IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM

(Hearing through Video Conferencing Mode)

आयकर अपील सं/ I.T.A. No.6261/Mum/2019
(**निर्धारण वर्ष** / Assessment Year: 2016-17)
&
आयकर अपील सं/ I.T.A. No.6262/Mum/2019
(**निर्धारण वर्ष** / Assessment Year: 2015-16)

ACIT-23(1) Room No.113, 1st Floor, Matru Mandir, Grant Road, Mumbai-400007.	**बनाम**/ Vs.	M/s. Ali Quresh Exports 310, Rizvi Chambers, Hill Road, Bandra (West), Mumbai-400050.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADFA1292M		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by:	Shri S. S. Iyengar (Sr. DR)
Assessee by:	Shri Rizwan Hussain Katolwala

सुनवाई की तारीख / Date of Hearing: 28/09/2021
घोषणा की तारीख /Date of Pronouncement: 16/12/2021

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The above mentioned appeals have been filed by the revenue against the order dated 31.07.2019 passed by the Commissioner of Income Tax (Appeals)-32, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Ys. 2016-17 & 2015-16 respectively.

ITA. NO.6261/MUM/2019

The revenue has filed the present appeal against the order dated 31.07.2019 passed by the Commissioner of Income Tax (Appeals) -32 Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2016-17.

2. The revenue has raised the following grounds: -

"1. Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) erred in holding payment made to foreign agents as commission payment and not fee for managerial services as established by the assessing officer and for reasons discussed in detail in the assessment order."

"2. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in relying on section 9(1}(vii)(c) which relates to when a paper is non-resident, whereas, in the impugned matter the payer is a resident and section 9(1)(vii)(b) would be applicable along-with Explanation after section 9(2) as amended with retrospective effect from 01.06.1976."

"3. Whether on the facts and circumstances of the case and in law, the Ld CIT(A) erred in giving relief when the assessee has not complied with the provisions of section 195 as there is no AO order nor any CA certificates regarding taxability or not of payment as per extant provisions."

"4. Whether on the facts and circumstances of the case and in law, the Ld CIT{A) erred in deleting the addition on account of non-deduction of TDS u/s 40(a}(i) of the Act on payment made to foreign agents given the fact that assessee was liable to make such deduction."

"5. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the assessing Officer be restored."

"6. The appellant craves leave to add, delete, alter, amend and modify any or all grounds of appeal."

3. The brief facts of the case are that the assessee filed its return of income on 13.10.2016 declaring a total income to the tune of Rs.13,66,50,720/- for the A.Y.2016-17. The return was processed u/s 143(1) of the Act. The case was selected for scrutiny under CASS. Notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. The assessee firm is engaged in the business of export of meat. During the year under consideration, the assessee has shown the income from business/profession and income from house property. In the profit and loss account, the assessee claimed the commission payments of Rs.5,96,42,754/-. The assessee was asked to furnish the details of commission expenses along with details of TDS. The assessee submitted the following information:-

S. No.	Name of Commission Agents	Commission	TDS	Remarks
1	Abdullah Ali Al Tassan Est	Rs.44,22,478/-	Nil	Foreign Agent
2	Bestmatch Enterprises	Rs.5,37,55,417/-	Nil	Foreign Agent
3	M/s. Fimatrade Ltd.	Rs.3,59,806/-	Nil	Foreign Agent
4	Nguyean Thi Kim Loan	Rs.93,002/-	Nil	Foreign Agent
	Total	Rs.5,86,30,703/-		

Thereafter, the claim of the assessee was declined and the commission income was added to the income of the assessee. The total income of the assessee was assessed to the tune of Rs.19,52,81,430/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) and the CIT(A) allowed the claim of the assessee but the revenue was not satisfied, therefore, filed the present appeal before us.

4. We have heard the arguments advanced by the Ld. Representative of the parties and perused the record. Before going further, we deem it necessary to advert the finding of the CIT(A) on record: -

> ***"****5. Decision: I have considered the AO's order, submissions of the appellant and details filed by the appellant.*
>
> *5.1 The AO has disallowed the commission paid to foreign agents in respect of exports made for the following reasons:*
>
> *i) The assessee has not made any deduction of tax at source u/s. 195{1) of the Act on payments made to foreign agents and therefore the expenditure was not allowable u/s.40(a)(i) of the Act, ii) The payment of commission 'was -taxable u/s 9(1)(vii}) as fees for technical services/managerial fees and assessee has not made any application to AO u/s.195(2) for determination of the appropriate rate of TDS.*
>
> *5.2 I find that the payment of commission has been made to foreign agents for rendering of services relating to sale of appellant's meat products in foreign countries and appellant has filed information in this respect, duly verified by the Chartered accountant in terms of section 195(6) of the Act r.w. Rule 37BB in Form 15CA & 15CB. The appellant has submitted that the services related to sales/exports have been rendered by the foreign agents in foreign countries, payments have been made through banking channels abroad and the agents do not have any permanent establishment in India. Thus, the appellant has not deducted the tax at source, considering the facts that no tax was chargeable in India on the payments of commission to non-residents, in light of ifs facts and the 'provision of DTAA etc. In this regard reference is made to some of the observations and findings of*

the Hon'ble Supreme Court in the case of G E Technology Cen. (P) Ltd vs CIT (2010)193 Taxman 234 (SC) –

"It may also be noted that section 195(1} is in identical terms with section 18(3B) of the 1922 Act. In CIT v. Cooper Engg. Ltd. 1 968 68 ITR 457 Bom. it was pointed out that if the payment made by the resident to the non-resident was an amount which was not chargeable to tax in India, then no tax is deductible at source even though the assessee had not made an application under section 1 8(3B) [now section 195(2) of the Income-tax Act]. The application of section °195(2) presupposes that the person responsible for making the payment to the non-resident is in no doubt that tax is payable in respect of some part of the amount to be remitted to a non-resident but is not sure as to what should be the portion so taxable or is not sure as to the amount of tax to be deducted. In such a situation, he is required to make an application to the ITO(TDS) for determining the amount. It is only when these conditions are satisfied and an application is made "to the ITO(TI)S) that the question of making an order under section 195/2) will arise."

"8, If the contention of the Department that the moment there is remittance the obligation to deduct TAS arises is to be accepted then we are obliterating the words "chargeable under the provisions of the Act" in section 195(1). The said expression in section 195(1) shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax, in India. The payer is bound to deduct TAS only if the tax is assessable in India. If tax is not so assessable, there is no question of TAS being deducted. [See: Vijay Ship Breaking Corpn. v. CIT (2009) 314 ITR 309 (SC}]."

5.2.1 The AO has relied on the decision of Hon'ble High Court of Karnataka in the case of Samsung Electronics Co. Ltd 185 Taxman 313, which had relied on the Apex Court decision in the case of Transmission Corpn. of A.P. Ltd. In this regard, I find that the said decision has been reversed by the Hon'ble Supreme Court in the above said case of G E India 193 Taxman 234, wherein it was observed as under:

In Transmission Corpn. of A.P. Ltd. a case (supra) 'a non-resident had entered Into composite contract with the-resident party making the payments. The said composite contract not only comprised supply of plant, machinery and equipment mm India, by, also comprised the installation and commissioning of the same in India. ft wag admitted that the erection and commissioning of plant and machinery in India gave to income-taxable in India. It was, therefore, clear even to the payer that payment, required to be made by him to the non-resident included an element of income which was exigible to tax in India. The only issue raised in that case was whether TDS wag applicable only to pure income payments and not to composite payments which had ay, element of income embedded or incorporated in them. The controversy before us in this batch of cases is, therefore, quite different. In Transmission Corpn. of A.P. Ltd.'s case (supra) it was held that TDS was liable to be deducted by the payer on the gross amount of such payment included in it an amount which was exigible to tax in India was held that if the payer wanted to deduct TAS not the gross amount but on the lesser amount, on the footing that only a portion of the payment made represented income chargeable to tax in India", then if was necessary for him to make an application under section 195(2) of the Act to the ITO(TDS) and obtain his permission for deducting TAS at lesser amount. Thus, it was held by this Court

that of the payer had a doubt as to the amount to be deducted as TDS he could approach the ITO{TDS) to compute the amount which was liable to be deducted at source. In our view, section 195(2) is based on the "principle of proportionality". The said sub-section gets attracted only in cases where the payment made is a composite payment in which a certain proportion of payment has an element of "income" chargeable to tax in India. it is in context that the Supreme Court stated, "If no 'such application is filed, income-tax on such sum is to be deducted and it is the statutory obligation of the person responsible for paying such 'sum' to deduct tax thereon before making payment. He has to discharge the obligation to TDS". If one reads the observation of the Supreme Court, the words "such sum" clearly indicate that the observation refers to a case of composite payment where the payer has a doubt regarding the inclusion of an amount in such payment which is exigible to tax in India. In our view, the above observations of this Court in Transmission Corpn. of A.P. Ltd.'s case (supra) which is put in italics has been completely, with respect, misunderstood by the Karnataka High Court to mean that it is not open for the payer to contend that if the amount paid by him to the non-resident ts not at all "chargeable to tax in India", then no TAS is required to be deducted from such payment. This interpretation of the High Court completely loses sight of the plain words of section 195(1) which in clear terms lays down that tax at source is deductible only from "sums chargeable" under the provisions of the Income-tax Act, ie:, chargeable under sections 4, 5 and 9 of the Income tax Act.

5.2.2 The AO has opined that the payment made by the appellant was chargeable to tax u/s. 9(1)(vii) as fees for technical/managerial services. da this regard the AO has referred to the various activities, performed by. 'the foreign agents on behalf of the assessee, like

facilitating and securing' "the overseas orders and collect the payment from various parties, get the samples of product approved and book new orders, provide market feedback, information etc, carryout liaison work, facilitate assessee's interaction with customers during the visit to respective countries The A O has concluded that these services/activities amount to managerial services and the payment made to foreign agents was Chargeable to tax u/s 9(1)(vii) of the Act .

5.2.3 I find that the! appellant has paid commission to foreign agents for procuring export orders and various services related to the activity of exports made by the appellant in the foreign jurisdiction. Such services, which relate to the sales/exports made in the foreign country cannot be categorized as managerial or technical services in terms of the provisions of section 9(1}(vu} of the Act, particularly when nothing has been brought on record to show that the foreign agents hate engaged technical/professional]l persons for providing various services to the appellant and the services are in the nature of technical/ managerial services in light of the DTAA with the where the foreign agents reside. In this regard, find that in the appellant's own case for A.Y 2012-13 and do13-14, the A.O had held that the commission payment to the foreign agents was in the nature of managerial services and had disallowed such payment u/s. 40(a}(i) of the Act. In the above said assessment years, it has been held by the ITAT Mumbai in ITA No. 4803 & 4804 /MUM/2017, vide order dated 15.11.2018 that no part of the remittance to the commission agent was 'taxable in India and the assessee was not under obligation to deduct tax at source from commission payment made to non-residents considering That the foreign agents are not residing in India and their operation of activity is also abroad, and the commission is paid

through banking channels through foreign 'currency with the permission of RBI. The nature of activities by the foreign agents was limited to foreign territory and they are not doing any business activity in India. The appeals of the revenue, for AY 2012-13 and 2013-14 in ITA No, 4803 & 4804/MUM/2017, have been dismissed sand it was held that the first appellate authority was justified in deleting the impugned disallowances/additions.

5.2.4 Further, I find that similar disallowance has been deleted in earlier years by the CIT(Appeals) from AY 2009-10 to 2015-16 and the order of CIT(A) for AY 2009-10 has also been upheld by the Income Tax Appellate Tribunal "G" Bench, Mumbai vide ITA No. 803/mum/2013 for A.Y 2009-10. In view of above precedents in appellant's own case and following the decision of the ITAT for A.Y 2012-13 and 2013-14, as noted above, the disallowance of Rs.5,86,30,703/- made by the A.O u/s. 40(a)(i) is found to be not justified and is hereby deleted. The ground taken by the appellant is allowed."

5. On appraisal of the above mentioned finding, we noticed that the CIT(A) has allowed the claim of the assessee on the basis of the decision of Hon'ble ITAT in the assessee's own case for the A.Ys.2012-13 & 2013-14 in ITA. No.4803 & 4804/Mum/2017 vide order dated 15.11.2018. The Hon'ble ITAT has also decided the matter of controversy in favour of the assessee in case bearing ITA. No.803/Mum/2013 for the A.Y.2009-10. Since the issue has squarely been covered by the decision of the Hon'ble ITAT in the assessee's own case, therefore, we are of the view that the finding of the CIT(A) is quite correct which is not liable to be interfered with at this appellate stage. Accordingly, we affirm the finding of the

CIT(A) on all the issues and decide these issues in favour of the assessee against the revenue.

In the result, the appeal filed by the revenue is hereby ordered to be dismissed.

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6. The facts of the present case are quite similar to the fact of the case as narrated above while deciding the ITA. No.6261/MUM/2019, therefore, there is no need to repeat the same. However, the figure is different. The matter of controversy is also the same. The finding given above in ITA. No.6261/Mum/2019 is quite applicable to the facts of the present case as mutatis mutandis and accordingly we decide the issues in this appeal in favour of the assessee against the revenue.

7. In the result, the appeals filed by the revenue are hereby ordered to be dismissed.

Order pronounced in the open court on 16/12/2021

Sd/-	Sd/-
(SHAMIM YAHYA)	**(AMARJIT SINGH)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 16/12/2021
Vijay Pal Singh (Sr. P.S.)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**