IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "C" BENCH: NEW DELHI

(THROUGH VIDEO CONFERENCING)

BEFORE SHRI G.S.PANNU, PRESIDENT &
SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No.1551/Del/2018
[Assessment Year : 2014-15]

ACIT, Circle-47(1), New Delhi.	vs	J.Kishore Exports, 558, Katra Ishwar Bhawan, Khari Baoli, New Delhi-110006. PAN-AAGFJ9713M
APPELLANT		**RESPONDENT**
Appellant by	Sh. Ashwani Kalia, CA	
Respondent by	Sh. Umesh Takyar, Sr.DR	
Date of Hearing	01.11.2021	
Date of Pronouncement	23.11.2021	

ORDER

PER KUL BHARAT, JM :

The present appeal filed by the Revenue for the assessment year 2014-15 is directed against the order of Ld. CIT(A)-16, New Delhi dated 23.11.2017. The Revenue has raised following grounds of appeal:-

1. *"On the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the disallowance of Rs.3,80,52,350/- made by the Assessing Officer.*

2. *Whether the commission payments made without TDS being deducted can be allowed to the agents who have business connection in India and are subject to tax deduction at source u/s 195 of the Act. ?*

3. *Whether the commission payment of Rs.3,80,52,350/- can be allowed even when the assessee failed to take recourse u/s 195(2) of the Act by making application to the AO ?*

4. *Whether the Ld. CIT(A) erred in not considering the ruling of the Authority for Advance Ruling in the case of SKF Boilers and Driers P. Ltd. - where a proposition of law was laid down that the right of non-resident agent to receive commission arise in India - may not be binding precedent but carry a lot of persuasive value?*

5. *Whether the Ld. CIT(A) was correct in restricting the disallowance @ 10% as against made by the AO @ 20% of car and telephone expenses as assessee had failed to submit any supporting documents?*

6. *The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal."*

2. Facts giving rise to the present appeal are that the assessee company filed its return of income through electronic mode, declaring total income of Rs.2,03,59,990/-. The case was taken up for scrutiny under CASS and the assessment u/s 143(3) of the Income Tax Act, 1961 ("the Act") was framed vide order dated 21.12.2016. The Assessing Officer during the course of assessment proceedings noticed that as per P&L A/c, it was found that the assessee had debited foreign commission of Rs.3,80,52,350/- which was paid by the assessee to M/s. Midland General Trading (LLC), a resident of Dubai. It was further noticed that the assessee did not deduct tax at source while making the afore-mentioned payment in respect of the foreign commission. Therefore, he issued a show cause notice seeking explanation in respect of this payment from the assessee. In response thereto, the assessee had filed a written explanation but was not found acceptable to the Assessing Officer. Therefore, he made addition of Rs.3,80,52,350/- on account of non-deduction of tax. The Assessing Officer further made addition of Rs.3,36,950/- on

account of disallowance of expenditure related to car, car depreciation, mobile expenditure and telephone expenditure to the extent of 20%.

3. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A) who after considering the submissions, partly allowed the appeal. Thereby, Ld.CIT(A) deleted the addition made on account of non-deduction of tax and restricted the addition to the extent of 10% of the expenditure.

4. Aggrieved against this, the Revenue is in appeal before this Tribunal.

5. Ground Nos. 1 to 4 are against the deletion of addition of Rs.3,80,52,350/- made by the Assessing Officer on account of non-deduction of tax on foreign commission payments.

6. Ld. Sr. DR supported the orders of assessment order and submitted that Ld.CIT(A)was not justified in deleting the addition. He further submitted that the assessee ought to have been deducted the tax, at source as provided under the law. Non-deduction of tax at source attracted the disallowance.

7. Per contra, Ld. Counsel for the assessee submitted that the issue is squarely covered in favour of the assessee. He relied upon the decision of Ld.CIT(A). Ld. Counsel for the assessee has relied upon the various judicial precedents. Ld. Counsel for the assessee placed reliance on the latest decision of Co-ordinate Bench of the Tribunal in the case of *Divya Creation vs ACIT in ITA No.5603/Del/2014 dated 14.09.2017* wherein the Co-ordinate Bench of the Tribunal decided the issue in favour of the assessee.

8. We have heard the rival contentions and perused the material available on record and gone through the orders of the authorities below. Ld.CIT(A) has decided this issue by observing as under:-

6. "The assessment order passed by the Ld.AO u/s 143(3) and the submissions made by the appellant before the undersigned and the AO, were carefully considered. I have also considered the various decisions cited before me. I find the Assessing Officer made addition of Rs.3,80,52,350/- u/s 40(a)(i) on the ground that assessee has not deducted tax from the foreign agency commission paid as per the provisions of section 195 of the I T. Act. While doing so, the Assessing Officer relied on the decision of the AAR in the case of SKF Boilers and Driers (P.) Ltd. (supra). I find that the Assessing Officer held that income arising to the agent on account of export commission very much falls within the ambit of provisions contained in section 5(2)(b) of the I T. Act as the income has accrued in India when the right to receive the same came into existence. According to him although the non- resident agent has rendered services and procured orders abroad but the right to receive the commission certainly arise in India when the order gets executed by the assessee. According to him, the mere fact that the agent is to render services abroad and the commission is to be remitted to him abroad are wholly irrelevant for the purpose of determining the income since income is from a source in India.

6.1 The short point for consideration in the case at hand is whether the appellant was responsible to deduct tax at source u/s 40(a)(i) on the amount of commission paid to its agent stationed in Dubai, UAE.

6.2 Before giving a finding it is necessary to deal with the issue by reference to certain principles laid down by the Hon'ble Courts in various cases. First of all, it was imperative for the AO to establish that the income earned by the foreign national i.e. commission agent was taxable in India by virtue of section 5 of the Act by dealing with the following fact situations:-

(i) If any operations of business are carried out in the taxable territories i.e. if the foreign agent operated in India and his income arose in India. If not, it follows that the income accruing or arising abroad or through or from any business in India cannot be deemed to accrue or arise in India.

(ii) If the agent, in the instant case, Midland General Trading (LLC), NRI settled in Dubai, UAE was deriving income from business carried out wholly or partly from India or from any profession set up in India.

(iii) If the income of commission accrued or arose from some source of income of the commission agent in India. (The word source does not mean as any legal concept but refers to that which a practical man would regard as a real source of income).

(iv) If the business carried on by the agent in Dubai, UAE, which yielded profits or gains in the form of commission, incurred a relationship between the business carried on by the agent (foreign national) and some activity in the taxable territories (in the instant case "India") which contributed directly or indirectly to the earning of those profits and gains i.e. if there was a relationship between the commission income and his activities in the taxable territories i.e. India, which facilitated or assisted the carrying on of that business abroad.

(v) If the income from "commission" received abroad accrued or arose in India which was attributable to the business carried out by it in India through its branches, office, project site, sales outlet, (etc) and fell within the scope and ambit of section 5(2) and 9 of the Act.

(vi) If the agent exercised control over the affairs of the appellant.

6.3 In the instant case the answers to all the questions of facts formulated as above are in the negative which negate the conclusion drawn by the AO on the basis of section 5 of the Act.

6.4 Secondly the AO was totally unjustified in ignoring the following facts and position in law revolving on sections 9 & 195 of the Act:-

i) Midland General Trading (LLC), is a non-resident.

ii) The Agent was paid commission by the appellant on export orders procured by it in Dubai. The commission was paid to it for services provided to the appellant firm from outside India.

iii) Midland General Trading (LLC), operated its activities from outside India in its own country.

iv) No part of his activities arose in India.

v) Midland General Trading (LLC), operated on principal to principal basis with the appellant.

vi) Midland General Trading (LLC), had no permanent establishment or place of business in India.

vii) Its services had no connection with the property in India.

viii) The commission was remitted directly to Midland General Trading (LLC), outside India as per RBI's guidelines and not received by anyone on behalf of it in India.

ix) The Explanation to Section 9(2) inserted by Finance Act, 2010 with retrospective effect from 01.06.1976, by virtue of which the income of the non-resident from the business connections was made taxable irrespective of the fact whether or not the non-resident had residence or place of business or business connection in India or had rendered services in India, also did not affect the allowability of the claim of the appellant. The deeming fiction applies only to such income as has been specifically covered by sub-clauses (v), (vi) and (vii) of sub section (1) of section 9. Since the payment of commission to non-resident is not covered by any of the sub clauses, insertion of the retrospective Explanation in Section 9(2) did not affect the claim of the appellant. It may also be noted that the withdrawal of Circular 23/1969 also did not affect the claim of the assessee.

x) The Hon'ble Delhi High Court in the case of CIT Vs EON Technologies Pvt Ltd (2011) 203 Taxman 266 held that commission paid by Indian exporters to non residents cannot be disallowed u/s 40(a)(i) of the Act.

xi) As per the AO, after issue of the CBDT Circular NO.7 dated 22.10.2009, by which Circular No. 23 dated 23.07.1969 and Circular No. 786 dated 07.02.2002 have been withdrawn, the income of the non resident agent has become taxable in India.

It may be noted in this context that the Hon'ble Hyderabad Bench of ITAT in the case of DCIT Vs Divi's Laboratories Ltd (2011) 131 ITD 271 and ACIT Vs Avon Organics Ltd (2013) 55 SOT 260 have also held that even after withdrawal of Circular 23 and 786, the commission paid to foreign agents for services rendered outside India was not taxable in India.

The withdrawal of Board circulars cannot change the statutory provisions as provided for in the Act. The ITAT followed the case of CIT v. Toshoku Ltd. [1980] 125 ITR 525 (SC) wherein a non resident acting as an Agent outside India did not carry on any business operation in India. In the said case, the Supreme Court held that sales commission which were earned by the non-resident for services rendered outside India could not be deemed to be income which had either accrued or arisen in India.

xii) Mumbai Bench in the case of Gujarat Reclaim & Rubber Products Ltd Vs ACIT in ITA No. 8868/Mum/2010 held that income of a non resident cannot be considered as accrued or arisen or deemed to accrue or arise in India as the services of such agents were rendered or utilized outside India and the commission was also paid outside India.

xiii) The ruling given by Hon'ble Authority for Advance Ruling (AAR) vide order dated 22.02.2012 in the case of S K F Boilers and Driers Pvt. Ltd., whereby a proposition of law was laid down that

the right of the non-resident agent to receive commission arise in India when the order was executed by the assessee in India even though all services by the agent are rendered outside India was not a judgment in the rem but a judgment in personnem hence not a binding precedent.

xiv) The non-resident agent Midland General Trading (LLC), was residing abroad and carrying on his business activity outside India searching markets for customers abroad. There was no business operation or rendering of marketing related services for the Indian company in India by the non-resident agent. Such commission income therefore, did not accrue or arise in India.

xv) That the commission payments could not be construed as royalty payments going by the definition of 'royalty' under the I T. Act as given in Explanation 2 of Section 9(i)(vi).

xvi) Further on the applicability of section 9(i)(vii), it would not be possible to construe by any possible means that mere order procurement, sales promotion without any right to conclude contracts by the agents would be a managerial, technical or consultancy service. Hence, commission payments to non-resident agents could not be regarded as 'fees for technical services' as defined in Explanation 2 of Section 9(vii), as the commission payment was not for the rendering of any managerial, technical or consultancy services by Midland General Trading (LLC). Further it was not the case of the AO also that commission payment in question was in the nature of fees, royalty or fees for technical services.

xvii) DCIT vs. Ardeshi B. Cursetjee & Sons Ltd (2008 115 TTJ Mumbai 916) where the ITAT Mumbai held that commission payment made to non-resident was not taxable in India, was attracted in this case.

xviii) It has been held that where no part of income of commission of the foreign agent was taxable in India there was no application of Section 195 of the IT Act. Since the income was out of purview of Section 195 there was no question of application of Section 195(2) or 195(3) of the IT Act as suggested by the AO. More particularly Section 195(2) is applicable on the income where part of income is chargeable to tax in India and section 195(3) covers the tax deductible u/s 195(1) on the payments made to non residents. For applicability of section 195(2) or 195(3) of the Act, the prerequisite is that the payment in question should have been fully or partly taxable in India which is not the case in the present appeal.

xix) The Hon'ble ITAT Delhi in its order dated 14.09.2017 in the case of Divya Creation Vs. ACIT ITA No. 5603/Del/2014 for A.Y. 2010-11 has taken similar view where 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.

7. Thus having regard to the above facts and circumstances of the case and on an analysis of the entire factual matrix of this case, I am of the considered view that neither section 5 nor section-9 of the Act provide any scope for taxing any such payments whose genesis was outside India. Merely by virtue of connection with the appellant in India the commission agent Midland General Trading (LLC), did not become liable to income tax in India and thereby u/s 40(a)(i) of the Act as is clear from the reasons indicated in the foregoing paragraphs."

9. The Revenue has not disputed that the payment was made on account of foreign agency commission. The Assessing Officer made addition by observing as under:-

4.1. "The submission of the assessee has been duly considered and placed on record. In the case of SKF Boilers and Driers Pvt. Ltd (343 ITR 385), Hon'ble Authority for advance Ruling (AAR) vide order dated 22.02.2012 discussed a very similar issue. In that case, an Indian company had received order from a Pakistani company through two Pakistani agents. The plant was shipped to Pakistani customers and on completion of export order, the commission became payable to agents. AAR expressed that no doubt the agents had rendered services abroad and had solicited orders abroad, but the right to receive commission arose in India, when the order was executed by the applicant in India. Therefore, it was held that commission was income deemed to accrue or arise in India. The facts of the instant case are exactly similar to the case in SKF boilers (supra).

4.2 CBDT had issued circular no. 7 on 22/10/2009, by which circulars 23 dated 23/7/1969 and 786 dated 7/2/2000 were withdrawn. - This circular stated that interpretation of circular 23 by some of the taxpayers to claim relief is not in accordance with the provisions of section 9 of the Income Tax Act 1961 or the intention behind the issue of circular 23. In the case of CIT vs EON technologies Pvt. ltd (supra), although the Hon'ble Delhi High Court had dismissed the appeal of the Department, but it was also held that the remedy lies with section 195(2) of the Income Tax Act 1961, wherein the payer has to apply to AO for determination of appropriate income which would be chargeable to tax. Further, this decision pertains to AY 2007-08, when circular 7 of 2009 was not existing. Thus, circular no. 7 of 2009 was not the subject matter of examination of Hon'ble Delhi High Court. Therefore, the decision of Hon'ble Delhi High Court is not applicable to the instant case due to changed position of law due to issue of circular 7 of 2009.

Similarly, the decision of Bombay High Court in the case Commissioner of Income Tax v/s Gujarat Reclaim & Rubber Products 1td pertains to Assessment Year 2008-09 and also considers the orders of the CIT (A) for the Assessment year 2007-08, when circular 7 of 2009 was not existing.

The Hon'ble High Court has noted that it was only subsequently i.e. on 22nd October, 2009 that the earlier Circular of 1969 and its reiteration as found in Circular No. 786 of 2000 were withdrawn and such subsequent withdrawal of an earlier Circular cannot have retrospective operation as held by this Court in UTI v/s P.K. Unny and Others 249 ITR 612. Thus, it is seen that the changed position of law after the withdrawal of circular no. 7 of 2009 was not the subject matter of examination of Hon'ble Bombay High Court.

Similarly, the decision of Madras High Court in the case of Commissioner of Income Tax v/s M/s FARIDA LEATHER COMPANY pertains to the Assessment Year 2010-11. i.e., Financial 2009-10, in which only a part of the year was covered under the changed position of law after the withdrawal of circular no. 7 of 2009. Further, a perusal of the entire case shows that the changed position of law after the withdrawal of circular no. 7 of 2009 was not the subject matter of examination of Hon'ble Madras High Court.

4.3 The bigger issues is that whether there is any change in the legal position on this issue or not post circular no 7 of 2009. The answer to this question is Yes. There is a substantial change. Otherwise, what was the need for CBDT to issue this circular. As stated in the circular, the assessee cannot interpret earlier circulars so as to defeat the of section 9. Section 195 mandates deduction of TDS on commission payments to non-residents. However, if any sum is not chargeable as income of the recipient, then recourse is available to the payer under section 195(2). It is not the right of the payer to decide not to deduct TDS, just as he thinks so. This is the change, which has been brought out by circular 7 of 2009. Hon'ble Delhi High Court in the case of EON technologies (supra) also observed that remedy for assessee lies in section 195(2). Therefore, the procedure for the payer is to resort to section 195(2) by making an application to the AO and obtain an order from him about the deductibility of TDS. Alternatively, the payee can also resort to section 195(3) of the Income Tax Act read with rules 37BB and submit necessary report to the

Income Tax Department, based on which TDS would not be deductible. However, neither the assessee (payer) nor payee have followed the laid down procedure and assessee unilaterally decided not to deduct TDS on commission paid to foreign agent in Dubai.

4.4 Thus, the case laws mentioned by the assessee are different in fact and circumstances from the present case hence are not applicable in the present case. Based on the discussions made above, in the light of the ruling of MR in the SKF boilers and driers Pvt. ltd (supra), I hold that the amount of commission paid by the assessee to M/s Midland General Trading (LLC), of Rs. 3,80,52,350/- is income deemed to accrue or arise to him in India and therefore liable for TDS deduction by the assessee. However, without prejudice to the same, even if it is held not liable for TDS deduction, the same cannot be allowed to assessee as deduction from its P&L account since, assessee has suo moto taken decision for non-deduction of TDS rather than following the procedure prescribed by law. Since, the assessee has not obtained the necessary order from his AO before transferring the commission to M/s Midland General Trading (LLC), the amount of Rs. 3,80,52,350/- is being disallowed and added to the income of the assessee. In view of the above facts, I am satisfied that the assessee has furnished inaccurate particulars of income within the meaning of section 271(1)(c) of the I.T. Act, 1961. Therefore, penalty proceedings u/s 271(1)(c) read with section 274 are initiated separately on this account."

(Addition Rs.3,80,52,350/-)

10. From the above, it is evident that the Assessing Officer relied upon the decision of the Authority for Advance Ruling ("AAR") in the case of *SKF Boilers and Driers Pvt. Ltd (343 ITR 385).* However, Ld.CIT(A) has relied upon the judgement of the Hon'ble High Court and the decision of the Co-ordinate Bench of this Tribunal. We find that the Co-ordinate Bench of this Tribunal in the

case of *Welspring Universal vs JCIT in ITA No.4761/Del/2014* vide order dated *12.01.2015* under the identical facts has held as under:-

> ***5.*** *The argument of the ld. DR that Explanation below section 9(2) will bring the instant case within the fold of section 9(1), is devoid of any merit. This Explanation simply states that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clauses (v) or (vi) or (vii) of sub-section (1) and shall be included in the total income of the non-resident whether or not the non-resident has a residence or place of business or business connection in India or the nonresident has rendered services in India. A bare perusal of the Explanation divulges that if there is some income of the nonresident which is in the nature of interest or royalty or fees for technical services, then, such income shall be deemed to accrue or arise in India irrespective of the non-resident rendering services in or outside India etc. The pre-condition for magnetizing this Explanation is that the income of the non-resident should be in the nature of interest or royalty or fees for technical services. It is only in respect of these three categories of incomes that the deeming provision is attracted notwithstanding the non-resident not having a place of business in India or not rendering services in India. As the commission income of non-resident does not fall in any of these three clauses, namely, (v), (vi) or (vii) of section 9(1) of the Act, we hold that Explanation below section 9(2) cannot help the Revenue's case.*
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> ***6.*** *In view of the foregoing discussion, it is apparent that the commission income in the hands of the non-resident can neither be considered as received or deemed to be received in India or accruing or arising or deemed to accrue or arise to him in India in terms of section 5(2) of the Act. Once it is held that the commission income of a non-resident for rendering services outside India does not fall within the scope of his total income, it automatically implies that the same is not chargeable to tax in his hands.*
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> ***7.*** *Sub-section (1) of section 195 provides that any person responsible for paying to a non-resident, not being a company, or to a foreign company,*

any interest or any other sum chargeable under the provisions of this Act, not being income chargeable under the head 'Salaries' shall, at the time of credit of such income to the account of the payee or at the time of payment thereof, whichever is earlier, shall deduct income-tax thereon at the rates in force. A circumspection of this provision indicates that in order to attract the withholding of tax on a payment made to a non-resident, it is essential that the sum should be chargeable to tax in the hands of the payee under the provisions of this Act. It is quite natural also because a liability for deduction of tax at source pre-supposes tax liability in the hands of the payee. If there is no tax liability in respect of the payments made to the payee, there can be no question of deducting any income-tax at source from such payment. Only if the amount is chargeable to tax in the hands of the recipient that the question of deducting any tax at source therefrom arises. In an earlier para, we have seen that the export commission is not chargeable to tax in the hands of nonresident in terms of section 5(2) of the Act. The natural outcome, which, therefore, emerges is that there can be no obligation of the assessee-payer to deduct tax at source on such commission payment to the non-resident.

8. *Now, we turn to the amendment to section 195, which has been invoked by the ld. CIT to fortify his view that the assessee was required to deduct tax at source before making payment of commission to the non-resident. Before evaluating such a submission, it would be apposite to consider the prescription of the Explanation 2, as under:-*

> *"Explanation 2.—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—*

(i) a residence or place of business or business connection in India; or

(ii) any other presence in any manner whatsoever in India."

9. *A glance at the above Explanation inserted by the Finance Act, 2012 with retrospective effect from 1.4.1962 reveals that the obligation to comply with sub-section (1), for making deduction of tax at source by the payer, applies and shall be deemed to have always applied to all the persons, resident or non-resident, whether or not the non-resident person has a residence or place of business or business connection in India or any other presence in any manner whatsoever in India. The Explanation simply clarifies that the obligation to deduct tax at source in terms of section 195(1) is not restricted only to the residents, but also extends to the non-residents irrespective of such non-resident not having a place of business or a business connection in India etc. Since the main part of sub-section (1) of section 195 casts obligation for withholding of tax at source on the payer, thus, it becomes axiomatic that the Explanation 2 amplifying the scope of subsection (1) of section 195 shall also apply to a payer and not a payee. As the extant assessee payer is a resident of India, it is even otherwise obliged to deduct tax at source from the payments made to non-resident in terms of the main sub-section (1), without applicability of the Explanation 2, if the requisite conditions as prescribed in the section are fulfilled. In other words, if a payment is made on account of any sum which is chargeable under the provisions of this Act, then, there will be an obligation to deduct tax at source. Per contra, if the amount is not chargeable to tax in the hands of the payee, then, no liability to deduct tax at source can be fastened on the payer. Thus it is vivid that the insertion of the Explanation 2 has not brought any change to the factual position obtaining before us. The effect of insertion of Explanation to section 195(1) is simply to clarify about liability of deductor. It has not done away with the pre-requisite condition of section 195(1) which mandates that amount should be chargeable to tax in the hands of the payee. In our considered opinion, the ld. CIT erred in invoking Explanation 2 to section 195(1) for*

treating the assessment order erroneous and prejudicial to the interest of the Revenue on account of non deduction of tax at source from the commission payment to the non-resident and the consequential non-making of disallowance u/s 40(a)(i) of the Act.

10. *The ld. DR vehemently accentuated on Circular no. 7 of 2009 to contend that with the withdrawal of the earlier benevolent circulars on this issue, the instant commission payment has become chargeable to tax in the hands of the payee and in the absence of the assessee having deducted tax at source, the ld. CIT was justified in setting aside the assessment order allowing deduction for such commission payment.*

11. *We do not find any force in this argument. It is relevant to note that Circular no 23 dt. 23/07/1969 clarified that no part of the income of a foreign agent of Indian exporter arises in India and hence such an agent is not liable to income-tax in India on the commission. Then circular no. 786 dt. 7/02/2000 further elaborated the consequence of Circular no. 23 by stating that since such commission income of foreign agent is not liable to tax in India, no tax is therefore, deductible at source under section 195 and consequently the export commission payable to a nonresident for services rendered outside India is not disallowable u/s 40(a)(i) of the Act. Thereafter, Circular no. 7 dated 22/10/2009 was issued withdrawing, inter alia, the above two circular nos. 23 and 786. The legal position contained in section 5(2) read with section 9, as discussed above about the scope of total income of a non-resident subsisting before the issuance of circular nos. 23 and 786 or after the issuance of circular no. 786 has not undergone any change. It is not as if the export commission income of a foreign agent for soliciting export orders in countries outside India was earlier chargeable to tax, which was exempted by the CBDT through the above circulars and now with the withdrawal of such circulars, the hitherto income not chargeable to tax, has become taxable. The legal position remains the same de hors any circular inasmuch as such income of a foreign agent is not chargeable to tax in India because it neither arises in India nor is received by him in India nor any deeming provision of*

receipt or accrual is attracted. It is further relevant to note that the latter Circular simply withdraws the earlier circular, thereby throwing the issue once again open for consideration and does not state that either the export commission income has now become chargeable to tax in the hands of the foreign residents or the provisions of section 195 read with sec. 40(a)(i) are attracted for the failure of the payer to deduct tax at source on such payments.

12. *Ex consequenti, we hold that the amount of commission income for rendering services in procuring export orders outside India is not chargeable to tax in the hands of the non-resident agent and hence no tax is deductible under section 195 on such payment by the payer. Resultantly, no disallowance is called for u/s 40(a)(i) of the Act.*

13. *It can be seen that the ld. CIT relied on two decisions of the Authority of Advance Ruling in SKF Boilers & Driers (supra) and Rajiv Malhotra (supra). It is correct that at least in SKF Boilers (supra), the Authority has held that the payment of commission on export orders is chargeable to tax u/s 5(2)(b) read with section 9(1)(i) of the Act. By an independent evaluation of the matter in the light of the provisions of section 5(2) read with section 9 of the Act, we have held above that the foreign commission is not chargeable to tax in the hands of the non-resident. Be that as it may, it is important to note that it is not a solitary precedent available on the subject. The Hon'ble jurisdictional High Court in Director of Income-tax (International Taxation) vs. Panalfa Auto Elektrik Ltd. (2004) 272 CTR (Del) 117, has held that the services rendered by non-resident agent for procuring export orders for the assessee cannot be held as fees for technical services u/s 9(1)(vii) of the Act. In this case, the assessee made an application u/s 195(2) for authorization to remit certain amount as commission for arranging export sales and realizing payment to non-resident company. The AO held that the commission payment was taxable as fees for technical services u/s 9(1)(vii) of the Act. That is how, when assailed, the Hon'ble High Court held that the payment of commission cannot be considered as fees for technical services in terms of section*

9(1)(vii) so as to call for any deduction of tax at source. The Hon'ble Madras High Court in CIT vs. Faizan Shoes (P) Ltd. (2014) 272 CTR (Madras) 170, has also held that no disallowance can be made u/s 40a(i) in respect of commission paid to non-resident agent for providing services outside India.

14. *At this juncture, it is pertinent to note that we are dealing with an appeal against the order passed u/s 263 of the Act. It is settled legal position that there can be no revision on a debatable issue. The Hon'ble Supreme Court has held so in Malabar Industrial Company Ltd. Vs. CIT (2000) 243 ITR 83 (SC). This view has been reiterated by the Hon'ble Apex Court in CIT vs. Max India Ltd. (2007) 295 ITR 282 (SC). In this case, the Hon'ble Summit Court held that when two views are possible and the ITO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the Revenue, unless the view taken by the ITO is unsustainable in law. Adverting to the facts of the instant case, it can be seen that the AO, after considering certain decisions relied by the assessee favouring non-deduction of tax at source in the present circumstances, accepted the assessee's contention. The fact that the decision of the Authority for Advance Ruling, relied by the ld. CIT, favours the Revenue's case, at the maximum, makes the issue about deduction of tax at source from foreign commission, a debatable one. In view of such a cleavage of opinion, this debatable issue goes outside the purview of section 263 in the light of the above referred two Supreme Court judgments. We, therefore, set aside the impugned order."*

11. Further, the Tribunal in the case of *Divya Creation vs ACIT* (supra) observing as under:-

19. "We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer made addition of

Rs.62,19,609/- u/s 40(a)(i) on the ground that assessee has not deducted tax from the foreign agency commission paid as per the provisions of section 195 of the I. T. Act. While doing so, the Assessing Officer relied on the decision of the AAR in the case of SKF Boilers and Driers Pvt. Ltd. (supra) and the decision in the case of Rajiv Malhotra (supra). We find the ld. CIT(A) while upholding the action of the Assessing Officer held that income arising to the agent on account of export commission very much falls within the ambit of provisions contained in section 5(2)(b) of the I.T. Act as the income has accrued in India when the right to receive the same came into existence. According to him although the non-resident agent has rendered services and procured orders abroad but the right to receive the commission certainly arise in India when the order gets executed by the assessee. According to him, the mere fact that the agent is to render services abroad and the commission is to be remitted to him abroad are wholly irrelevant for the purpose of determining the income since income is from a source in India.

20. We find identical issue had come up before the Ahmedabad Bench of the Tribunal in the case of Welspun Corporation Ltd. (supra). The Tribunal in the said decision has held that the payments made by the 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. The Tribunal while deciding the issue has also considered the two decisions of the AAR which has been relied on by the Assessing Officer as well as the CIT(A).

21. We find the Hon'ble Allahabad High Court in the case of Model Exims (supra) has held that failure to deduct tax at source from payment to non-resident agents, who has their own offices in foreign country, cannot be disallowed, since the agreement for procuring orders did not involve any managerial services. It was held that the Explanation to section 9(2) is not applicable. It was further held that the situation contemplated or clarified in the Explanation added by the Finance Act, 2010 was not

applicable to the case of the assessee as the agents appointed by the assessee had their offices situated in the foreign country and that they did not provide any managerial services to the assessee. Section 9(1)(vii) deal with technical services and has to be read in that context. The agreement of procuring orders would not involve any managerial services. The agreement did not show the applicability or requirement of any technical expertise as functioning as selling agent, designer or any other technical services.

22. We find the Hon'ble Supreme Court in the case of Toshoku Ltd. (supra) has observed as under :-

> *"During the previous year relevant to the assessment year 1962-63, B, a dealer in tobacco in India, purchased tobacco and exported it to Japan and France through non-resident sales agents, a Japanese company and a French business house respectively. Under the terms of the agreement, the Japanese company, which was appointed as exclusive sales agent in Japan for tobacco exported by B, was entitled to a commission of 3 per cent. of the invoice amount. The sale price received on the sale in Japan was remitted wholly to B in India and B debited his commission account and credited the amount of commission payable to the Japanese company in his account books and later remitted the amount to the Japanese company. There was a similar agreement with the French business house in relation to the corresponding area and similar credit and debit entries and subsequent remittance of the commission were made. The question was whether the commission earned by the non-resident sales agents could be taxed in India, treating B as representative assessee under s. 161 of the I.T. Act, 1961:*
>
> *Held, (i) that it could not be said that the making of the entries in the books of B amounted to receipt, actual or constructive, by the non-resident sales agents as the amounts so credited in their favour were not at their disposal or control; they could not, therefore, be*

charged to tax on the basis of receipt of income, actual or constructive, in the taxable territories.

(ii) That the non-residents did not carry on any business operation in the taxable territories : they acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to the remitted by the purchasers from abroad did not amount to an operation carried out by the non-residents in India as contemplated by cl. (a) of the Explanation to s. 9(1)(i) of the I.T. Act, 1961. The commission amounts which were earned by the non-residents for services rendered outside India could not be deemed to be income which had either accrued or arisen in India.

A credit balance, without more, only represents a debt and a mere book entry in the debtor's own books does not constitute payment which will source a discharge from the debt."

23. Similar view has been taken by the Hon'ble Madras High Court in the case of Kikani Exports Pvt. Ltd. (supra) and Faizan Shoes Pvt. Ltd. (supra). The Hon'ble Delhi High Court in the case of EON Technology P. Ltd. (supra) has also taken similar view where 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. In view of the decisions cited above (supra), we are of the considered opinion that the assessee is not liable to deduct tax under the provisions of section 195 of the I.T. Act on account of foreign agency commission paid outside India for promotion of export sales outside India. Accordingly, the order of the CIT(A) is set-aside and the grounds raised by the assessee are allowed."

Therefore, in view of the bindings precedents, we do not see any reason to interfere in the order of Ld.CIT(A), the same is hereby affirmed. Thus, Ground Nos.1to 4 raised by the Revenue are rejected.

12. Ground No.5 raised by the Revenue is against the adhoc disallowance in respect of car and telephone expenses.

13. Ld. Sr. DR submitted that Ld.CIT(A) was not justified in restricting the disallowance to the extent of 10%. He submitted that the assessee failed to furnish the supporting evidences.

14. On the contrary, Ld. Counsel for the assessee submitted that the disallowance is not justified. In view of the fact that no specific instance is pointed out by the Assessing Officer.

15. We have heard the rival contentions and perused the material available on record. We find that Ld. CIT(A) after considering the material available on record, had decided the issue in para 8.2 in his order by observing as under:-

> *8.2. "I have carefully considered the submission of the assessee and perused the finding given by the Assessing Officer in assessment order. The Assessing Officer has made the disallowance due to the fact the appellant has not maintained Log book and not produced complete record/proofs in support of the claim of these expenses. I am in agreement with the Assessing Officer and the disallowance has been correctly made in absence of supporting evidences. Probability of personal use of these expenses cannot be ruled out. However, the disallowance is on the higher side therefore I restrict to 10% i.e. Rs.1,68,475/-. Therefore, this ground of appeal is partly allowed."*

16. We do not find any infirmity in the order of Ld.CIT(A) as he has pointed out that the assessee has failed to furnish the log book etc. The view of Ld.CIT(A) is justified in the facts and circumstances of the present case. Thus, Ground No.5 raised by the Revenue is dismissed.

17. Ground No.6 raised by the Revenue is general in nature, needs no separate adjudication.

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

Above decision was pronounced on conclusion of Virtual Hearing in the presence of both the parties on 23rd November, 2021.

Sd/- ***Sd/-***

(G.S.PANNU) **(KUL BHARAT)**
PRESIDENT **JUDICIAL MEMBER**

** Amit Kumar **

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI