IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 2116 OF 2013
WITH
INCOME TAX APPEAL NO.169 OF 2014

Commissioner of Income Tax-10 .. Appellant.
v/s.
Gujarat Reclaim & Rubber Products Ltd. .. Respondent.

Mr. Arvind Pinto, for the Appellant in both the matters.
Mr. F. V.Irani with Mr. Atul Jasani, for the Respondent in both the matters.

CORAM: M.S.SANKLECHA, &
G.S.KULKARNI, JJ.
DATE : 8th DECEMBER, 2015.

P.C:-

Income Tax Appeal No. 169 of 2014- not on board. Mentioned. Upon mentioning, taken up on board for admission along Income Tax Appeal No. 2116 of 2013.

2 Both these appeals under Section 260-A of the Income Tax Act, 1961 (the Act) challenge the common order dated 19th April, 2013 of the Income Tax Appellate Tribunal (Tribunal) for the Assessment Years 2007-08 and 2008-09.

3 Mr. Pinto, learned Counsel appearing for the Revenue urges the following common question of law in both the appeals for our consideration:-

"(a) Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in holding that commission payments made to non-resident sales agents on which no tax was deducted is not disallowable u/s. 40(a)(i)?

(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was in error in holding that the company had sufficient free funds and the disallowance of interest was not warranted?".

4 Although the impugned order of the Tribunal is common and dealt with identical issue for both Assessment Years 2007-08 and 2008-09. However, the only difference between the two is that for the Assessment Year 2007-08, the Commissioner of Income Tax (Appeals) [CIT(A)] decided in favour of the Revenue while for the Assessment Year 2008-09 the very issue is decided by the CIT(A) in favour of the Assessee.

5 **Re:- Question (a):-**

(a) For the subject Assessment Year, the Respondent-Assessee had during two Assessment Years made payment of commission to non-resident agent in respect of sales made out side India. The Assessing Officer in both the Assessment Years passed an order disallowing the payments made to non-resident agent under Section 40(a) (i) of the Act for failure to deduct tax at source. The basis of both the Assessment Order disallowing the expenditure is in view of the fact that the Circular No. 23 of 1969 and 786 of 2000 issued by the CBDT which had clarified that commission paid to non-resident agent for sale does not give it rise to income had been withdrawn by Circular No.7 dated 22nd October, 2009;

(b) In appeal, so far as Assessment Year 2007-08 was concerned, the CIT(A) upheld the order of the Assessing Officer on the same ground i.e. withdrawal of the earlier Circular Nos.23/1969 and 786/2000 by Circular No. 7 of 2009. So far as Assessment Year 2008-09 is concerned, the CIT(A) by order dated 10th October, 2009 allowed Respondent-Assessee's appeal. The CIT(A) while allowing Respondent-Assessee's Appeal for the Assessment Year 2008-09, inter alia held that the commission agent did not have any business connection in India as they had no permanent establishment in India and in fact neither any income arose or accrued to non-resident agent in India. The CIT(A), inter alia relied upon the decision of the Tribunal In ***DeIT v/s.Ardeshi B. Cursetjee & Sons Ltd. 115 TTJ 916*** which held that the commission paid to non-resident agent outside India for the services rendered were not chargeable to tax in India. In these circumstances, the CIT(A) held that there was no occasion to deduct tax at source in respect of the payment made to the non-resident agent;

(c) Moreover, the order of CIT(A) also holds that the Circular No.7 of 2009 withdrawing the earlier Circulars will not have retrospective effect so as to render Circular No.23 of 1965 and 786 of 2000 inoperative for the Assessment Years;

(d) Being aggrieved, the Respondent-Assessee as well as Revenue preferred an Appeal to the Tribunal from the order of CIT(A). In respect of the order of CIT(A) for Assessment Year 2007-08 – Respondent-Assessee's filed an appeal, while in respect of order

of the CIT(A) for the Assessment Year 2008-09 – Revenue has filed Appeal;

(e) By the common impugned order, the Tribunal after considering the submissions places reliance upon the decision of its Co-ordinate Bench in ***Armayesh Global v/s. ACIT, 50 SOT 564,*** the decision of the Delhi High Court in ***CIT v/s. Eon Technology 343 ITR 366*** and the reasons recorded by the CIT(A) in his order for the Assessment Year 2008-09 to conclude that the income of non-resident commission agent cannot be considered as income arising or accruing in India. Therefore, the provisions of Section 40(a)(i) would have no application for the two Assessment Years under consideration;

(f) The grievance of the Revenue is that the impugned order of the Tribunal merely reproduces the order of the CIT(A) for the Assessment Year 2008-09 which was in favour of the Respondent-Assessee and approves the same. This without bestowing any consideration to the order passed by the CIT(A) in respect of Assessment Year 2007-08 which was in favour of the Revenue. In these circumstances, it is submitted that appeals warrant admission.

(g) We find that the common order of the Tribunal while dealing with the order of the CIT(A) for the Assessment Year 2008-09 also considers the order of the CIT(A) for the Assessment Year 2007-08 while dealing with the Revenue's contention as reflected in the orders of the Assessing Officer which are similar for both the Assessment Years. In fact, the reasons for the order of the

CIT(A) for Assessment Year 2007-08 are identical to the Assessing Officer's orders in both the Assessment Years i.e. the earlier Circular Nos.23 of 1969 and 786 of 2000 stand withdrawn by Circular No.7 of 2003. Therefore, the earlier Circular which cover the issue would not be applicable/ available for the Assessment Years 2007-08 and 2008-09. In fact, the CIT(A) in his order for Assessment Year 2008-09 while allowing the appeal of the Respondent-Assessee places reliance upon the decision of the Tribunal in case of Ardeshi B. Cursetjee (supra) which in turn relies upon the decision of the Supreme Court in ***CIT v/s. Toshoku Ltd. 125 ITR 525*** wherein on almost identical facts, the Apex Court held that the commission earned by the non-resident agent who carried on the business of selling Indian goods outside India, cannot be said have deemed to be income which has accrued and/or arisen in India. This view of the CIT(A) for Assessment Year 2008-09 was found acceptable by the Tribunal in its impugned order and applied the same even for Assessment Year 2007-08. In view of the fact that the issue sands concluded in favour of the Respondent-Assessee by the decision of the Supreme Court in Toshoku Ltd. (supra). The Revenue has not shown any change in the law in the subject Assessment Years which would warrant our not following the Apex Court's decision;

(h) Moreover, we find CBDT Circular No.23 of 1969 has been reproduced – in the impugned order and the relevant extract reads as under:-

" Foreign agents of Indian exports – a foreign agent of Indian exporter operates in his own country and no part of his income arises

in India. His commission is usually remitted directly to him and is, therefore, not received by him or on his behalf in India. Such an agent is not liable to income tax in India on the commission."

This Circular of 1969 was admittedly in force during the two Assessment Years. It was only subsequently i.e. on 22nd October, 2009 that the earlier Circular of 1969 and its reiteration as found in Circular No.786 of 2000 were withdrawn. However, such subsequent withdrawal of an earlier Circular cannot have retrospective operation as held by this Court in ***UTI v/s. P. K. Unny and Others 249 ITR 612.***

(i) In view of the above, not only the entire issue stands concluded in favour of the Respondent-Assessee in the present facts by the CBDT Circular Nos. 23 of 2969 and 786 of 2000 which were in force during the subject Assessment Years but also by the decision of the Apex Court in Toshoku Ltd. (supra) in favour of the Respondent-Assessee. Thus, no substantial question of law arises in the question framed for our consideration. Accordingly, Question (a) not entertained.

6 **Re:- Question (b):-**

(a) We find that the impugned order of the Tribunal allows the Respondent-Assessee's appeal by following its decision in DCIT v/s. Mohit Diamonds Pvt. Ltd. in Appeal No.2097/M/2011 for Assessment Year 2007-08 dated 31st July, 2012.

(b) However, Mr. Pinto, learned Counsel appearing for the Revenue is unable to inform us in the absence of the instructions from the Officer even though sought for by Mr. Pinto - whether or not any

appeal has been preferred by the Revenue from the order of the Tribunal in M/s. Mohit Diamond (supra) and if no appeal has been preferred, therefrom the reason/justification for preferring the appeal against the impugned order;

(c) We have in our order in ***DIT (I.T.) v/s. Credit Agricole Indosuez 377 ITR 102*** have observed as under:-

" Undoubtedly, an advocate has to fearlessly put forth his client's point of view, however, the same has to be tempered/guided by truth and justice of the dispute. In matters of tax, justice requires that there must be certainty of law which presupposes equal application of law. Thus, where the issue in controversy stands settled by the decisions of this court or the Tribunal in any other case and the Revenue has accepted that decision then in that event the Revenue ought not to agitate the issue further unless there is some cogent justification such as change in law or some later decision of an higher forum, etc., then in such cases appropriately the appeal memo itself must specify the reasons for preferring an appeal failing which at least before admission the officer concerned should file an affidavit pointing out the reasons for filing the appeal. It is only when the court is satisfied with the reasons given, that the merits of the issue need be examined of purposes for admission [please see I.T.A. No.37 of 2013 CIT v. Proctor and Gamble Home Products Ltd. Dated January 19,2015 [2015] 377 ITR 66 (Bom.); I.T. A. No.269 of 2013, CIT v. SBI dated February 19, 2015 [2015] 375 ITR 20 (Bom); I.T.A. No. 330 of 2013 DIT v. Citibank N. A. dated March 11, 2015 -[2015] 377 69 (Bom).]

Filing of appeal under section 260A of the Act is a serious issue. The parties who seek to file such appeals (which are normally after two tiers of appeal before the authorities under the Act) must do so after due application of mind and not raise frivolous/ concluded issues. This is certainty expected of the State. The Registry has informed us that out of 4784 appeals from the order of the Tribunal filed in this court during the period January 1, 2014 to June 1,2014, the appeals filed by the Revenue are 3968 and only 816 by the class of the assessee as a whole."

(d) In spite of the aforesaid observations repeatedly made, no explanation is forthcoming either in the grounds of Appeal or by filing an affidavit explaining the reason why the present appeal is being filed against the impugned order on the above issue when no appeal has been filed against the order which has been merely followed in the impugned order. In these circumstances, we see no reasons to entertain the appeal;

(e) In any event, even on merits, we find that the impugned order records that it is undisputed that the Respondent-Assessee has interest free funds aggregating to Rs.16.09 Crore. The advances and interest made to group companies by the Respondent-Assessee is to the tune of Rs.26.55 lakhs. The amounts borrowed in the aggregate being to the extent of Rs.6.81 lakhs i.e. both working capital and term loans. Thus, as held by this Court in ***CIT v/s. Reliance Utilities & Power Ltd. 313 ITR 340*** that where both interest bearing funds and interest fee funds are available then a presumption would arise that investments to sister companies would be out of its interest free funds;

(f) In view of the above, we find that no substantial question of law arises for our consideration in the proposed question (b). Accordingly, Question No.(b) also not entertained.

7 Accordingly, **Appeal dismissed**. No order as to costs.

(G.S.KULKARNI,J.) **(M.S.SANKLECHA,J.)**