IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL No. 290 of 2018

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PR COMMISSIONER OF INCOME TAX RAJKOT 1

Versus

NOVA TECHNOCAST PVT LTD

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Appearance :
Mr MANISH R BHATT, Sr Advocate with Mrs MAUNA M BHATT, Advocate for the PETITIONER

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CORAM: HONOURABLE Mr. JUSTICE AKIL KURESHI
and
HONOURABLE Mr. JUSTICE B.N. KARIA
9th April 2018

ORAL ORDER (PER : HONOURABLE Mr. JUSTICE AKIL KURESHI)

Revenue is in appeal against the judgment of the Income Tax Appellate Tribunal, Rajkot Bench dated 28th August 2017, raising the following question for our consideration :-

> **"Whether the Appellate Tribunal is right in law and on facts in not appreciating the fact that, the persons to whom commission of Rs.81,96,111/- was paid by the assessee, had earned such commission from the business activity accruing and airing in India and hence, the same is taxable in India, for which no TDS was made by the assessee and as such, the same is disallowance u/s. 40[a](ia) of the Act ?"**

The issue pertains to the obligation on the part of the respondent-assessee to deduct tax at source in relation to the commission payment made to its foreign Commission Agent. After the Assessing Officer in the order of assessment disallowed such commission expenditure, for the failure of the assessee to deduct tax at source, the assessee carried the matter in appeal before the Appellate Commissioner. The Appellate Commissioner observed that keeping in mind the facts, circulars and legal position, the commission paid to NRI Agent whose income was not taxable in India did not incur TDS requirement. It was on this basis that the Appellate Commissioner deleted disallowances made by the Assessing Officer under Section 40 [a](ia) of the Income-tax Act, 1961.

Revenue carried the matter in appeal before the Tribunal. The Tribunal, by the *impugned* judgment, dismissed such appeal making the following observations :

> "We have heard the rival contentions and perused the material on record carefully. Section 195 required that any person responsible for paying to a non resident any some chargeable to tax shall deduct tax there on at the rate in force. We noticed that assessee has paid commission to non-residents for services rendered in sales and marketing of assessee's product as commission agent outside India. We observe that the agents were notarized and not having fixed base in India and have

> rendered all the sales and marketing services outside India. We have also perused the judicial pronouncements of the *Hon'ble* Supreme Court in the case of *GE India Technology CEN Private Limited versus Commissioner of Income tax,* (2010)193 Taxman 234(SC), wherein, it was held that section 195 gets attracted in cases where payment made is a composite payment in which a certain proportion of payment has an element of income chargeable to tax in India and prayer seeks a determination of appropriate proportion of sum chargeable. We are of the considered view that the assessee has paid commission to non-residents in respect of services rendered abroad and the non-residents has not carried any business operation in India, therefore, we find that the assessee is not liable to deduct tax at source. We have also noticed that the assessing officer has not controverted the claim of the assessee that commission was paid to non-residents in respect of services rendered abroad. After looking to the fact as stated supra and judicial finding, we consider that disallowance of commission paid to the aforesaid non-residents under the above circumstances is not appropriate under the provisions of Section 40(a)(ia) of the Act. Therefore, the appeal of the revenue is dismissed."

It can thus be seen that while confirming the order of CIT [A], the Tribunal relied on judgment of the Supreme Court in the case of **G.E India Technology Centre P. Limited vs. Commissioner of Income-Tax & Anr.,** reported in [2010] 327 ITR 456 (SC). In such judgment, it was held and observed that the most important expression in Section 195 [1] of the Act consists of

the words, "chargeable under the provisions of the Act". It was observed that, "*..A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the Act.*" Counsel for the Revenue, however, drew our attention to the *Explanation* 2 to sub-section [1] of Section 195 of the Act which was inserted by the Finance Act of 2012 with retrospective effect from 1st April 1962. Such explanation reads as under :-

> *Explanation* 2 – For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has -
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> [i] a residence or place of business or business connection in India; or
> [ii] any other presence in any manner whatsoever in India.

It is indisputably true that such explanation inserted with retrospective effect provides that obligation to comply with sub-section [1] of Section 195 would extend to any person resident or non-resident, whether or not non-resident person has a residence or place of business or business connections in India or any other persons in any manner whatsoever in India. This expression which is added for removal of doubt is clear from the plain language thereof, may have a bearing while ascertaining whether certain

payment made to a non-resident was taxable under the Act or not. However, once the conclusion is arrived that such payment did not entail tax liability of the payee under the Act, as held by the Supreme Court in the case of *GE India Technology Centre P. Limited* [Supra], sub-section [1] of Section 195 of the Act would not apply. The fundamental principle of deducting tax at source in connection with payment only, where the sum is chargeable to tax under the Act, still continues to hold the field. In the present case, the Revenue has not seven seriously contended that the payment to foreign commission agent was not taxable in India.

Tax Appeal is therefore dismissed.

[Akil Kureshi, J.]

[B.N Karia, J.]

Prakash