IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C", NEW DELHI
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.5603/Del/2014
Assessment Year : 2010-11

Divya Creation, Plot No.97, NSEZ, Noida.	**Vs.**	ACIT, Circle- 2, Noida.
PAN : AADFD4879K		
(Appellant)		**(Respondent)**

Assessee by	**:**	Shri Piyush Kaushik, Adv.
Department by	**:**	Shri Arun Kumar Yadav, Sr.DR
Date of hearing	**:**	06-07-2017
Date of pronouncement	**:**	14-09-2017

O R D E R

PER R. K. PANDA, AM :

This appeal filed by the assessee is directed against the order dated 07.07.2014 of CIT(A), Noida relating to assessment year 2010-11.

2. Facts of the case, in brief, are that the assessee is a partnership firm engaged in the business of manufacturing and export of plain and studded Gold and Silver jewellery. It filed its return of income on 29.09.2010 declaring taxable income of Rs.2,83,03,490/-. During the course of assessment proceedings, the Assessing Officer observed that the assessee has debited expenses under the head "Foreign Agency Commission" amounting to Rs.62,12,609/-. The Assessing Officer asked the assessee to furnish the details regarding this commission expenses to which the assessee submitted that an

amount of Rs.4,60,523/- was paid to M/s TWC, 2 Route De Cillers Le Lac, Les Chauchets, Les Fins 25,500/-, France and Rs.57,52,086/- were paid to M/s Newtechno SA, Rue Des Fontaines 2 2087, Cornaux Ne, Switzerland as foreign agency commission for promoting the sale all over Europe. The assessee also furnished the copy of the agreement with the foreign commission agent.

3. The Assessing Officer noticed that the assessee has not deducted tax on such foreign agency commission as per the provision of section 195 of the I.T. Act. He, therefore, asked the assessee to explain as to why disallowance u/s 40a(i) should not be made in respect of such commission expenses as they come under the purview of section 195 of the I.T. Act.

4. The assessee submitted that the foreign agents appointed by the assessee firm provide services from their respective country and for the work done by them, payment of commission is directly remitted to them in their country. Since these agents operate outside India and they do not have any permanent establishment or business connection in India, no part of their income accrues or arises in India under the provisions of section 5(2) read with section 9(1) of the I.T. Act. Further, since the payment is directly remitted to these agents in their countries it cannot be held to have been received by or on behalf of the agents in India and hence these agents are not liable to income tax in India on the commission received by the, from the assessee firm.

5. It was submitted that whether tax at source has to be deducted on the payment to non-resident as per provision of section 195(1) of the I.T. Act, relevant section for consideration is section 5 read with section 9 of the I.T. Act. Section 5 defines the scope of total income according to which, income of a non-resident is taxed in India if it is received, accrued or arisen in India. Section 9 of the I.T. Act deals with the income that accrues or arises in India inter-alia it covers any income accruing or arising to a non-resident directly or indirectly through or from any business connection in India and any assets or source of income in India. The provisions of Explanation 2 to section 9(1)(vii) of the I.T. Act which defines the term of business connection was brought to the notice of the Assessing Officer. It was explained that the analysis of this Explanation clearly solves the issue in the present case that assessee firm is not liable to deduct tax at source since foreign agents neither have any business connection in India nor have any permanent establishment in India. It was submitted that non-resident foreign agent did not carry on any business operation in India (Taxable Territories). Only they acted as selling agents outside India. The commission amount which were earned by the non-resident agent for services rendered outside India could not be deemed to be the income accrue or arise to them India.

6. Referring to provision of section 195(1) of the I.T. Act it was argued that the person responsible for paying any sum to non-resident is liable to deduct tax

at source if the said sum is chargeable under the provisions of this Act. The expression "chargeable under the provisions of the Act" in section 195(1) of the I.T. Act shows that the remittance has got to be of a trading receipt, the whole or part of which is liable to tax in India. If tax is not so assessable, there is no question of tax at source being deducted.

7. However, the Assessing Officer was not satisfied with the explanation given by the assessee. He observed that the commission has been remitted to the foreign agent only after realisation of proceeds by the assessee from the customers solicited by the agents. Further, it is explicitly stated in point 4 of the agreement that in case of any losses/interest etc. being not paid by the customers on account of delay in payment, the same will be adjusted against commission earned by the agent. Further, point 5 of the agreement states that Mr. Alban Chaumet is personally acting as an agent of M/s Divya Creation. Therefore, he inferred that the income of foreign agent has a real and intimate connection with the income accruing to the assessee and this relationship amounts to a business connection through or from which income can be deemed to accrue or arise to the non-resident. Rejecting the various explanations given by the assessee and relying on the decision of the AAR in the case of SKF Boilers and Driers Pvt. Ltd. reported in 68 DTR 106 and the decision of AAR in the case of Rajiv Malhotra reported in 284 ITR 564., the Assessing Officer disallowed the

expenses debited under the head Foreign Commission amounting to Rs.62,12,609/- u/s 40a(i) of the I.T. Act.

8. In appeal, ld. CIT(A) distinguishing the various decisions cited before him upheld the action of the Assessing Officer.

9. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds of appeal :-

> *"1. That on the facts and circumstances of the case and in the Law, the lower authorities have grossly erred in holding that payment of agency commission of Rs. 62,12,609 outside India for promotion of export sales outside India is subject to tax withholding u/s 195.*
> *2. That on the facts and circumstances of the case and in the Law, the lower authorities have grossly erred in confirming disallowance of Rs. 62,12,609 on account of agency commission u/s 40(a)(i) on the premise that it was subject to the requirement of tax withholding u/s 195.*
> *3. That without prejudice to the foregoing grounds, the lower authorities have grossly failed to appreciate that section 40(a)(i) can be invoked only with respect to the amount payable as on the last day of previous year and not with respect to amount which has already been paid as per the mandate from Hon'ble Jurisdictional High Court (Allahabad High Court) & since admittedly in the present case the agency commission has been actually paid during the year therefore the same cannot be subject matter of disallowance u/s 40(a)(i).*
> *4. That without prejudice to the foregoing grounds and in the alternative the lower authorities have grossly erred in not allowing to the assessee the benefit of deduction u/s 10A on the enhanced amount of business income resulting from the aforesaid disallowance of agency commission.*
> *That the appellant craves leave to Add to and / or Amend, modify or withdraw the grounds outlined above before or at the time of hearing of the appeal."*

10. Ld. counsel for the assessee did not press ground no.3 for which ld. DR has no objection. Accordingly, the ground no.3 is dismissed as not pressed.

11. Ground no.4 is an alternate ground of ground no.3. Ld. counsel for the assessee did not press the same. Therefore, ground no.4 is also dismissed as not pressed.

12. So far as ground no.1 and 2 are concerned, ld. counsel for the assessee strongly challenged the order of the CIT(A). He submitted that the agents are based in Switzerland and France who have procured business for the assessee abroad. Referring to the decision of the Co-ordinate Bench of the Tribunal in the case of DCIT (International Taxation) vs. Welspun Corporation Ltd. reported in 77 taxmann.com 165, he submitted that the Tribunal in the said decision has held that the services of the nature rendered by non-resident commission agents cannot be treated as fees for technical services any way and the same is not chargeable to tax in the hands of the non-resident commission agent and consequently there is no requirement of tax withholding on the same. He submitted that the Tribunal in the said decision has held that two decisions of AAR relied on by the Assessing Officer and the CIT(A) are neither biding precedents for ITAT nor they have laid down the correct position of law.

13. Referring to the decision of Hon'ble Allahabad High Court, which is the jurisdictional High Court in the case of the assessee, he submitted that Hon'ble High Court in the case of CIT vs. Model Exims reported in 363 ITR 66 has held that the agreement with non-resident commission agents for procuring orders does not involve rendering any managerial or technical services and consequently no tax withholding required on payment of said commission. The Hon'ble High Court has further held in the said decision that Explanation to

section 9(2) inserted with retrospective effect by Finance Act 2010 does not apply to such non-resident commission agents.

14. Referring to the decision of the Hon'ble Supreme Court in the case of CIT vs. Toshoku Ltd. reported in 125 ITR 525, he submitted that the Hon'ble Supreme Court in the said decision has held that the non-resident commission agents based outside India rendering services of procuring orders cannot be said to have a business connection in India and the commission payments to them cannot be said to have been either accrued or arisen in India.

15. Referring to the decisions of Hon'ble Madras High Court in the cases of CIT vs. Kikani Exports Pvt. Ltd. reported in 369 ITR 96 and CIT vs. Faizan Shoes Pvt. Ltd. reported in 367 ITR 155, he submitted that the Hon'ble High Court in the said decisions has held that the services rendered by a non-resident commission agent can at best be called as a service for completion of commitment and would not fall within the definition of 'fees for technical services' and therefore section 9 is not applicable and therefore the question of tax withholding on same does not arises.

16. Referring to the decision of Hon'ble Delhi High Court in the case of CIT vs. EON Technology P. Ltd. reported in 343 ITR 366, he submitted that the Hon'ble High Court in the said decision has held that the non-resident commission agents based outside India rendering services of procuring orders

cannot be said to have a business connection in India and the commission payments to them cannot be said to have been either accrued or arisen in India.

17. He accordingly submitted that the order of the CIT(A) be reversed and the grounds raised by the assessee should be allowed.

18. Ld. DR on the other hand heavily relied on by the order of the CIT(A).

19. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and Paper Book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer made addition of Rs.62,19,609/- u/s 40(a)(i) on the ground that assessee has not deducted tax from the foreign agency commission paid as per the provisions of section 195 of the I. T. Act. While doing so, the Assessing Officer relied on the decision of the AAR in the case of SKF Boilers and Driers Pvt. Ltd. (supra) and the decision in the case of Rajiv Malhotra (supra). We find the ld. CIT(A) while upholding the action of the Assessing Officer held that income arising to the agent on account of export commission very much falls within the ambit of provisions contained in section 5(2)(b) of the I.T. Act as the income has accrued in India when the right to receive the same came into existence. According to him although the non-resident agent has rendered services and procured orders abroad but the right to receive the commission certainly arise in India when the order gets executed by the assessee. According to him, the mere fact that the agent is to render services

abroad and the commission is to be remitted to him abroad are wholly irrelevant for the purpose of determining the income since income is from a source in India.

20. We find identical issue had come up before the Ahmedabad Bench of the Tribunal in the case of Welspun Corporation Ltd. (supra). The Tribunal in the said decision has held that the payments made by the assessee for services rendered by non-resident agents could not be held to be fees for payment for technical services. These payments were in nature of commission earned from services rendered outside India which had no tax implications in India. The Tribunal while deciding the issue has also considered the two decisions of the AAR which has been relied on by the Assessing Officer as well as the CIT(A).

21. We find the Hon'ble Allahabad High Court in the case of Model Exims (supra) has held that failure to deduct tax at source from payment to non-resident agents, who has their own offices in foreign country, cannot be disallowed, since the agreement for procuring orders did not involve any managerial services. It was held that the Explanation to section 9(2) is not applicable. It was further held that the situation contemplated or clarified in the Explanation added by the Finance Act, 2010 was not applicable to the case of the assessee as the agents appointed by the assessee had their offices situated in the foreign country and that they did not provide any managerial services to the assessee. Section 9(1)(vii) deal with technical services and has to be read in that

context. The agreement of procuring orders would not involve any managerial services. The agreement did not show the applicability or requirement of any technical expertise as functioning as selling agent, designer or any other technical services.

22. We find the Hon'ble Supreme Court in the case of Toshoku Ltd. (supra) has observed as under :-

> *"During the previous year relevant to the assessment year 1962-63, B, a dealer in tobacco in India, purchased tobacco and exported it to Japan and France through non-resident sales agents, a Japanese company and a French business house respectively. Under the terms of the agreement, the Japanese company, which was appointed as exclusive sales agent in Japan for tobacco exported by B, was entitled to a commission of 3 per cent. of the invoice amount. The sale price received on the sale in Japan was remitted wholly to B in India and B debited his commission account and credited the amount of commission payable to the Japanese company in his account books and later remitted the amount to the Japanese company. There was a similar agreement with the French business house in relation to the corresponding area and similar credit and debit entries and subsequent remittance of the commission were made. The question was whether the commission earned by the non-resident sales agents could be taxed in India, treating B as representative assessee under s. 161 of the I.T. Act, 1961:*
>
> *Held, (i) that it could not be said that the making of the entries in the books of B amounted to receipt, actual or constructive, by the non-resident sales agents as the amounts so credited in their favour were not at their disposal or control; they could not, therefore, be charged to tax on the basis of receipt of income, actual or constructive, in the taxable territories.*
>
> *(ii) That the non-residents did not carry on any business operation 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 the remitted by the purchasers from abroad did not amount to an operation carried out by the non-residents in India as contemplated by cl. (a) of the Explanation to s. 9(1)(i) of the I.T. Act, 1961. The commission amounts which were earned by the non-residents for services rendered outside India could not be deemed to be income which had either accrued or arisen in India.*
>
> *A credit balance, without more, only represents a debt and a mere book entry in the debtor's own books does not constitute payment which will source a discharge from the debt."*

23. Similar view has been taken by the Hon'ble Madras High Court in the case of Kikani Exports Pvt. Ltd. (supra) and Faizan Shoes Pvt. Ltd. (supra).

The Hon'ble Delhi High Court in the case of EON Technology P. Ltd. (supra) has also taken similar view where it has been held that non-resident commission agents based outside India rendering services of procuring orders cannot be said to have a business connection in India and the commission payments to them cannot be said to have been either accrued or arisen in India. In view of the decisions cited above (supra), we are of the considered opinion that the assessee is not liable to deduct tax under the provisions of section 195 of the I.T. Act on account of foreign agency commission paid outside India for promotion of export sales outside India. Accordingly, the order of the CIT(A) is set-aside and the grounds raised by the assessee are allowed.

24. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open on this 14th day of September, 2017.

Sd/-	**Sd/-**
(SUCHITRA KAMBLE)	(R. K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 14-09-2017.
Sujeet

Copy of order to: -

1) The Appellant
2) The Respondent
3) The CIT
4) The CIT(A)
5) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi