IN THE INCOME TAX APPELLATE TRIBUNAL
PANAJI BENCH, PANAJI

BEFORE SHRI N.S. SAINI, HON'BLE ACCOUNTANT MEMBER AND SHRI GEORGE MATHAN, HON'BLE JUDICIAL MEMBER

ITA No. 267/PAN/2015
(Asst. Year : 2009-10)

DCIT, Circle-1(1), Panaji.	Vs.	M/s. Sesa Resources Ltd., (Formerly known as M/s. V.S. Dempo & Co. Pvt. Ltd.), Dempo House, D.B. Marg, Campal, Panaji – Goa. PAN No. AAACV 7160 R
(Appellant)		(Respondent)

Assessee by	:	Shri Mihir Naniwadeker – Adv.
Department By	:	Shri K. Mehboob Ali Khan - DR
Date of hearing	:	27/04/2016.
Date of pronouncement	:	27/04/2016.

O R D E R

PER N.S.SAINI, ACCOUNTANT MEMBER

This is an appeal filed by the Revenue against the order of Commissioner of Income Tax (Appeals)-1, Panaji, dated 25/03/2015.

2. This appeal was decided by the Tribunal vide its order dated 20/08/2015 in ITA No. 267/PNJ/2015. The assessee filed appeal against the order of the Tribunal before the Hon'ble High Court raising the following substantial question of law:-

> *"Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in upholding disallowance under sec. 40(a)(ia) in respect of non-deduction of tax at source on payments of commission to non-resident sales agents, when it was clear from the provisions of the Act as also Circulars issued by the CBDT that the relevant amounts were not chargeable to*

tax under the Income Tax Act, 1961, in the hands of the non-resident recipients?"

3. The Hon'ble Bombay High Court at Goa, vide order dated 07/03/2016, restored the issue back to the file of the Tribunal for re-adjudicating the same afresh.

4. Facts of the case are that the Assessing Officer disallowed commission paid to foreign agents of ₹ 10,86,92,826/- on account of non-deduction of TDS and that the expenditure has not been paid for the purpose of business of the assessee. The Tribunal held that the commission payment to the foreign agents was for the purpose of business and commercial expediency, however regarding non-deduction of TDS, applicability of the provisions of sec. 40(a)(ia), the Tribunal held that the provisions of sec. 195 has been amended by the introduction of Explanation-II to the said section by the Finance Act, 2012 with retrospective effect from 01/04/1992, whereby it is clarified that "the obligation to comply with sub-sec. (1) and to make deduction there under 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 (i) a residence or place of business or business connection in India; or (ii) any other presence in any manner whatsoever in India". Therefore, as the assessee has not deducted TDS under sec. 195, the disallowance made by the Assessing Officer by invoking the provisions of sec. 40(a)(ia) are restored.

5. Being aggrieved by the said order of the Tribunal, the assessee filed appeal before the Hon'ble High Court and the Hon'ble High Court restored the issue to the file of the Tribunal for adjudication afresh. The Hon'ble High Court at para 8 of its order has given finding that on the substantial question of law referred to above, the judgment of the

Division Bench of Bombay High Court in the case of *CIT Vs. Gujarat Reclaim & Rubber Products Ltd.* in Income Tax Appeal No. 169/2014 dated 08/12/2015, it has been, inter alia, held that before effecting deduction at source one of the aspects to be examined is whether such income is taxable in terms of the Income Tax Act. This aspect has not been considered by the Tribunal while concluding that the appellant has committed a default in not deducting the tax at source. We find that the Commissioner of Income Tax (Appeals) has given a finding that the services of non-resident sales agents namely Mitsui & Co. Ltd. and Allied Ore Inc, Japan, are performed outside India and the same are not taxable in India, hence, TDS is not deductable from the payments made to them. This finding of fact by the Commissioner of Income Tax (Appeals) is not disputed by the Revenue before us. Therefore, this issue stands covered by the decision of the Hon'ble Bombay High Court in the case of Gujarat Reclaim & Rubber Products Ltd. (supra), wherein it was held as under:-

> *"5. Re:- Question (a):*
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> *(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 outside 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 22fld October, 2009;*
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> *(b) In appeal, so far as Assessment Year 2007-08 was concerned, CIT(A) upheld the order of the Assessing Officer on the same ground i.e. Withdrawal of the earlier Circular Nos.23/1969, 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-Assessees 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 submissions places reliance upon the decision of its Co-ordinate Bench in Armayesh Global v/s. ACIT, 50 SOT 564, the Delhi High Court in CIT vs. Eon 366 ad the reasons recorded by the CIT(A) in his order for the Assessment Year 2008-09 to conclude that of non-resident commission agent cannot be as income arising or accruing in India of Section 40(a)(i) would have no Assessment Years under consideration;

(f) The grievance of the Revenue is that the impugned order of the 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 No7 of 2003. Therefore, the earlier Circular which cover would not be applicable/ available for the Assessment Year 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 p1.. the Tribunal in case of Ardeshi B. Cursetjee (supra) which in turn relies upon the decision of the Supreme Court in CIT'Ws 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 that 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 stands 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. Respectfully following the same, we dismiss this ground of appeal of the Revenue.

7. In the result, appeal of the Revenue is dismissed.

Order Pronounced in the Court at the close of the hearing on Wednesday, the 27th day of April, 2016 at Goa.

Sd/-	sd/-
(GEORGE MATHAN)	**(N.S.SAINI)**
Judicial Member	**Accountant Member**

Dated : 27th April, 2016.

vr/-

Copy to:

1. *The Assessee.*
2. *The Revenue.*
3. *The CIT*
4. *The CIT(A)*
5. *The D.R.*
6. *Guard file.*

By order

Assistant Registrar
I.T.A.T., Panaji