic law i.e. Section 9.*
- ii) Once concluded that income embedded in these payments did not have tax implication in India, no fault can be found in not deducting tax at source from these payments or for the purpose, even not approaching the AO for order u/s 195.*

5.2. The order of the jurisdictional tribunal is binding on me and facts are similar in assessment year under consideration. The Ld. AR also informed that a copy of order is held with the AO. Hence, addition of Rs.78,90,570/- made by the AO is unsustainable and accordingly deleted. The appellant succeeds on both the grounds.”

6. Aggrieved by the action of the CIT(A) in restoring the claim of the assessee, the Revenue preferred the appeal before the Tribunal.

7. When the matter was called for hearing, the learned Representative from the Department relied upon the order of the AO and submitted that the decision rendered by the Tribunal in AY 2010-11 is distinguishable on facts. It was submitted that the relief was granted to the assessee by the Tribunal having regard to the nature of expenditure being commission payments whereas in AY 2015-16 in reference, the expenditure was found to be in the nature of 'fee for technical services' by the AO and therefore the impugned commission payment is governed by provisions of Section 9(1)(vii) of the Domestic Act. Consequently, the receipt in the hands of non-

resident agents are taxable at 'source' based taxation under s.9 of the Act regardless of residential status of the non-resident. The learned DR accordingly submitted that the CIT(A) has misconstrued and misapplied the decision rendered by the Tribunal in past.

8. The learned counsel for the assessee, on the other hand, defended the order of the CIT(A) and submitted that these agents are responsible for liaison between company and its customers in specific regions and services rendered are in the nature of pure agency services only. Hence, the payments made to non-resident agents are in the nature of commission payment only and therefore provisions of Section 9(1)(vii) of the Act will not come into play at all. It was submitted that the majority of non-resident agents are the same as existing in AY 2010-11 and the model of business has not changed much in this regard. A tabulated party-wise comparative statement towards commission payments for AY 2010-11 and 2015-16 were placed on record after the closure of hearing as directed by the Tribunal to support its claim that the payments were continued to be made towards commission expenses. It was further pointed out that the agents engaged for securing orders overseas do not have business connection or any permanent establishment in India. It was thus submitted that no interference with the appellate order of CIT(A) is called for.

9. We have carefully considered the rival submissions and the assessment order as well as the first appellate order. The materials referred and relied upon were carefully considered. The solitary issue involved in the instant case is, whether in the facts of the case, the remittance made by the assessee abroad towards commission expenses is chargeable to tax in India or not and consequently, whether the commission payment is susceptible to

provisions of s.195 of the Act or not. An incidental issue that arises for consideration is whether the services rendered by the non-residents are in the nature of 'fee for technical services' as widely defined in Explanation (2) to s.9(1)(vii) of the Act. It is the case of the assessee that the remittance have been made towards commission payments almost to the same parties as in the earlier years for which favourable view has been taken by the Tribunal on facts. It is the case of the assessee that the commission agents have rendered the services abroad and the *situs* of accrual or receipt of their commission income is outside India. It is further claimed that services rendered by agents have been utilized by the assessee outside India in procuring the export orders.

10. We straightway find that the issue is squarely covered in favour of the assessee by the decision of co-ordinate bench for AY 2010-11 as rightly acknowledged by the CIT(A). The commission payments are seen to be made to the similar set of parties as in AY 2010-11. The allegation on behalf of the Revenue that expenses incurred are covered in the wider definition of 'fees for technical services' as defined in Explanation (2) to Section 9(1)(vii) of the Act is devoid of any rationale. Except for bald allegation of the services being akin to managerial or consultancy services, the AO has not brought any material on record to discard the stand of assessee. The co-ordinate Bench of Tribunal has duly analyzed this aspect in length in *ITA No.1391/Ahd/2015* for AY 2010-11 in the case of assessee itself and has delivered a speaking order in favour of the assessee on all aspects of subject matter on facts. The services in respect of commission expenses are stated to be rendered outside India as well as utilized outside India and therefore the income arising by way of commission against rendition of agency services cannot be deemed to accrue or arise in India in the hands of

the recipients of such commission payments. In the circumstances, where the income arising to non-resident commission agents is not found to be chargeable in India under S.4 r.w.s. 5(2) of the Act, the obligation under S.195 of the Act for deduction of tax at source cannot be fastened upon the remitter assessee. In the absence of statutory obligation arising under Section 195 of the Act for deduction of tax in the absence of chargeability of remittances, the corresponding disallowance under s.40(a)(i) is without any merit and thus uncalled for. We thus see no error in the action of the CIT(A) who has rightly applied the decision of the Tribunal in the facts of the case. We thus decline to interfere.

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

This Order pronounced on 11/01/2021

Sd/-
(JUSTICE P. P. BHATT)
PRESIDENT

Ahmedabad: Dated 11/01/2021

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।