आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'B' अहमदाबाद।

IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER

ITA No.452, 453, 454 and 455/Ahd/2022
Assessment Year :2012-13 to 2014-15 and 2017-18

Globe Textiles (India) P.Ltd. Plot No.38 to 41 Ahmedabad Apparel Park GIDC Khokhra Ahmedabad. PAN : AACCS 1339 K	Vs	The DCIT, Cir.1(1)(1) Ahmedabad.

(Applicant)		(Responent)

Assessee by	:	Shri Dhinal Shah, and Shri Bhadresh Gandhakwala, AR
Revenue by	:	Shri Sanjay Kumar, Sr.DR

सुनवाई की तारीख/**Date of Hearing : 17/01/2024**
घोषणा की तारीख /**Date of Pronouncement: 24/01/2024**

आदेश/O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

The above four appeals have been filed by the assessee against orders passed by the Ld.Commissioner of Income-Tax(Appeals),National Faceless Appeal Centre (NFAC), Delhi (hereinafter referred to as "ld.CIT(A)of even dated i.e. 18.10.2022under section 250(6) of the Income Tax Act, 1961 ("the Act" for short) pertaining to Assessment Years2012-13 to 2014-15 and 2017-18.

2. It was common ground that the issue involved in all the appeals was the same relating to disallowance of sales commission

expenses paid to agents outside India for non-deduction of tax at source on the same, in terms of provisions of section 40(a)(i) of the Act. It was contended that the disallowance was made in all the years impugned before us in identical facts and circumstances. Therefore, it was pleaded that all the appeals be heard together.

We accordingly heard the appeals together and they have been disposed off by this common consolidated order for the sake of convenience.

3. The facts relating to all the years involved before us are being mentioned and dealt with together.

4. The background of the case is that the assessee is engaged in the business of manufacturing and export of textile fabrics/fibre, yarn and other items. The assessee made payment of commission to non-residents in all the years impugned before us, without deducting any TDS on the same. The amounts so paid in each year is –

Asstt.Year	**Amount (Rs.)**
2012-13	Rs.1,73,87,137/-
2013-14	Rs,.2,55,67,592/-
2014-15	Rs.5,98,74,596/-
2017-18	Rs.5,93,23,704/-

5. The AO and the CIT(A)held that the impugned amount of commission paid to foreign agents was liable to TDS and on account of failure of the assessee to do so, all the above amounts of commission paid by the assessee was disallowed in terms of provisions of section 40(a)(ia) of the Act.

6. Aggrieved by the same, the assessee has raised identical ground before us in all the years impugned and for the sake of convenience, we reproduce the grounds raised by the assessee in Asst.Year 2012-13 in ITA No.452/Ahd/2022, which read as under:

> *"The learned CIT(A) has erred in confirming the addition under 'Section 40(a)(i) in relation to foreign commission of Rs. 1,73,87,137 on the ground that the assessee has not deducted TDS on such amount under Section 195 in as much as TDS is not required to be deducted on such payment as income is not chargeable to tax in India and therefore there is no requirement to deduct TDS on such payment and hence such foreign commission cannot be disallowed.*
>
> *The learned CIT(A) has erred in not considering the assessee's submission by letter dated 16-01-2021 giving detailed reasons for wrong addition of foreign commission.*
>
> *The learned CIT(A) has erred in not granting opportunity to make submission through Video Conferencing facility and thereby not followed principles of natural justice and guidelines issued by CBDT."*

7. We have heard both the parties and have also gone through the orders of the AO as well as the ld.CIT(A).

8. The finding of the ld.CIT(A) while confirming the disallowance of commission expenses is identically worded in all years impugned before us, and for the sake of convenience, we reproduce the finding in Asst.Year 2012-13 from para 6.5 to 6.13 of the order as under:

> *"6.5 I have seen the assessment order and the submissions of the appellant. The appellant has given documentary evidences like :*
>
> *[a] Export Invoice No.*
> *[b] Name of the foreign customer ' -*
> *[c] Country of the foreign customer*
> *[d] Date of export invoice.*
> *[e] Bill amount in US$*
> *[h] Percentage of commission.*
> *[g] Commission in US$*
> *[h] Exchange rate*
> *[i] Commission amount in Indian Rupees.*
> *[j] Name of the foreign agent.*
> *[k] country to which he belongs to*

6.6 From the above, it is seen that the assessee has provided documents which are related to business activities pertaining to the appellant and not of the foreign agent. No document relating to agent to whom commission has been paid has been produced like the ITR of foreign agent showing taxability of the commission income in his country.

6.7 The assessee has also not explained the specific details/specifications of the material exported through each agent and the evidence to the fact that what was the procedure to execute the Agreements executed between the Company and the foreign commission agents. Further, the document showing that the commission paid to foreign agents have been charged to tax in their respective countries has not been provided closing the argument that income is not received or deemed to be received in India as well as accrues or arises or is deemed to accrue or arise in India.

6.8 Specifically, the following were not produced by the appellant during the course of the appellate proceedings.

(a) Nature of service rendered by the subsidiary company abroad.

(b) Copy of agreement/work order with description of service rendered.

(c) Details of bank advice and e-mail correspondence in connection with the service provided.

(d) DTAA between India and the country where material was exported

(e) Copy of income tax return of the relevant period of foreign agents to clarify the issue

6.9 Section 195 of the IT Act requires any person to deduct IDS before making payments to a non-resident if the income of such non-resident is chargeable to tax in India. Once the payment in question is commission then the provisions of Section 40(a)(i) of the IT Act are applicable only if such sum is chargeable to tax under IT Act. Commission paid to non-resident outside India for the services rendered outside lndia will not fall in the category of the income received or deemed to be received in India as well as accrues or arises or is deemed to accrue or arise in India.

6.10 In the present case the appellant could not prove that the commission paid to persons were foreign residents as the agreement with foreign agents mentions the word agent and not foreign agent.

6.11 The appellant has also not explained the process of order procurement through agents which is prime to show whether there is any business connection in India or not. It has also not been exhibited by the appellant that the commission has been shown by the agents in their foreign income tax return. Hence the amount paid

by the assessee is chargeable to- tax in India and the assessee is liable to deduct TDS and consequently the provisions of Section 40(a)(i) of the IT Act could be invoked for making the disallowance.

6.12 In the present case it is not proved from the material submitted by the appellant that the commission has been paid to non-resident outside India for the services rendered outside India will fall in the category of the income received or deemed to be received in India as well as accrues or arises or is deemed to accrue or arise in India.

6.13 Thus, insufficient documentary evidence has not been able to prove that the payment of sales commission is exempt from TDS, making payment chargeable to tax under Section 195(1) of the IT Act and the provisions of Section 40(a)(i) has been rightly applied.

Hence, the action of the A.O is correct and needs no interference."

9. Perusal of the above would reveal that, broadly the reasons for confirming the disallowance of commission expenditure by the ld.CIT(A) was that the assessee was unable to prove that the commission so paid was for services rendered outside India. Para-6.12 of the order of the ld.CIT(A) brings out the above facts, wherein he noted that the assessee had been unable to prove with evidence that the commission had been paid to non-residents for services rendered outside India so as to take it outside the purview of section 40(a)(ia) of the Act.

10. During the course of hearing before us, the ld.counsel for the assessee drew our attention to the decision of Hon'ble Apex Court in the case of CIT Vs. Toshoku Lld., (1980) 125 ITR 525 (SC) wherein the Hon'ble Apex Court had settled the proposition of law with regard to the issue of chargeability to tax of commission paid to foreign agents ,in which situation they would be treated as not accrued or arising in India. Our attention was drawn to page no.7 of the order pointing therefrom that Hon'ble Apex Court had categorically held that where the services on account of which the commission was earned, were not rendered in India, the commission cannot be deemed to have accrued or arisen in India. The relevant

portion of the judgment of the Hon'ble Apex Court is reproduced as under:

> *"The second aspect of the same question is whether the commission amounts credited in the books of the statutory agent can be treated as incomes accrued, arisen, or deemed to have accrued or arisen in India to the non-resident assessees during the relevant year. This takes us to s. 9 of the Act. It is urged that the commission amounts should be treated as incomes deemed to have accrued or arisen in India as they, according to the department, had either accrued or arisen through and from the business connection in India that existed between the non-resident assessees and the statutory agent. This contention overlooks the effect of cl. (a) of the Explanation to cl. (i) of sub-s. (1) of s. 9 of the Act which provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under that clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. If all such operations are carried out in India, the entire income accruing therefrom shall be deemed to have accrued in India. If, however, all the operations are not carried out in the taxable territories, the profits and gains of business deemed to accrue in India through and from business connection in India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in the taxable territories. If no operations of business are carried out in the taxable territories, it follows that the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India (See CIT v. R.D. Aggarwal and Co. [1965] 56 ITR 20 (SC) and Carborundum Co. v. CIT [1977] 108 ITR 335 (SC) which are decided on the basis of s. 42 of the Indian I.T. Act, 1922, which corresponds to s. 9(1)(i) of the Act).*
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> *In the instant case, the non-resident assessees did not carry on any business operations 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 be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by cl. (a) of the Explanation to s. 9(1)(i) of the Act. The commission amounts which were earned by the non-resident assessees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the department."*

11. We find that even the ld.CIT(A) has noted this settled proposition of law. But as per the ld.CIT(A) the assessee has not demonstrated rendering of services by the commission-agents outside India. In fact, as per the ld.CIT(A) the assessee has not submitted any evidence to demonstrate the rendering of any services of the agents.

12. Before us, the ld.counsel for the assessee pointed out that this finding of the ld.CIT(A) is incorrect on facts. He contended that during appellate proceedings, the assessee had submitted all the documentary evidences to prove that the services by these foreign agents were all rendered outside India. He contended that copy of the agreement with the commission agents were filed to the ld.CIT(A) pointing out there from that their scope of work was to procure sale orders for the assessee from the territories outside India. He further pointed out that copies of invoices of sale bills made in the territories of these agents on which commission paid to them was also filed to the ld.CIT(A). He further pointed out that even a certificate from a Chartered Accountant was filed to the ld.CIT(A) in form No.15CB, certifying the fact that the commission paid to the foreign agents was for services rendered outside India. In this regard, he drewour attentionto the copy of the agreement with respect to one of the agents, placed before us at Page Pg. No.39 to 41 specifically pointingout para 4.1 page no.41 wherein the scope of the agents workwas enumerated therein. Our attention as also drawn to the copies of invoices, which included commission payments made to the agents for sales made in their territory and placed before us at page no.368 to 370 of the PB. Our attention was also drawn to copy of Form No.15CB placed before us at PB Page no.354. Attention was also drawn to the copies of invoices raised by these foreign agents and also certificate furnished by them stating that they had no place of business in India, copy of each certificate was placed before in PB Page nos.44,48, 49, 53 and 55. The ld.counsel for the assessee further pointed out that all these documents were filed as additional evidences before the ld.CIT(A) who had sought report from the AO on the same. In this regard, our attention as drawn to the remand report of the AO placed before us at PB Page no.334. Our attention

was drawn to para-7. The ld.counsel for the assessee pointed out that the AO acknowledged the filing of the following documents by the assessee in relation to the commission paid to the foreign agents being agreement executed with them, certificate of service registration of the foreign agents in their countries, and certificate furnished by them to the effect that they had no business connection in India, and bills/debit notes raised by the agents, as also Form NO.15CB furnished by the CA. He further pointed out that even the AO acknowledged the fact that agreement mentioned that all the sale orders in the territories awarded to the agents was to be procured and assigned to the agents for payment of commission to them. Our attention as drew attention to para-5 to 7 of the remand report of the AO, which reads as under:

> *5. The appellant is producing now following as additional evidences:*
>
> *i. Agreement executed between the appellant company and the foreign commission agent.*
>
> *ii. Certificate of registration for the foreign commission agents in their respective countries.*
>
> *iii. Undertaking/certificates by the foreign commission agents to the effect that t icy do not have any business connection or permanent establishment in India, their country of origin etc.*
>
> *iv. bills, debit notes raised by the overseas agent on the appellant, form No 15 CB as per Rule 37 BB of the IT Rules.*
>
> *6. Appellant has further stated that these all information was lying with the Marketing department of the appellant, and hence could not be submitted during the course of assessment proceedings as the Finance and Accounts Department of appellant was not aware about such documents lying in the Marketing Department of the company. This statement of appellant is flimsy. All the records and documents which the appellant is now putting on record were lying with the appellant itself as stated. Therefore, it was nothing but mere abstinence of not placing these entire set of documents at the time of assessment proceedings. Further, placing additional evidences is not going to make any material difference when the nature of addition in the assessment order u/s 143(3) vide dated 05.03.2015 is entirely on the ground that TDS has not being deducted at the time of payments to foreign commission agents.*

> *7. Besides, the at page no 8, the additional evidence produced by the appellant is actually a copy of agreement between the appellant and one of the foreign commission agents i.e. M/s Euro Asia Representatives No.10 UBI Crescent, Hex 03-25, UBI Tech park, Lobby B, Singapore 408564. The clause 6(iii) of the' agreement says that "It shall not entertain direct orders from the territories assigned to the agent and in case any orders are received by it the same shall be passed on to the agent and they will be paid commission up to 7% on such orders."*

13. Referring to the above, the ld.counsel for the assessee contended that evidently all possible evidences to prove that the services rendered by the foreign agents outside India, for which the commission was paid to them, were filed and in accordance with the decision of Hon'ble Apex Court in Toshoku Ltd. (supra), there was no occasion to treat the commission income so earned by the foreign agents as accruing or arising in India, and therefore, no liability of the assessee to deduct any TDS on the same; that accordingly, there was no occasion for making any disallowance of said commission expenses under section 40(a)(ia) of the Act. The ld.counsel for the assessee therefore pleaded that the disallowance so made in all the years impugned before us be deleted.

14. The ld.DR on the other hand, was unable to controvert the factual contentions made by the ld.counsel for the assessee before us. He heavily relied on the order of the ld.CIT(A) pointing out that the assessee was unable to prove that it had been charged to tax with respect to the commission income in the country of its jurisdiction.

15. Considering the factual contentions made by the ld.counsel for the assessee before us, supported with the documentary evidences referred to before us, we find that the assessee had sufficiently demonstrated that services rendered by the foreign agents were all outside India for procuring the sale orders for the assessee with the agreement clearly pointing out that foreign agents required to

procure sales from the respective territories outside India for the assessee. The certificates furnished by these agents demonstrated that they had no place of business in India and invoices of exports, as also invoices raised by the commission agents sufficiently proved that they had paid commission for the export orders procured by them for the assessee. Thus, all the documentary evidences, placed before us and noted by us, have been sufficiently proved, we hold that the agents were remunerated by way of commission for procuring sale orders for the assessee outside India; that there is no evidence on record to show that any services by these agents was rendered in India.

16. Considering the fact as noted by us and applying proposition of law laid down by the Hon'ble Apex Court in the case of Toshoku Ltd. (supra), the commission income earned by such agents cannot be termed to have incurred or arisen in India, and therefore, was not taxable in India. Therefore, we completely agree with the ld.counsel for the assessee that on such circumstances, therefore, there was no liability on the assessee to deduct any TDS of such commission income. The disallowances therefore made in all the impugned years before us, are uncalled for we hold, and are directed to be deleted.

17. In the result, all the appeals of the assessee are allowed.

Order pronounced in the Court on 24th January, 2024 at Ahmedabad.

Sd/-	**Sd/-**
(T.R. SENTHIL KUMAR)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad,dated 24 /01/2024

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