

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI**

**Before Sh. G. C. Gupta, Hon'ble Vice President
And
Sh. O.P.Kant, Accountant Member**

**ITA No.6229/Del./2012
Asstt. Year : 2009-10**

DCIT, Circle-8(1), New Delhi	Vs	Sigma Corporation India Ltd., R-561, new Rajinder Nagar, Shankar Road, New Delhi PAN: AABCS8062L
(APPELLANT)		(RESPONDENT)

**Appellant by : Sh. Sujit Kumar, Sr. DR
Respondent by : Sh. Baljeet Singh, CA**

Date of Hearing : 30.09.2015	Date of Pronouncement : 14.10.2015
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ORDER

PER O.P.KANT, AM.

This appeal of the Revenue emanates from the order of learned Commissioner of Income-tax (Appeals)-XI, New Delhi dated 03.09.2012 for Assessment Year 2009-10. The grounds of appeal raised by the Revenue are as under:-

- "1. The Id CIT(A) erred on facts and in law in deleting the addition of Rs.24,00,000/- made by the AO. under section 40A(2)(b) of the Income tax Act, 1961.*
- 2. The Id CIT(A) erred on facts and in law in deleting the addition of Rs.15,00,149/- made by the AO under section 40(a)(ia) on account of commission paid of foreign agents."*

2. The facts in brief as culled out from the orders of lower authorities are that the assessee was engaged in the manufacturing of auto rubber parts in the previous year relevant to assessment year. The assessee filed return of income declaring total income of Rs.68,96,250/- on 30.09.2009. The case was selected for scrutiny. In

the course of scrutiny, the learned Assessing Officer noticed that Mr. Preetpal Singh, who was the person specified u/s 40A(2)(b) of the Income Tax Act, 1961 (in short 'Act'), was paid a remuneration of Rs.48 lacs for responsibility of alleged management of day to day affairs of every kind, without any appointment letter or copy of contract containing terms of contract and payment schedule etc. or documentary evidences in support of duties, work or responsibilities assigned. The learned Assessing Officer also observed that there was no improvement in the financial position of the company after joining of Mr. Preetpal Singh. In view of above observations, the learned Assessing Officer disallowed 50% of remuneration paid to Mr. Preetpal Singh in terms of section 40A(2)(b) of the Act, being excessive and unreasonable expenditure. The learned Assessing Officer also observed that the assessee had paid commission Rs.15,00,149/- to foreign selling agents but no tax was deducted by the assessee on such payment. The learned Assessing Officer was of view that the services rendered by the non-resident selling agents falls under the category of 'Fee for Technical Services' (FTS) and according to the circular No.7 dated 22-10-2009, the assessee was liable for deducting tax at source in terms of section 195 of the Act. Therefore, the learned Assessing Officer disallowed the commission amount paid in terms of section 40(a)(ia) of the Act in the assessment order passed u/s 143(3) of the Act on 19.10.2011.

3. Aggrieved, the assessee filed an appeal before the learned Commissioner of Income-tax (Appeals). Before the learned Commissioner of Income-tax (Appeals), the assessee made detailed submission in respect of educational qualification and experience of Mr. Preetpal Singh. The assessee also forwarded legal arguments that the learned Assessing Officer had not obtained any information

as to what would be the fair market salary/remuneration payable in similar position to any other person and therefore the section 40A(2)(b) of the Act was applied arbitrarily. The assessee also relied on the various case laws in support of its contention. In respect of disallowance made u/s 40(a)(ia) of the Act, the assessee submitted that section 9 of the Act was not applicable in the facts of the case, therefore commission paid to foreign selling agents was not liable for deduction and hence disallowance made u/s 40(a) (ia) of the Act was not proper. The learned Commissioner of Income-tax (Appeals) after considering the copy offer of Swastik Outsourcing to Mr. Preetpal Singh and other submissions of the assessee and various case laws, decided the first issue in favour of the assessee. On second issue, the learned Commissioner of Income-tax (appeals) held that the commission did not fall in the category of Fees for Technical Services (FTS) as the person to whom payments made, were merely acted as selling agent for procuring sale orders for the assessee and ensuring payments from the buyers. He further held that non-residents did not carry out any business operations in the taxable territory of India and therefore the section 9(1)(i) of the Act was not applicable in case of commission paid by the assessee. He also held that the circular No.7 of 2009 was not applicable in the facts of the assessee and therefore, the disallowance cannot be made u/s 40(a)(ia) of the Act invoking section 195 of the Act. The relevant finding of the learned Commissioner of Income-tax (Appeals) is reproduced as under:

“The AO quoted circular 7 of 2009 while making the addition and disallowed the claim of the appellant. Circular No.7 of 2009 was issued on 22/10/09, therefore it will not be applicable to AY 09-10.

As per the decision of the ITAT Lucknow Bench in the case of CIT vs Sanjiv Gupta, "Circular No.7 will be operative only from 22/10/09 and not prior to that date."

In view of circular No.786 of 2000 and the decisions cited by the appellant, I am in agreement with the appellant that tax shall not be deducted at source from the payment of commission. The addition of Rs.15,00,149/- is therefore deleted. This ground of appeal is ruled in favour of the appellant."

4. Aggrieved with the action of the learned Commissioner of Income-tax (Appeals), the Revenue is before us.

5. At the time of hearing the learned Senior Departmental Representative (in short Sr. DR) relied on the order of the learned Assessing Officer and submitted that this is first year when Mr. Preetpal Singh has joined the company and in the history of the assessee no remuneration of such a huge amount was paid. Further, he submitted that on enquiry by the learned Assessing Officer, in respect of the work performed by Mr. Preetpal Singh, the reply submitted by the assessee shows that he was solely responsible for all the activities of the assessee, which was not possible for any human being. The Id. Sr. DR also submitted that the assessee has failed to explain that was hiring of Mr. Preetpal Singh a need of the business of the assessee and was any benefit accrued to the business of the assessee by inducting Mr. Preetpal Singh in the assessee company. Whereas, on the other hand, the learned Authorised Representative (In short 'AR') submitted that Mr. Preetpal Singh was graduate in engineering and master in business management from reputed institutions from USA, and has provided a direction to the company and the company has been benefited in subsequent years. He further argued that the learned Assessing Officer has not made any proper comparison in respect of the salary paid to Mr. Preetpal Singh. The Id. AR then reiterated his submission

made before of the learned Commissioner of Income-tax (appeals) and the relied on judgements cited before him. The Id AR also submitted recent decision of ITAT Delhi 'G' Bench in the case of DCIT, Circle 9(1), New Delhi Vs. Spark Hotels (P) Ltd reported in 22 taxman.com 257. In rejoinder, the Id. Sr DR submitted that amount of Rs.48 lakhs paid was excessive, as compared to amount of Rs. 10.60 lakhs paid by another sister concern of the assessee as salary/remuneration to Mr.Preetpal Singh as against Rs. 48.00 lakhs paid by the assessee.

6.1 We have heard rival the submission and perused the material on record. In the decision of the ITAT in DCIT Vs. Spark Hotels (P) Ltd (supra) , it has been held as under:

"6.2 A mere glance at the aforesaid provision reveals that the expenditure mentioned therein is in relation to any person referred to in clause (b) of the subsection and the expenditure has to be considered in relation to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to the assessee therefrom. Hon'ble Gujarat High Court observed in Coronation Flour Mills v. Asstt. CIT [2010] 188 Taxman 257 that in relation to the disallowance under the provisions of section 40A(2)(a) of the Act, a plain reading of the provision reveals that where an assessee incurs any expenditure in respect of which payment is required to be made or has been made to any person referred to in clause (b) of section 40A(2) of the Act and the AO is of the opinion that such expenditure is excessive or unreasonable having regard to (a) fair market value of the goods, services or facilities for which the payment is made or (b) the legitimate needs of the business of the assessee; or (c) the benefits derived by or accruing to the assessee on receipt of such goods, services or facilities, then the AO shall not allow as a deduction so much of the expenditure as is so considered by the AO to be excessive or unreasonable. Therefore, it becomes apparent that the AO is required to record a finding as to whether the expenditure is excessive or unreasonable in relation to any one of the three requirements prescribed, which are independent and alternative to each other. All the three

requirements need not exist simultaneously. In a given case, if any one condition is shown to be satisfied the provision can be invoked and applied, if the facts so warrant. Thus, only so much of the expenses, if paid to a person referred to in clause (b), are allowable which are found to be not excessive and unreasonable and the excessive or unreasonable portion has to be disallowed. It is well settled that the provisions of section 40A(2)(a) of the Act cannot have any application unless it is first concluded that the expenditure was excessive or unreasonable, as held in the case of Upper India Publishing House (P) Ltd. Vs. CIT (1979) 117 ITR 569/1 Taxman 365 (SC). In the instant case, there is nothing to suggest that the AO found the payment of remuneration to director excessive having regard to either (a) fair market value of the service or facilities; or (b) the legitimate needs of the business of the assessee; or (c) the benefits derived by or accruing to the assessee on receipt of such services or facilities.

6.2. While delivering the decision in above case, the Tribunal has considered almost all the decisions cited by the assessee in his submission. Therefore, we need to examine, whether the assessee qualify the tests in respect of remuneration paid to Mr. Preetpal Singh, as laid down in the decision of Tribunal In Spark Hotels (p) Ltd (supra).

6.3. In the instant case, Mr. Preetpal Singh is relative in terms of section 40A(2)(b) the AO and Payment of Rs. 48 lakhs has been made by the assessee. On perusal of the copy of the biodata of Mr. Preetpalsingh, which is placed at page 13 of the assessee's paper book, we find that Mr. Preetpal singh has completed his degree of Bachelor of Engineering in the period from the year 1997 to 2000, from 'Cleaveland State University' and during this period, he has also done summer training for 2-3 months as intern either in the assessee company or other group companies. Further, in the period from 2001 to 2003, he has done Master in Business management (MBA) from 'Case Western Reserve University' with major in Marketing/ Finance'.

Alongwith his MBA, he has been worked as trainee in a company for 4 months. Thereafter, he has with the assessee company as vice president marketing. From the bio data, we find that Mr. Preetpal singh has neither obtained any special qualifications nor having any experience in the field of software etc., which were claimed before the Assessing Officer as part of responsibilities of Mr. Preetpal singh. We agree with the contention of the Id. Sr. Dr that before the Assessing Officer, the assessee has shown as such Mr. Preetpal singh was responsible for almost all day to day activities of the company, which is not possible for a human being the assessee. The assessee has failed to substantiate the work performed by Mr. Preetpal Singh. The Id. AR also could not controvert the argument of the Id. SR DR that the salary paid by the assessee company to Mr. Preetpal Singh for the post of Vice President Marketing was much higher than the salary paid by the sister concern of the assessee to him for the role of Director of that company. Thus, we find that payment of remuneration to Mr. Preetpal Singh was excessive having regard to the fair market value of services rendered by him. We also agree with the contention of the Id. Sr DR that the assessee failed to explain and substantiate the needs of the business of the assessee for hiring services of Mr. Peetpal Singh and the benefit accrued to the business of the assessee by inducting Mr. Peetpal Singh. The offer price in letter of 'Swastik Outsourcing', submitted by the assessee before the learned Commissioner of Income-tax is only an imaginary figure which never materialized. In our view, the assessee has failed in all tests laid down in decision of Spark Hotels (P) Ltd (Supra) with regard to remuneration paid to Mr. Preetpal Singh. In view of the facts and circumstances of the case and we are of the opinion that allowance of salary/ remuneration to Mr. Preetpal Singh restricted by the

Assessing officer to 50% of the amount paid is justified and therefore, the order that of passed by the learned Commissioner of Income-tax (Appeals) on this issue is reversed. Accordingly, the first ground of the Revenue is allowed.

7. As regards to ground No.2 the Id Sr. DR relied on the order of the learned Assessing Officer and submitted that the assessee has not complied with the provisions of section 195 of the Act and made remittance without deduction of tax at source. Further, he submitted that the CBDT Circular No.786 of 2000 was not applicable in the case of the assessee and therefore, the learned Assessing Officer has rightly disallowed the commission payment in absence of deduction of tax at source by the assessee. On the other hand, the Id AR of the assessee referred to copy of agreements with the foreign selling agents and submitted that those agents were located in foreign countries and they performed services outside India and therefore income has neither accrued or deemed to accrue in India as per the provision of section 9 of the Act. Further, he submitted that payments of commission have been made following due procedure laid down in Circular issued by the Reserve Bank of India. Further, he placed reliance on the judgement of the Supreme Court reported in 327 ITR 456 and submitted that the learned Commissioner of Income-tax (Appeals) has rightly deleted the addition made by the learned Assessing Officer. He also relied on the judicial pronouncements in the case of DCIT Vs. Eon Technology (P) Ltd. (2011) 11 Taxmann.com 53 (Delhi), A.B.Hotel Ltd. (Radisson Hotel) Vs. DCIT , (2008) 25 SOT 368 (Delhi).

8. We have heard rival submissions. The Id AR has successfully demonstrated that the selling agents were located outside India and service of procuring orders and following payment from buyers etc

was performed by them outside India. Once it is established that services are performed outside India, the provision of section 9 are not applicable in the case of foreign residents. The learned Commissioner of Income-tax (Appeals) has discussed the applicability of the circular of the CBDT and we are in agreement with the conclusion of the learned Commissioner of Income-tax (Appeals) on this issue.

9. In view of the well reasoned order of the learned Commissioner of Income-tax (Appeals) on this issue, and judgments relied upon by the Id AR, we are of the opinion that the assessee was not required to deduct tax at source on the payment made to foreign selling agents and therefore, we hold that no interference is required in the order of the learned Commissioner of Income-tax (Appeals) on this issue. Accordingly, this ground of the Revenue is dismissed.

10. In the result the appeal of the Revenue is partly allowed.

Order Pronounced in the Court on 14/10/2015.

-Sd/-

(G.C. Gupta)
VICE PRESIDENT
Dated:14/10/2015

-Sd/-

(O.P.Kant)
ACCOUNTANT MEMBER

Ajay
Copy forwarded to:

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

ASSISTANT REGISTRAR