IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Anubhav Sharma, Judicial Member

ITA No. 5929/Del/2019 : Asstt. Year : 2012-13

DCIT, Central Circle-31, New Delhi-110055	Vs	Cheslind Textiles Ltd., Kharigram, P.B. No. 28, Post Office-Gulabpura, Distt. Bhilwara, Rajasthan-311021
(APPELLANT)		(RESPONDENT)
PAN No. AABCC2435K		

Assessee by : Sh. S. S. Nagar, CA
Revenue by : Ms. Shashi Kajle, Sr. DR

Date of Hearing: 02.05.2022		Date of Pronouncement: 01.06.2022

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the Revenue against the order of ld. CIT(A)-30, New Delhi dated 30.04.2019.

2. Following grounds have been raised by the Revenue:

"1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the disallowance made u/s 40(a)(i) of the Act in respect of payments of Rs. 2,41,93,337/- being commission on export sales.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in not appreciating the content of CBDT Circular No. 05/2014 dated 11.02.2014 which clarifies that Rule 8D read with Sec 14A of the Act provides for disallowance of the expenditure even when the taxpayer in a particular year has not earned any exempt income.

3. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in not appreciating the fact that the assessee should have claimed the TUF subsidy by filing revised return income.

4. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in ignoring the facts that TUF subsidy received by the assessee is a revenue receipt."

Commission on Sales:

3. The assessee has appointed agents at various countries, made export of goods and paid commission to the non-resident agent under the head "commission on export sales" amounting to Rs.2,41,93,337/-. The AO held that the income arises in India to the foreign agents which is chargeable to tax in India. The ld. CIT(A) relying on the order for the A.Y. 2011-12 in assessee's own case allowed the appeal of the assessee.

4. For the A.Y. 2010-11 and A.Y. 2011-12, the appeal of the assessee on the similar issue has been allowed by the Co-ordinate Bench of the ITAT holding as under:

"6. We have considered the rival submissions as well as the relevant material on record. The payment in question was paid by the assessee to various overseas marketing agents as per the respective agreements between the assessee and the agents. Marketing agents were appointed to market, promote and sale the product of the assessee within the respective territory in accordance with the terms of the agreements. Therefore, the payment was made to the market agents against the performance to collect information regarding the products and to deal with the customers of the assessee in respect of the sale of the assessees products in the respective territories. The payment is termed as commission payable to the marketing agents as per Clause 2 of the agreement which is based on FOB value of the product as a percentage to be decided on case to case basis for the services rendered outside India. Thus it is clear from the terms and conditions of the agreement that the payment in question were made to the non-resident marketing agents for their services rendered outside India. It is admitted fact that these non-resident

agents have non PE in India therefore the income in their hand which is not a royalt.x-.4.e.for Technical Services' (in short 'FTS') is not chargeable to tax in India, The Assessing Officer has not given a finding that the payment in question is in the nature of FTS or royalty as per the provisions of Section 9(1)(vi) and 9(1)(vii) of the Act. Once the payment in question is not treated as ETS or royalty then, the same being business income in the hands of the non-resident marketing agents is not chargeable to tax in India in the absence of PE. The CIT (Appeals) has allowed the claim of the assessee by giving the finding in paras 5 & 6 as under:

"5. I have considered the appellant's submission also perused the assessment order. The appellant engaged in the manufacture and export of cotton yarn/knitted fabrics. The observation of the Assessing Officer is that the appellant has debited a sum of Rs.1,68,59,037 towards an export soles and on such commission TOS was not deducted. However, the appellant's contention is that the appellant company had appointed agents at various countries to collect orders and pass them to the company in India for export of the goods dealt by the company. These agents are paid agreed commission based on the quantity /free of the exported goods against the order procured by the agent. The operation of the agents operates on behalf of the appellant company. These agents do not have any operation in India nor do they carry out any other business in India. The appellant had furnished copies of 'Marketing Agency Agreement' and from it transpires that agents are non-resident agent and their business operation in abroad only and PE whatsoever in India. In this context the appellant placed reliance on the decision of the Hon'ble ITAT, Hyderabad in the case of DCIT Vs. Divi's Laboratories Ltd. (2011) 12 taxmann.Com 103 (Hyd) –

9. It Is pertinent to note that s. 195 of the Act has to be read along with the charging ss. 4, 5 and 9 of the Act. One should not read s. 195 to mean that the moment there is a remittance, the obligation to deduct TDS automatically arises. If we were to accept such contention, it would mean that on mere payment in India, income would be said to arise or accrue in India.These are the observations made in the judgment of apex Court in the case of GE India Technology Centre (P) Ltd. vs. CIT (supra) relied on by the learned counsel for the assessee, for the proposition that provision are tax applies only to those sums which are chargeable to tax under the IT Act. If the contentions of the Department are to be taken as correct that any person making payment to a nonresident is necessarily required to deduct tax, then the consequence would be that the Department would be entitled to appropriate the monies deposited by the payer even if the sum paid is not

chargeable to tax because there is no provision the IT Act by which a payer can obtain refund. As per s. 237 r.w.s. 199 of the Act implies that only the recipient of the sum i.e., payee would seek a refund. In view of the above, hence, no tax is deductible under s. 195 of the Act on commission payments and consequently the expenditure on export commission payable to non-resident for services rendered outside India becomes allowable expenditure and the same is outside rigours of the s. 40(a)(ia) of the Act.

10. The judgment of the Karnataka High Court in the case of Samsung Electronics Co. Ltd. & Ors. vs. CIT & Ors. (2009) 227 CTR (Kar) 335 (2009) 31 DTR (Kar) 257 : (2010) 320 ITR 209 (Kar) retied on by the Department, dealt on whether tax is to be deducted at source, under s. 195 of the Act, in respect of payment made to non-resident, on import of software. The judgment of the Karnataka High Court is largely based on the judgment of Supreme Court in the case of Transmission Corporation of AP Ltd. & Anr. vs. CIT (1999) 155 CTR (SC) 489 (1999) 239 ITR 587 (SC). However, the Karnataka High Court not followed the subsequent binding judgment of the Supreme Court in the case of Vijay Ship Breaking Corpn. & Ors vs CIT (2008) 219 CTR (SC) 639 : (2008) 14 DTR (SC) 74 : (2009) 314
ITR 309 (SC) wherein the apex Court has categorically held that the resident is not required to deduct TDS under s. 195(1) of the Act, if the income of non-resident recipient is not taxable in India. Given this binding precedent, the judgment of Karnataka High Court in the case of Samsung Electronics Co. Ltd & Ors. vs. CIT & Ors. (supra) would not apply to the cases where the non-resident recipient is not taxable in India, We also find that the judgment of apex Court in the case of Ishikawajrna-Harima Heavy Industries Ltd. vs. Director of IT
(2007) 207 CTR (SC) 361 (2007) 288 ITP. 408 (SC) wherein it was held that for s. 195 is to be attracted, the services rendered by the nonresident should have been rendered in India and also should have been used in India and that, this twin tests has to be satisfied for s. 195 is to be attracted. We find that the legislation introduced the Explanation to s. 9(2) of the Act, after this judgment, with retrospective effect from 1st June, 1976 in the Finance Act, 2007, Despite this introduction of Explanation to s. 9(2) of the Act, the Karnataka High Court in the case of Jindal Thermal Power Co. Ltd. vs. Dy. CIT (2009) 225 CTR (Kar) 220 (2009) 26 DTR (Kar) 172 : (2010) 321 ITR 31 (Kar) held that the law laid down by the apex Court in the case of Ishikawajima Harima Heavy Industries Ltd. (supra) still holds good despite the retrospective amendment to S. 9 of the Pt. In our opinion, the requirement of services of the nonresident being rendered in India and being utilized in India is
still valid, despite the judgment of the Karnataka High Court in the case of Samsung Electronics Co. Ltd. & Ors. (supra)

and withdrawal of earlier circulars issued on this subject by CBDT.

11. It is well-settled law that the provisions of DTAA would prevail over the provisions of the IT Act, would seem to have been completely not followed by Karnataka High Court while rendering the judgment in the case of Samsung Electronics Co. Ltd. & Ors. (supra). Therefore, in our considered opinion, the law related to deduction of tax at source under s. 195 has not been changed consequent to the judgment of Samsung Electronics Co, Ltd. & Ors. (supra) or withdrawal of earlier circulars, on this issue by the CBDT and therefore the rigours of s. 40(a)(0) of the Act, disallowance of expenditure, is not attracted for the payments made to the overseas agents by the assessee without deduction of TDS. In the case under consideration, the CIT(A) observed that the AO has not been able to establish that there is specific intention of the payee to receive the payment within the territory of India as per the decision in the case of Ogale Glass Works Ltd. (supra); therefore, in our opinion, the CIT(A) rightly did not agree with the view taken by the A0 with regard to the addition made on this issue and hence, the CIT(A) is justified in directing the AO to delete the said addition. After considering the totality of facts and the circumstances of the case, we are not inclined to interfere with the order of the CIT(A) on this issue and accordingly the same is upheld. Hence the grounds raised by the Revenue for all the years under consideration are rejected"

6. A plain reading of the Hon'ble IIAT, Hyderabad the issue on hand is squarely applicable and respectfully following the said decision, the Assessing Officer is directed to allow of Rs.1,68,59,037 as deduction under Section 37 of the Act.

Thus it is clear that the CIT (Appeals) has followed the decision of the Tribunal in case of Divi's Laboratories Pvt. Ltd. (supra). The learned Departmental Representative has not brought to our notice any contrary decision/precedence. In view of the above facts and circumstances of the case where the commission payment in question is not treated by the Assessing Officer as ITS or royalty then in the absence of PE, it is not chargeable to tax in India. The learned Departmental Representative has relied upon the Explanation 2 of Section 195(1) of the Act. However, we are of the view that this Explanation 2 to Section 195(1) would not obliterate the prerequisite condition of Section 195(1) that "sum chargeable under the provisions of the Act". We further note that an identical issue has been considered by the co-ordinate bench of this Tribunal in the case of Zanav Home Collection (supra) in paras 38 to 41 asunder:

38. We have considered the rival submissions. The copies of the Agreement between the Assessee and the non-resident (7 out of the 10 non-residents listed in the earner part of this order) has been filed before us as Annexure-H in the paper book filed by the Assessee. The main clauses in the agreement needs to be seen to appreciate the contentions of the parties before us.(Agreement between Assessee and M/.Duo Textiles).

Clause-1, 3 and 4 of the Agreement reads as follows:

1. APPOINTMENT: Principal grants Agent the right to sell the merchandise (stipulated in Article 2) in the territory (stipulated in Article 3) and Agent accepts such appointment. 3. TERRITORY: The Territory covered under this agreement is confined to South Africa. 4, COMMISSION:

Principal shall allow the Agent 5% commission for all Merchandise (based on FOB prices) Commission are not payable later than 2 (two) months after merchandise have been shipped in respect of all orders which have been accepted and executed by Principal. However, that no such commissions shall be payable until Principal receives the full amount of payment due to him."

39. The terms of the Agreement in the case of all the agents are identical. It is clear from the agreements that the nonresidents rendered services outside India and the nature of services rendered by them is as agent of and Indian exporter operating in his own country. There is absolutely no territorial nexus with India as far as the non-residents are concerned. The nonresident's source of income outside India and accrues and arises outside India. The Hon'ble Supreme Court in the case of Caroorandum Co. v. CIT (1977) 108 ITR 335, has held that "the carrying on of activities or operations in India is essential to make the nonresident have business connection in India in order that he may be liable to tax in respect of the income attributable to that business connection the CBDT in Circular No. 17(XXXVII) of 1953 dated 17th July, 1953 has stated as follows:-

"Foreign agents of Indian exporters - A foreign agent of an Indian exporter operates in his own country and no part of his income arises in India. Usually, his commission is remitted directly to him; arid is, therefore, not received by or on his behalf in India. Such an agent is not liable to Indian income tax."

The CBDT circular No.786 dated 07/02/2000 regarding taxability of export commission payable to non-resident

agents rendering services abroad has stated that "No tax is therefore deductible under section 195 and consequently the expenditure on export commission and other related charges payable to a non-resident for services rendered outside India becomes allowable expenditure." The conclusions of the AO and CIT(A) that the non-resident had a business connection in India in our view is without any basis and cannot be sustained.

40. On applicability of Expin-2 to Sec.195(1) of the Act which was introduced by the finance Act 2012 w e f 1 4 i962 we are of the view. That the said explanation is applicable only when there is accrual of income in India. When the conclusion reached is that there is no accrual of income in India, we fail to see how Expin,2 to Sec. 1951) of the Act are attracted.

41. In view of the above conclusions, we are of the view that there was no obligation on the part of the Assessee to deduct tax at source while making payment to the non-resident. Consequently, no disallowance of commission expenses paid to non-resident could be made invoking the provisions of sec. 40a)(1) of the Act. We hold accordingly and direct the AO to delete the disallowance so made.

Accordingly, in view of the facts and circumstances of the case as well as the decision of this Tribunal, we do not find any error in the impugned order of the CIT (Appeals).”

5. In the absence of any material change in the facts of the case and the legal preposition, we hereby delete the appeal of the Revenue on this ground.

<u>Section 14A:</u>

6. The assessee made an investment to the tune of Rs.2,55,00,000/- to purchase wind power under captive consumption with the power generating companies and has earned no exempt income. Owing the judgment of Hon’ble Apex Court in the case of PCIT Vs Oil Industry Development Board in SLP (Civil) Diary No. 2755/2019, we hereby hold that the provisions of Section 14A cannot be invoked in the absence of any exempt income claimed by the assessee.

Claim of TUF subsidy – Capital receipt:

7. The assessee has taken up additional grounds and prayed for the admission thereof for consideration of claim of Technology Upgradation Fund (TUF) subsidy as capital receipt. Admission of the additional ground has been opposed in principle by the ld. DR. Keeping in view, the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs CIT (1998) 229 ITR 383, the additional ground filed by the assessee is accepted. The relevant portion of the judgment is as under:

> *"5. Under Section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.*
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> *6. In the case of Jute Corporation of India Ltd. v. C.I.T. . this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have*

in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g., C.I.T, v. Anand Prasad (Delhi), C.I.T. v. KaramchandPremchand P. Ltd. and C.I.T. v. Cellulose Products of India Ltd. . Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

8. The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

8. Respectfully following the above judgment of the Hon'ble Apex Court, the additional grounds taken up by the assessee are hereby admitted.

On merits:

9. Facts relevant to the adjudication of the issue are that the assessee filed return of income on 10.09.2012 by treating TUF

subsidy received during the year amounting to Rs.1,42,36,701/- as revenue receipt and paid tax on the same. During the course of assessment proceedings, the assessee based on the judgment of Hon'ble Apex Court filed application for modification in the computation of income on 04.12.2014 to consider above mentioned TUF subsidy as capital receipt and exclude such subsidy while calculating taxable income. The AO vide order dated 26.03.2015 disregarded the letter submitted by the assessee by stating that the assessee should have filed the revised return for claiming the benefit. The ld. CIT(A) admitted the additional ground and after verifying the claim allowed the appeal of the assessee.

10. TUF subsidy is granted in order to encourage the upgradation of technology and size. So as to meet the global challenges, the Ministry of Textiles, Government of India had launched the Technology Upgradation Fund ('TUF') Scheme which is to upgrade the technology and hence considering the purpose test, the same needs to be treated as capital in nature. The subsidy is granted to improve technology upgradation in the context of liberalization of the industry and trade policy in order to improve competitiveness and long term viability. The benefits under the TUF are available for modernization and expansion of existing units and also for setting up of new units in various segments of textiles and jute industry. Taking into consideration, the decision of Hon'ble High Court of Punjab & Haryana in the case of CIT Vs. Sham Lal Bansal 200 Taxmann 14, judgment of Hon'ble Jammu & Kashmir High Court in the case Balaji Alloys Vs. CIT and taking into consideration the judgments of Hon'ble Apex Court in the case of Ponni Sugars & Chemicals Ltd. Vs. CIT 229 ITR 383 and Sahney Steel and Press

Works Ltd. Vs. CIT 228 ITR 253, we hereby hold that the assessee is eligible to treat the same as capital receipt.

11. In the result, the appeal of the Revenue is dismissed.
Order Pronounced in the Open Court on 01/06/2022.

Sd/- Sd/-

(Anubhav Sharma)
Judicial Member

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 01/06/2022
Subodh Kumar, Sr. PS

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

ASSISTANT REGISTRAR