IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SHRI KESHAV DUBEY, JUDICIAL MEMBER

ITA No. 1129/Bang/2023
Assessment Year : 2011-12

The Income Tax Officer, Ward – 2(1)(1), Bangalore.	**Vs.**	M/s. G.Tex Inc., No. 19, Lakshmi Sadan, 2nd Cross, Nehru Nagar, Sheshadripuram, Bangalore – 560 020. **PAN: AABFG3420D**
APPELLANT		**RESPONDENT**

Assessee by	**:**	Shri Hemanth, CA
Revenue by	**:**	Shri V. Parithivel, JCIT-DR

Date of Hearing	**:**	18-04-2024
Date of Pronouncement	**:**	26-06-2024

ORDER

PER KESHAV DUBEY, JUDICIAL MEMBER

This appeal at the instance of the revenue is directed against the CIT(A)/NFAC order dated 08.11.2023 vide DIN & Order No. ITBA/NFAC/S/250/2023-24/1057815452(1) passed u/s. 250 of the I. Tax Act, 1961 for A.Y. 2011-12.

2. The revenue has raised the following grounds-

> *"1. On facts and circumstances of the case, the Ld.CIT(A) erred in allowing the appeal of the assessee without accepting the fact that assessee has claimed the expenses of Rs.3,00,25,255/- under the head payment of overseas commission' in his Profit & loss A/c without having made any actual payments.*
>
> *2. On facts and circumstances of the case, the LdCIT(A) erred in accepting the fact that the assessee has devised an arrangement to avoid payment of taxes."*

3. The brief facts of the case are that the assessee filed return of income for the A.Y. 2011-12 on 27.09.2011 declaring total income of Rs. Nil. Thereafter the assessment was completed u/s. 143(3) of the IT Act, 1961 on 07.08.2013. Later on, the Ld.AO on further verification of profit and loss account, noticed that a sum of Rs.3,00,25,255/- was debited as overseas commission on which TDS as per section 195(1) was not deducted & deposited by the assessee and therefore the Ld.AO was of the view that this expenditure required to be disallowed u/s. 40(a)(i). Thereafter, after issuing Notices U/s 148 as well as notices U/s 142(1) r.w.s 129 of the I. Tax Act, 1961, the Ld.AO passed the assessment order u/s. 143(3) r.w.s 148 of the IT Act, 1961 dated 31.12.2016 by holding that as the assessee has paid an overseas commission of Rs.3,00,25,255/- during the Financial Year relevant to Assessment Year 2011-12 without compliance of the provisions of section 195(1) of the IT Act, 1961 and therefore the expenditure of Rs.3,00,25,255/- incurred towards the payment of overseas commission was disallowed as per the provisions of section 40(a)(i) of the Act and brought to tax accordingly.

4. Aggrieved by the assessment completed u/s. 143(3) r.w.s 148 of the IT Act, 1961, the assessee preferred an appeal before the Ld.CIT(A). The Ld.CIT(A) relying the judgment of Hon'ble Apex Court in the case of Commissioner of Income Tax vs. Thoshoku Ltd, Equivalent citation: 1981 AIR 148, 1981, SCR (1) 587 as well as following few Tribunal decisions concluded that the assessee paid commission to the foreign agent is not the income chargeable to tax in India and once an income is not chargeable to tax in India, then the question of deducting TDS under the provision of section 195 of the Act does not arise and accordingly, allowed the appeal of assessee.

5. Aggrieved by the order of Ld.CIT(A), the revenue has filed the present appeal before the Tribunal.

6. The solitary issue that is raised whether the Ld.CIT(A) is justified in allowing the appeal of the assessee without accepting the fact that assessee has claimed the expenses of Rs.3,00,25,255/- under the head payment of overseas commission in his profit and loss account without having made any actual payments & even without deducting Tax at Source U/s 195(1) of the Act which is nothing but an arrangement to avoid payment of taxes.

7. Before us, the Ld.AR supported the order of the first appellate authority and submitted that in the original assessment proceeding, the Ld.AO has duly verified the profit and loss account and allowed the overseas commission expenses of

Rs.3,00,25,255/- but on the change of opinion, the Ld.AO initiated the proceeding u/s. 148 of the IT Act which is not permissible under the law. Further, the Ld.AR of the assessee vehemently argued that since the commission to the foreign agent is not the income chargeable to tax in India, then the question of deducting TDS under the provisions of section 195 of the IT Act does not arise. Further, the Ld.AR in support of his claim produced paper book containing 24 pages enclosing therein the copies of the following documents during the course of hearing before us.

a) Memo for Production of Documents
b) Copy of the acknowledgment downloaded from the income tax e-filing portal for having been submitted the documents and judgments before the Learned Commissioner Appeals
c) Sample copies of the purchase order received through email.
d) List depicting the details of overseas commissions
e) Sample copies of export invoices, along with shipping bill for export and Bank Certificate for export and realisation.

8. Further, the Ld.AR of the assessee also submitted the memo for production of documents containing 792 pages which were submitted before the National Faceless Appeal Centre during the first appeal proceedings. The Ld. DR on the other hand, vehemently submitted that no agreement between the agent and the assessee were produced either before the assessing authority or at the first appellate stage. Further the Ld.DR also submitted that as per the provision of section 9(1)(i) of the Act, all income accruing or arising, whether directly or indirectly through or from any business connection in India, the income is said to be

deemed to accrue or arise in India. Accordingly, the Ld.AO has rightly disallowed the overseas commission of Rs.3,00,25,255/- as there was non-compliance of the provisions of section 195(1) of the Act and accordingly disallowed the payment of overseas commission as per the provisions of section 40(a)(i) of the IT Act, 1961.

9. We have heard the rival submissions and perused the material available on record.

10. On perusal of the record submitted by the AR of the Assessee we find that the assessee had made payment to overseas commission agents amounting to Rs.3,00,25,255/- which were in the nature of commission billed along with the garments exported from India . We also find that these commissions were not paid by the appellant company directly to the agent but instead paid by the customers / purchasers of the appellant company outside India. The overseas commission agents are non-resident and also do not have any permanent establishments (PE) or dependent personal agencies in India. The Ld.AO also could not bring any material on record that the services for which the commission is paid or rendered in India or the overseas commission agents having any permanent establishments (PEs) in India. Therefore we are of the opinion that as the overseas commission agents are non-residents and they do not have PE in India and also the services are not rendered in India, the commission income in the hands of the overseas commission agents is not chargeable to tax in India. Once an income is not

chargeable to tax in India, the question of deducting TDS under the provisions of section 195 of the IT Act does not arise. We are also of the opinion that the principles laid down by Hon'ble Apex Court in the case of Commissioner of Income Tax vs. Thoshoku Ltd. reported in 125 ITR 525 (SC) is squarely applicable in the case of the Appellant. The Hon'ble Apex Court has held that the commission amount which were earned by the non-resident assessee for services rendered outside India cannot, therefore be deemed to be income which have either accrued or arisen in India. Further, relying on the decision in the case of DCIT, Cir - 2(1)(1), Ahmedabad. Vs. M/s. Gujarat Microwax Pvt. Ltd., in the ITA No 2503/Ahd/2016, the Hon'ble ITAT Ahmedabad has held that "the Commission income in the hands of foreign agent is not chargeable to tax in India in the given facts & circumstances. Once an income is not chargeable to tax in India then the question of deducting TDS under the provision of section 195 of the Act does not arise".

11. In the case of ITO, Ward-26(1), New Delhi Vs. Kulbeer Singh, H-432, Vikas Puri, New Delhi in the ITA No.5204/De1/2014. In the page no 35-37 vide paragraph no 7 and 8 the Hon'ble ITAT, Delhi has held that "In the present case, the commission is paid to the two parties for export sales. The foreign agents are non - resident and the services have been rendered undisputedly by them outside India. The commission payment was also supported by the copy of the agreement and confirmation of commission paid. The copy of the passport of the commission agents were also submitted along with the party wise and invoice wise details

resulting into payment of commission. Therefore, it is not the case that the payment has been made to on identified parties. Further, the revenue has not brought any material on record to show that either of these commission agents has rendered any of their services in India and the payments have been made to them in India. In view of the finding of the learned Commissioner appeals, we are of the opinion that the income of the foreign agents is not chargeable to tax in India, as they do not have any "business connection" as per provisions of section 9 of the income tax act. In absence of any business connection, the income is not chargeable to tax under section 5 of the income tax act of the non-resident foreign agents. Therefore, the natural consequences is that on such payment assessee is not obliged to deduct tax at source under section 195 of the income tax act. The learned Commissioner of income tax appeals has relied upon the decision of the jurisdictional High Court in 343 ITR 366 wherein it has been held that when a non-resident agent operates outside the country no part of his income arises in India and since payment is remitted directly abroad and merely because an entry in the books of accounts of the assessee is made, it did not mean that non-resident has received any payment in India. Therefore, no business connection is established and income tax was not deductible at source and hence no disallowance is called for. In view of this, we do not find any infirmity in the order of the learned first appellate authority as it followed the decision of the jurisdictional High Court. Therefore, we dismiss the appeal of the learned assessing officer and confirm the finding of the Commissioner appeals. Accordingly, we direct learned assessing

officer to delete the disallowance of Rs. 4,41,40,860/- on account of commission paid to foreign agent who did not render any services in India."

12. Similar view has been taken by the Hon'ble ITAT, Kolkata in the case of M/s Bengal Tea & Fabrics Ltd., Vs. DCIT, Circle-4, in the ITA No.1667/KOL/2016.

13. Therefore relying upon the above decisions we are of the opinion that as the appellant has never made payment to the commission agent directly and in fact the commission amount were paid by the Foreign buyer / purchaser on behalf of the appellant company and even commission agents are different and also belongs to various countries without having any PE in India, the provision of TDS itself will not attract in the appellant case. In view of the aboe, we do not find any infirmity in the decision taken by the Ld.CIT(A) in deleting the additions. Accordingly, we confirm his order.

In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 26th June, 2024.

Sd/-	Sd/-
(CHANDRA POOJARI)	(KESHAV DUBEY)
Accountant Member	Judicial Member

Bangalore,
Dated, the 26th June, 2024.
/MS /

Copy to:

1. Appellant	2. Respondent
3. CIT	4. DR, ITAT, Bangalore
5. Guard file	6. CIT(A)

By order

Assistant Registrar,
ITAT, Bangalore