IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C': NEW DELHI
(Through Video Conferencing)

BEFORE,
SHRI R.K.PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

I.T.A No.3894/Del/2017
(ASSESSMENT YEAR 2011-12)

I.T.A No.3895/Del/2017
(ASSESSMENT YEAR 2013-14)

ACIT, Circle-10(2), New Delhi.	Vs.	M/s Groz Engineering Tools Pvt. Ltd., C-717, New Friends Colony, New Delhi-110 065. PAN-AABCG 4017H
(Appellant)		**(Respondent)**

Appellant By	**Ms. Anima, Sr. DR**
Respondent by	**Sh. Ved Jain, CA &** **Sh. Ashish Goel, CA**
Date of Hearing	**17.06.2021**
Date of Pronouncement	**13.09.2021**

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

ITA No.3894/Del/2017 is the appeal of the Department preferred against order dated 10.02.2017 passed by the Ld.

Commissioner of Income Tax (Appeals)-39, New Delhi {CIT(A)} for Assessment Year 2011-12 whereas ITA No.3895/Del/2017 is the Department's appeal against order dated 10.02.2017 passed by the Ld. Commissioner of Income Tax (Appeals)-39, New Delhi {CIT(A)} for Assessment Year 2013-14. Since, both the appeals involved identical issues, the same were heard together and are being disposed by this common order for the sake of convenience.

2.0 The brief facts of the case are that the assessee company is engaged in the business of manufacturing and sale of engineering tools. The return on income was filed for Assessment Year 2011-12 declaring income at Rs.3,28,57,870/-. The assessment was completed at an income of Rs.5,26,65,065/- after making a disallowance of Rs.40,58,425/- out of payment of royalty, disallowance of Rs.1,56,68,770/- out of commission payments and Rs.80,000/- out of pollution expenses.

2.1 In Assessment Year 2013-14, the return of income was filed declaring an income of Rs.67,97,84,740/- and assessment was completed at an income of Rs.71,03,94,530/- after making

disallowance out of royalty payment amounting to Rs.34,54,190/-, disallowance u/s 40a(ia) of the Income Tax Act, 1961 (hereinafter called 'the Act') on account of non-deduction of TDS from commission payment amounting to Rs.2,71,47,499/-, addition on account of difference between income returned and income as per Form 26AS amounting to Rs.6,882/- and disallowance of expenses relating to previous years amounting to Rs.1,220/-.

2.2 The assessee's appeals before the Ld. CIT(A) were allowed in both assessment years.

2.3 Aggrieved, the Department now is in appeal before the Tribunal and has raised the following grounds of appeal:

ITA No.3894/Del/2017 for Assessment Year 2011-12:-

"1. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) erred in deleting the addition of Rs.40,58,425/- made on account of disallowance on account of payment of Royalty' vide order u/s 143(3) of the I.T. Act 1961 passed by the DCIT, Circle 12(1), ignoring the fact that the assessee company has failed to prove any legal backing to the agreement and there is nothing mentioned in the agreement regarding the justification for these payments.

2. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) erred in deleting the addition of

Rs.1,56,68,770/- made on account of 'non-deduction of TDS on commission payment made to foreign companies u/s 40(a)(ia)' vide order u/s 143(3) of the I.T. Act 1961 passed by the DCIT, Circle 12(1), ignoring the fact that though the payment has been made for work done outside India but the profit is actually earned in India.

3. The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing."

ITA No.3895/Del/2017 for Assessment Year 2013-14 :-

"1. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) erred in deleting the addition of Rs.34,54,190/- made on account of "disallowance on account of payment of Royalty' vide order u/s 143(3) of the I.T. Act 1961 passed by the DCIT, Circle 12(1), ignoring the fact that the assessee company has failed to prove any legal backing to the agreement and there is nothing mentioned in the agreement regarding the justification for these payments.

2. Whether on the facts and circumstances of the case & in law, the Ld. CIT(A) erred in deleting the addition of Rs. 2,71,47,499/- made on account of 'non-deduction of TDS on commission payment made to foreign companies u/s 40(a)(ia)' vide order u/s 143(3) of the I.T. Act 1961 passed by the DCIT, Circle 12(1) ignoring the fact that though the payment has been made for work done outside India but the profit is actually earned in India.

3. The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing."

3.0 At the outset, the Ld. Authorized Representative (AR) submitted that both the issues being agitated by the Department are covered in favour of the assessee. It was submitted that the issue of disallowance of royalty payments treating the same as capital expenditure is covered by the orders of this Tribunal in assessee's own case for Assessment Year 2005-06, 2006-07 and 2007-08, Assessment Year 2008-09, Assessment Year 2010-11 and 2012-13 wherein similar issue has been decided in favour of the assessee and the Tribunal had deleted the addition. It was submitted that the order passed by the Tribunal in Assessment Year 2008-09 was affirmed by the Hon'ble Delhi High Court vide order dated 04.09.2015 and the appeal filed by the Revenue was dismissed. It was submitted that the Ld. CIT(A) has deleted the disallowance made by the Assessing Officer by relying upon the judgment of the ITAT Delhi Bench in assessee's own case in ITA Nos.637, 638/Del/2013, and ITA No.4373/Del/2013 dated 14.10.2013 for Assessment Years 2005-06, 2006-07 and 2007-08 and further in ITA No.4776/Del/2013 dated 14.11.2014 for Assessment Year 2008-09. The Ld. AR drew our attention to the

order of the Hon'ble Delhi High Court passed for Assessment Year 2008-09 upholding the order of the Tribunal and submitted that, thus, for all these years the issue stands decided in favour of the assessee and, therefore, the Ld. CIT(A) had rightly deleted the addition.

3.1 Coming to the second issue of non-deduction of TDS on commission payments made to foreign companies, the Ld. AR again submitted that the issue was squarely covered by the order of the Tribunal in assessee's own case for Assessment Year 2012-13 vide order dated 17.02.2021 in ITA No.5488/Del/2017. The Ld. AR, apart from this, also placed reliance on the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Maruti Suzuki India Ltd. [2017] 12 TMI 474-Delhi High Court and the CIT Delhi-IV, New Delhi vs. EON Technology Pvt. Ltd. reported in [2012] 343 ITR 363 apart from numerous other judicial precedents in this regard by the Tribunal.

4.0 The Ld. SR. DR placed her reliance on the assessment order in this regard. However, she fairly accepted that the issues

are covered in favour of the assessee by the order of Tribunal as well as the decision of the Hon'ble Delhi High Court.

5.0 We have heard the rival submissions and have also perused the material on record. We agree with the contention of the Ld. AR that both the issues agitated by the Department are covered against the Department and in favour of the assessee by the order of the Tribunal.

5.1 As far as the issue of disallowance on account of royalty payment by treating the same as capital expenditure is concerned, it is seen that on identical issue, the Hon'ble Delhi High Court had upheld the order of the ITAT for Assessment Year 2008-09 by observing as under:

> *"6. In the impugned order, the ITAT has observed, on perusal of the very same agreement, that the royalty is essentially being paid for use of the trademark 'Macnaught' on the products of the Assessee and for using the drawings etc. The expenditure was incurred wholly and exclusively for the purposes of the business of the Assessee. From the payments made to MPL, the Assessee had deducted tax at source and deposited it with the Government. The genuineness of the payment was also not in doubt. In the circumstances, the ITAT was of the view that the CIT(A) was not justified in enhancing*

the addition made by the AO by capitalising the royalty. The appeals of the Assessee were, accordingly, allowed.

7. It is urged before us by Mr. Raghvendra Singh, the learned Junior Standing counsel for the Revenue, that the royalty agreement between the
Assessee and MPL was vague. There was nothing to indicate that the use of the trademark was permitted only for a limited period after which it would revert to MPL. It was also not clear whether there was anything to indicate that the benefit thereunder could not continue indefinitely. He urged that document was drawn up in a very casual manner without completely spelling out the rights and obligations of the parties. According to him, the royalty agreement was a sham document without any legal sanctity.

8. There was sufficient opportunity for the AO, if he doubted the genuineness of the payment of royalty by the Assessee to MPL, to have conducted a detailed inquiry. The Assessee on its part furnished the agreement between itself and MPL under which it was inter alia permitted to use the trademark 'Macnaught' on its products. The royalty was payable per unit of the product and, therefore, was clearly linked to sales. There was also no doubt that such payment was in fact made by the Assessee to MPL. It is also not in doubt that MPL was not related to the Assessee in any manner. In the circumstances, there should have been some reasonable basis for the CIT(A) to simply conclude that this was a sham transaction and proceed to enhance the disallowance. The interpretation of the agreement by the ITAT appears to be plausible. The Court is not persuaded to hold that the impugned order of the ITAT is perverse.

9. No substantial question of law arises. The appeals are dismissed."

5.2 Accordingly, on identical facts, for both the years under consideration, we uphold the orders passed by the Ld. CIT(A) and dismiss the grounds raised by the Department.

5.3 On the issue of non-deduction of TDS on commission payment, in the present case, it is undisputed fact that:-

(i) The Assessee has made the payment of foreign commission to the non-resident agents.

(ii) Payments are made in foreign currency.

(iii) There is no Permanent Establishment or business connection of these nonresidents in India.

(iv) There is no iota of evidence with the AO that these non-resident have any sort of income which is chargeable to tax in India.

(v) The AO has intended to cover the taxability of the export commission invoking the provisions of section 9(1)(i) and Section 9(1)(vii)(b) of the Income Tax Act.

5.4 As regards the taxability under section 9(1)(i) of the Income Tax Act, it is to be noted that these non-residents have rendered the services outside India and have been paid in foreign currency. Therefore, no income accrues or arises in India. These non-residents do not have any PE or business connection in India which is not doubted by the AO. Further, the Assessing Officer has not made any efforts to establish any "business connection" for invoking section 9(1)(i) of the Act. Thus, in the absence of same, the AO is wrong in invoking the provisions of section 9(1)(i) and accordingly export commission paid by the assesse is not chargeable to tax in India.

5.5 Regarding taxability under section 9(1)(vii)(b) read with Explanation-2 the AO in Pg. 7 Para 4.7 has alleged that the payments made by the assessee are in the nature of 'Fees for Technical services' for consultancy, Technical and Managerial Services provided by these agents and hence chargeable to tax in India in terms of section 9(1)(vii)(b) read with Explanation 2 of the Income Tax Act. In this regard it is pertinent to note that these non-

resident agents have provided services of securing the orders in overseas market for the assessee company and are entitled to commission on the business procured by them as is evident from agreements placed in the Paper Book. Further, no managerial, technical & consultancy services undisputedly have been rendered by these non-residents agents to the assessee and accordingly, the AO cannot invoke Section 9(1)(vii)(b) of the Act there is no iota of evidence with the AO that these non-residents have rendered any technical services. Therefore, in view of the above, the commission payment made to them does not fall into the category of "fees of technical services" and therefore, explanation (2) to Section 9(1)(vii) of the Act, as invoked by the Assessing Officer, has no application to the facts of the assessee's case.

5.6 On the issue of 'non-deduction' of TDS on commission payments made to foreign company, we also note that ITAT, Delhi Bench, in assessee's own case for Assessment Year 2012-13 in ITA No.5488/Del/2017 vide order dated 17.02.2021 has decided in favour of the assessee by holding as under:

"5. Apropos ground No. 2 dealing with non-deduction of TDS on commission paid to foreign companies has also been dealt by the Co-ordinate Bench of the Tribunal for the A.Y. 2011-11 as well as for A.Y. 2013-14 wherein it was held that the commission has been paid to foreign agents deciding outside India and they have not rendered any technical services and hence do not come under the provisions of Section 9(1)(vii)(b) of the Income Tax Act, 1961. In the absence of any change in the position of the facts and proposition of the law, we hold that the disallowance made by the AO u/s 40(a)(ia) is not legally tenable. We affirm the order of the ld. CIT (A) on this ground."

5.7 The issue is also squarely covered by the judgment of Hon'ble Delhi High Court in the case of Commissioner of Income Tax, Delhi vs. Maruti Suzuki India Ltd. 2017 912) TMI 474-Delhi High Court and The Commissioner of Income Tax, Delhi-IV, New Delhi vs. Eon Technology P. Ltd. [2012] 343 ITR 366 wherein it has been held that no TDS is required to be deducted on the commission paid to overseas agent.

5.8 The observations of the Hon'ble Delhi High Court in the case of Commissioner of Income Tax, Delhi Vs. Maruti Suzuki India Ltd.- 2017 (12) TMI 474 - Delhi High Court are as under:

"11. The contention of the Revenue, invoking Section 195 (1) of the Act, proceeds on the premise that the amount paid to the

agents abroad were in fact "chargeable" to tax in India. Factually it would have to be shown that the said sum was received in India. Here there is also no factual determination that the non-resident agent who operates outside India has any income which arises in India. Without these foundational facts, the question of applying Section 195 (1) of the Act does not arise.

12. In CIT v. Model Exims Kanpur (supra), it was *held that there* was *no obligation to deduct TDS under Section 195 of the Act from the commission paid to a non-resident recipient who was not liable to tax in India. In CIT v. Gujarat Reclaim & Rubber Products Ltd. (supra), the commission earned by a non-resident agent who* was *in the business of selling Indian goods abroad,* was *held not to be income that had accrued and/or arisen in India. Therefore, Section 40 (a) (i) of the Act could not be invoked to disallow such payment as deduction on the ground that no TDS under Section 195 (1) was deducted from such payment. Further the CBDT Circular No. 23 dated 23rd July 1969 stated that "A foreign agent of an Indian exporter operates in his own country and no part of his income arises in India." It acknowledges that such commission is remitted to the agent abroad and "not received by him or on his behalf in India. Such agent is not liable to income-tax in India on the commission. " This* was *reiterated by the subsequent Circular*

No 786 dated 7th February 2000. Both the circulars are binding on the Revenue.

13. The contention of the Revenue that the above Circulars cannot override the Act, was *negatived by this Court in CIT v. EON Technology (P.) Ltd. (supra), by holding that when a non-resident operates outside the country, no part of his income arises in India. Further it* was *held that merely because an entry is made in the books of accounts does not mean that the nonresident received any payment in India. Since no part of the income could be deemed to have accrued to the non-resident in India, there* was *no obligation to deduct TDS from the payment made to such non-resident. Consequently, the question of disallowing the payment under Section 40 (a) (i) of the Act for failure to deduct TDS did not arise."*

5.9 Similarly in the case of Commissioner of Income Tax-1, Vs. Angelique International Ltd. 2013 (10) TMI 17 Delhi High Court – [2012] 359 ITR 9, it was held as under:

"10. So long as the circulars were in force, it aided in uniform and proper administration and application of the provisions of the Act. Read in this manner, we do not think the respondent-assessee was *in default and had failed to deduct at source, though it was mandated and required. The respondent* was *entitled to rely upon the circulars. In light of the judgments of the Supreme Court in CIT versus Eli Lilly Company (India)*

> *Private Limited, (2009) 312 ITR 225 (SC) and G.E India Technologies Centre Private Limited versus CIT, (2010) 327 ITR 456 (SC), once the income* was *not exigible or chargeable to tax, TDS* was *not required to be deducted. Money paid to the third parties, who did not have any office or permanent establishment in India,* was *exempt and not chargeable to tax. Thus on the said payments or income, TDS* was *not required to be deducted. We also note that the payments in question were made prior to circular No. 7/2009. On this aspect, there is no dispute. We, therefore, do not find any reason to interfere with the order passed by the tribunal deleting the addition made by the Assessing Officer under Section 40(a) (i) of the Act. The appeal, being devoid of merit, is dismissed. "*

5.10 Therefore, respectfully following the ratio laid by the Hon'ble Delhi High Court as aforesaid, we uphold the action of the Ld. CIT(A) in deleting the impugned disallowance for non deduction of tax on commission payment made to foreign company in both the years.

6.0 In the final result, both appeals of the Department stand dismissed.

Order was announced on 13th September, 2021

Sd/-	Sd/-
(R.K.PANDA)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated:13/09/2021
PK/Ps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI