IN THE INCOME TAX APPELLATE TRIBUNAL

"B" BENCH : BANGALORE

BEFORE SHRI A.K. GARODIA, ACCOUNTANT MEMBER

AND SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA Nos.442 to 444/Bang/2015
Assessment years : 2008-09 to 2010-11

M/s. Apsara Silks, No.46, 1st B Cross, Doresanipalya, Bannerghatta Road, Bengaluru – 560 076. **PAN: AACFA 3739N**	Vs.	The Income Tax Officer, International Taxation, Ward 1(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Ashok Kulkarni, Advocate
Respondent by	:	Shri K.C. Das, Jt. CIT(DR)

Date of hearing	:	24.04.2016
Date of Pronouncement	:	29.04.2016

O R D E R

Per A.K. Garodia, Accountant Member

All these 3 appeals are filed by the assessee which are directed against the combined order of ld. CIT (Appeals)-12, Bengaluru dated 20.1.2015 for the assessment years 2008 - 09 to 2010 - 11. All these

appeals were heard together and are being disposed of by way of this common order for the sake of convenience.

2. Grounds raised in ITA No.442/Bang/2015 for A.Y. 2008-09 are as under:-

> "1. The order of the Commissioner of Income Tax (Appeals)-12, Bengaluru is opposed to law and facts of the case.
>
> 2. The Hon'ble Commissioner of Income Tax (Appeals) ought to have held that the provisions of Section 201(1) & 201(1A) are not applicable in the facts and circumstances of the case.
>
> 3. The Hon'ble Commissioner of Income Tax (Appeals) ought to have held that there was no statutory obligation on the appellant to deduct tax on the commission paid to the non-resident agents.
>
> 4. Alternatively and without prejudice, assuming there was a default on the part of the appellant the act of non-deduction is attributable to a bonafide error on the part of the appellant.
>
> 5. The Hon'ble Commissioner of Income Tax (Appeals) ought to have appreciated that the obligation to deduct tax u/s 195 arises only when the said payments made are "chargeable under the provisions of the IT Act.
>
> 6. Alternatively and without .prejudice the Hon'ble Commissioner of Income Tax (Appeals) was bound by the circulars issued by the Central Board of Direct Taxes as regards

the interpretation of Section 195 to the effect that when the payment is made to a non resident having no permanent establishment in India the provisions of Section 195 is not applicable.

7. The appellant craves for leave to add to, delete from or amend the ground of appeal."

3. The grounds raised in the remaining two appeals are identical and therefore, for the sake of brevity, these grounds are not reproduced.

4. First of all, the ld. AR of assessee brought to our attention to Para No.15 of the order passed by the Assessing Officer where he reproduced Explanation 2 to section 9(1)(i) of the I.T. Act and pointed out that this Explanation is applicable to those, who are having activities in India on behalf of non-resident. But in the present case, the agents being non-residents are acting outside India on behalf of assessee being resident in India and therefore, this Explanation 2 to section 9(1) (i) is not applicable in the present case. He also submitted that in the present case, the submissions made by the assessee before the ld. CIT(Appeals) are available on pages 13 to 18 of the Paperbook and as per the same, it could be seen that it is the submission of the assessee before the CIT(A) that even if the payment to the non-resident is liable to incidence of tax under the provisions of the Act and in the event of contrary provisions in the DTAA, then the said provisions of DTAA will prevail over the provisions of the Act, if the provisions of DTAA are more beneficial to the assessee

under sub-section (2) of section 90 of the I.T. Act. He also submitted that relevant provisions of the DTAA between India and State of Qatar are available at pages 20 to 39 of PB. In particular, our attention was drawn to page 25 of PB containing Article 7 of DTAA and it was pointed out that as per Article 7 of DTAA between India and Qatar, the profits of an enterprise of contracting State shall be chargeable only in that State, unless the enterprise carries on business in other contracting State through a Permanent Establishment (PE) situated therein. It was further submitted that it is nobody's case that the agents to whom commission was paid were having PE in India. It was also submitted that the relevant provisions of DTAA between India and Republic of South Africa are available at pages 40 to 61 of PB; between India and Kingdom of Spain at pages 62 to 87 of PB; between India and Govt. of USA at pages 88 to 115 of PB; between India and Singapore at pages 116 to 132 of PB; and between India and Govt. of Argentina Republic at pages 133 to 144 of PB. It was also submitted that in all these DTAAs, the provisions are same and therefore, the commission income earned by non-resident agents is not liable to tax in India and as a consequence, no TDS is deductible from such payment of commission u/s. 195 of the Act.

5. Regarding reliance placed by the ld. CIT (Appeals) on two decisions of AAR, it was submitted that the facts in those cases are different and therefore, these Rulings of AAR are not applicable to the present case. In particular, the ld. AR of assessee drew our attention to page 6 of Written

Submissions being reproduction of Ruling of AAR in the case of *Rajiv Malhotra, 284 ITR 564 (AAR)* and he pointed out that in this order, AAR has referred to its own another Ruling in *Ind. Telesoft P. Ltd., 267 ITR 725 (AAR)* and it is stated that in that case, agents were securing business from outside India and this Ruling was distinguished by AAR in the case of *Rajiv Malhotra (supra)* by stating that the facts in that case are different, because in that case, the non-resident agents secured business from persons abroad who are to be persuaded to book the space and participate in the exhibition and to pay charges therefor. It was submitted that in the present case, the facts are similar to the facts in the case of *Ind. Telesoft P. Ltd. (supra)* and this Ruling of AAR is in favour of assessee. It was submitted that the ld. CIT (Appeals) was not justified in following the Ruling of AAR in the case of *Rajiv Malhotra (supra)* and not following the Ruling in the case of *Ind. Telesoft P. Ltd. (supra)*.

6. Regarding another Ruling of AAR rendered in the case of *SKF. Boilers & Driers (P.) Ltd., 345 ITR 385 (AAR)*, the ld. AR of assessee submitted that in that case, benefit under the provisions of DTAA was not claimed by the assessee, whereas in the present case, the assessee is claiming benefit under DTAA and therefore, this Ruling is also not applicable in the present case.

7. The ld. DR supported the orders of revenue authorities.

8. We have considered the rival submissions. First of all, we will examine the validity of the action taken by the Assessing Officer. AO has proceeded on this basis that as per Explanation 2 to section 9(1) (i), business connection shall include any business activity which is carried out through a person acting on behalf of non-resident, as noted by AO in para 16 of his order. In the present case, the non-resident commission agent is carrying out business outside India on behalf of resident assessee and therefore, in our considered opinion, this Explanation 2 to section 9(1) (i) is not applicable in the present case.

9. Now, we will examine the applicability of DTAA between India and various countries i.e., Qatar, South Africa, Spain, USA, Singapore and Argentina. Article 7 in the DTAAs regarding business profits is similar in all these DTAAs and as per the same, profits of an enterprise of a contracting State shall be taxable only in that State, unless the enterprise carries on business in the other contracting States through a PE situated therein. Therefore, in the absence of a finding that commission agents are having PE in India as per Article 7 of DTAAs between India and these countries, the business profit of commission agents cannot be brought to tax in India and as per section 90(2), if DTAA is more beneficial than the domestic laws, then DTAA has to prevail.

10. In this view of the matter, the order of AO and CIT (Appeals) are not sustainable because in the facts of the present case and legal position as

discussed above, commission payment made by the assessee to these commission agents outside India for procuring export orders cannot be brought to tax in India and as a consequence, TDS is not deductible. We order accordingly.

11. In the result, all these appeals of assessee are allowed.

Pronounced in the open court on this 29th day of April, 2016.

Sd/-	Sd/-
(VIJAY PAL RAO)	(A.K. GARODIA)
Judicial Member	Accountant Member

Bangalore,

Dated, the 29th April, 2016.

/D S/

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.