IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G", NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER

	I.T.A. No. 4395/DEL/2014		
	A.Y. : 2011-12		
DCIT, CIRCLE 9(1), ROOM NO. 163, C.R. BUILDING, NEW DELHI		VS.	M/S STERLING ORNAMENT (P) Ltd., B-37, 1ST FLOOR, GEETANJALI ENCLAVE, SAKET, NEW DELHI – 110 017
(APPELLANT)			**(RESPONDENT)**

Department by : Sh. K. Tewari, Sr. DR
Assessee by : Sh. Piyush Kaushik, Adv.

ORDER

PER H.S. SIDHU, JM

This appeal by the Revenue is directed against the Order of the Ld. Commissioner of Income Tax

(Appeals)-XII, New Delhi dated 28.5.2014 pertaining to assessment year 2011-12 on the following grounds:-

1. The Ld. CIT(A) has erred in law and on facts in deleting the disallowance of Rs. 50,63,797/- made by the AO u/s. 40(a)(i) for non-deduction of TDS.
2. The appellant craves to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.

2. The brief facts of the case are that the assessee has filed the return of income declaring income of Rs.3,22,74,970/- on 30.9.2011. The case of the assessee was processed u/s. 143(1) of the Income Tax Act, 1961 24.9.2013. Later on, the case of the assessee was selected for scrutiny under CASS and notice u/s. 143(2) of the I.T. Act was sent on

20.9.2012. Again notice u/s. 143(2) of the Act alongwith questionnaire u/s. 142(1) of the Act was sent on 05.07.2013. In response to the same, the A.R. of the Assessee appeared from time to time and submitted the requisite details. The assessee is engaged in the business of manufacturer and exporter of Silver, Gold and Brass Jewellery. The assessee has claimed an expense of Rs. 50,63,797/- on account of foreign agency commission. Assessee was show caused vide order sheet entry dated 21.12.2012 as to why the additions made in earlier years. In response to the show cause, the assessee has submitted its reply dated 01.01.2014. After considering the reply, the AO observed that payment made by the assessee to a non-resident is squarely covered by the provisions of Section 195 of the Act which call for deduction of tax at appropriate rate at the time of payment to a non-resident. AO further observed that in view of these

provisions which find place in the Statute, the provisions of section 40(a)(i) are also attracted wherever TDS on payment of commission to a non-resident has not been made at appropriate rates. These provisions bar deduction of any payment on account of commission (fee for technical services) made to a non-resident, without TDS. The AO further observed that income (which is commission) is not taxable under the Income Tax Act, 1961, hence, the assessee is liable to deduct tax at source at the time of credit of such income to the account of payee or at the time of payment whichever is earlier. Alternatively, the assessee has to obtain certificate for no deduction or lower deduction of tax on the payments as required u/s. 195(2) of the Act. AO further noted that the foreign agents can also obtain certificates for non deduction or lower deduction of tax as required u/s. 195 of the Act. As a result, the expenditure on export

commission and other related charges payable to a non-resident for services rendered outside India is not allowable expenditure and accordingly, an amount of Rs. 50,63,797/- was disallowed u/s. 40(a)(i) of the Act and added to the total income of the assessee and income of the assessee was assessed u/s. 143(3) of the Act at total income of Rs. 3,73,38,770/- vide order dated 17.01.2014.

3. Against the aforesaid assessment order, the assessee appealed before the Ld. CIT(A)-XII, New Delhi, who vide its impugned order dated 28.05.2014 has allowed the appeal of the assessee and deleted the addition in dispute, after following the various case laws and in view of the fact that assessee's appeal for the assessment year 2009-10 on the same issue was allowed by the Ld. CIT(A)-XII vide order dated 12.6.2012.

4. Aggrieved with the impugned order, the Revenue is in appeal before the Tribunal.

5. At the time of hearing, Ld. DR relied upon the order passed by the AO and reiterated the contentions raised by the Revenue in the grounds of appeal.

6. On the other hand, Ld. Counsel of the Assessee, Sh. Piyush Kaushik, Adv. has relied upon the order of the Ld. CIT(A) and reiterated the contentions made before the Ld. CIT(A). He further stated that since the Ld. CIT(A) has rightly deleted the addition in dispute by following the various case laws as well as following the Ld. CIT(A)-XII, New Delhi Order dated 12.6.2012 passed in assessment year 2009-10 in assessee's own case. He further stated that following facts are undisputed which arise from Agreements with Non-resident agents duly recorded (pages 2-4 PB) before the AO as noted at pages 1 & 2 of AO order itself:

i) Non-resident foreign agents are based outside India.

ii) Work of non-resident agent is to procure orders from customers outside India;

iii) Non-resident agents based outside India provide services in connection with sales outside India from their respective countries outside India;

iv) Commission to non-resident agents is remitted outside India from the realization of export proceeds;

v) It is not a case of AO that any of the non-resident agents have a Permanent Establishment (PE) in India.

6.1 Ld. Counsel of the Assessee further submitted that under the aforesaid undisputed facts the assesseee's claim i.e. payment of commission to non-

residents does not require any tax withholding and consequently there cannot be any disallowance u/s. 40a(i) of the Act. In support of this contention, he relied upon the following cases laws:-

i) Decision of the Coordinate Bench of ITAT in the case of DCIT (International Taxation), Ahmedabad vs. Welspun Corporation Ltd. (2017) 77 taxmann.com 165.

ii) Decision of Hon'ble Jurisdictional High Court (Allahabad High Court) in the case of CIT vs. Model Exims (2014) 363 ITR 66 (All.)

iii) Decision of the Hon'ble Supreme Court of India in the case of CIT vs. Toshoku Ltd. 125 ITR 525 SC.

iv) Decision of Hon'ble Madras High Court in the case of CIT vs. Kikani Exports Pvt. Ltd. (2014) 369 ITR 96.

v) Decision of the Hon'ble Madras High Court in the case of CIT vs. Faizan Shoes Pvt. Ltd. (2014) 367 ITR 155.

vi) Decision of Hon'ble Delhi High Court in the case of CIT vs. EON Technology P. Ltd. 343 ITR 366 (Del.)

vii) Decision of Delhi ITAT in the case of Divya Creation vs. ACIT (2017) 86 taxmann.com 276

viii) Decision of Delhi ITAT dated 23.4.2018 in the case of ACIT vs. Smt. Sangeeta Khanna 2018-TII-144-ITAT-Del-Intl.

ix) Decision of ITAT, Ahemadabad in the case of DCIT vs. M/S Gujarat Microwax Pvt. Ltd. 2018-TII-160-ITAT-AHM-Intl.

x) Decision of ITAT, Ahemadabad in the acse of ITO vs. Excel Chemicals India Pvt. Ltd. dated 15.5.2018 2018-TII-167-ITAT-AHM-Intl.

6.2 In view of the aforesaid discussions and precedents, Ld. Counsel of the Assessee has requested to dismiss the Appeal of the Revenue by upholding the action of the Ld. CIT(A).

7. We have heard both the parties and perused the relevant records available with us, especially the impugned order as well as the case laws cited by the Ld. Counsel of the assessee, as aforesaid. We find that Ld. CIT(A) on the same issue has rightly deleted the addition in dispute by following the various case laws as well as following the Ld. CIT(A)-XII, New Delhi Order dated 12.6.2012 passed in assessment year 2009-10. We also note that Ld. CIT(A)-XII, New Delhi

vide his order dated 12.6.2012 in the assessment year 2009-10 has discussed the issue in dispute elaborately at page no. 8 to 9. For the sake of convenience, we are reproducing hereunder the relevant findings of the Ld. CIT(A) for the assessment year 2009-10 as under:-

> *"I have perused the facts stated in the assessment order as well as assessee's reply. The assessee in his submission has stated that the Assessing Officer has taken the commission payment under the term "fees for Technical Services" and as per Explanation 2 to section 9(1)(vii) of the Act has held that the payment made by the assessee company to the overseas agents is the income accrue/arises to them in India and hence the assessee company is liable to deduct tax at source as per the provision of section 195(1) of*

the Act. Since tax at source has not been deducted, the Assessing Officer has made disallowance of Rs. 32,48,174/- u/s 40(a)(i) of the Act. The assessee in support of his claim has given the following case laws:-

1) DCIT vs. Divi's Laboratories Ltd reported in 2011 TII 182 (2011) 12 Taxmann. Com 103,

2) Eon Technologies (P) Ltd vs. DCIT 11 Taxmann.com 53 (Del).

4) Hon'ble ITAT Chennai Bench in the case of DCIT vs. M/s Mainetti (India) p. Ltd. 138/20, Florida Towers, 3rd Floor, Chennai.

The assessee in his submission has clearly stated that payment made to

foreign agent is clearly commission paid and according to section 195(1) of the act, the payment directly made to the overseas agent at their places was not accrue or arises to the overseas agent in India is not chargeable to tax under the provisions of Income Tax Act.

> *"Section 195 of the Act has to be read alongwith the charging Section 4,5 and 9 of the Act. One should not read Section 195 of the Act to mean that the moment there is a remittance, the obligation to deduct tax automatically arises. Section 195 of the Act clearly provides that unless the*

income is chargeable to lax in India, there is no obligation to withhold tax. In order to determine whether the income could be deemed to accrue or arise in India, section 9 of the Act is the basis.

The taxpayer paid commission to non-resident agents for services rendered outside India.

The taxpayer had not deducted tax on these payments on the ground that the overseas agents operated in their own

country and no part of their income had accrued in India".

Keeping in view of the above facts and following the case laws cited above, I am of the opinion that the assessee company is not liable to deduct tax at source. Hence, the appeal is allowed on these grounds.

In result the appeal of the assessee is allowed."

7.1 After perusing the aforesaid finding of the Ld. CIT(A) for the assessment year 2009-10 in assessee's own case, we find that the issue involved in the assessment year i.e. 2011-12 is squarely covered by the Ld. CIT(A)'s order dated 12.6.2012 passed in assessment year 2009-10 in assessee's own case as

the facts and circumstances are similar and therefore, the Ld. CIT(A) has followed the same precedence in the assessment year 2011-12 and rightly allowed the appeal of the assessee by deleting the addition in dispute. We further find that Ld. CIT(A) in the assessment year 2009-10 has respectfully followed the following decisions:-

1) DCIT vs. Divi's Laboratories Ltd reported in 2011 TII 182 (2011) 12 Taxmann. Com 103,

2) Eon Technologies (P) Ltd vs. DCIT 11 Taxmann.com 53 (Del).

3) Hon'ble ITAT Chennai Bench in the case of DCIT vs. M/s Mainetti (India) p. Ltd. 138/20, Florida Towers, 3rd Floor, Chennai.

7.2 We also find that on the anvil of the following decisions, the assessee is not liable to deduct tax at source:-

i) Decision of the Coordinate Bench of ITAT in the case of DCIT (International Taxation), Ahmedabad vs. Welspun Corporation Ltd. (2017) 77 taxmann.com 165, wherein it was observed (Heads Note only) that payments made by 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.

ii) Decision of Hon'ble Madras High Court in the case of CIT vs. Kikani Exports Pvt. Ltd. (2014) 369 ITR 96 wherein it was held that the services rendered by the non-resident agent could at best be called as a service for completion of the export commitment and would not fall within the definition of "fees for technical services" and, therefore, section 9 was not applicable and, consequently, section 195 did not come into play. Therefore, the disallowance made by the AO towards export commission paid by the assessee to the non-resident was rightly deleted.

iii) Hon'ble Allahabad High Court in the case of CIT vs. Model Exims (2014) 363 ITR 66 (All.) has observed (Heads Notes) that Business Expenditure – Disallowance –

Payments to non-resident – Failure to deduct tax at source – Assessee's agents had their own offices in foreign country – Agreement for procuring orders not involving any managerial services – Explanation to Section (2) not applicable – No disallowance of commission payments can be made – Income Tax Act, 1961 ss. 9(1)(vii), 40(a)(i), 195.

iv) Decision of Hon'ble Delhi High Court in the case of CIT vs. EON Technology P. Ltd. 343 ITR 366 (Del.) wherein 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.

v) Decision of Delhi ITAT in the case of Divya Creation vs. CIT (2017) 86 taxmann.com 276 wherein it has been observed that (Heads Note) where assessee-firm made payments of commission to those agents, since those agents had their offices situated abroad and, moreover, services were also rendered by them outside India, assessee was not required to deduct tax at source while making payments in question.

7.3 In the background of the aforesaid discussions and respectfully following the precedents, as aforesaid, we hold that assessee company is not liable to deduct tax at source, hence, we uphold the order of the Ld. CIT(A)

on this issue in dispute and dismiss the grounds raised by the Revenue.

8. In the result, the Appeal filed by the Revenue stands dismissed.

Order pronounced on 27/06/2018.

Sd/-	**Sd/-**
[N.K. BILLAIYA]	**[H.S. SIDHU]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date 27/06/2018

"SRBHATNAGAR"
Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY By Order,

Assistant Registrar,
ITAT, Delhi Benches