आयकर अपीलीय अधिकरण "एफ" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI JOGINDER SINGH, JM AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No. 4522/Mum/2013
(**निर्धारण वर्ष /** Assessment Year: 2009-10)

Asst. CIT-17(2), Room No. 217, 2nd Floor, Piramal Chambers, Mumbai-400 012	**बनाम**/ Vs.	Vilas N. Tamhankar, 25-26, Jenabai Building, Dada Sahib Phalke Road, Dadar, Mumbai-400 014
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AABPT 3377 J		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Pawan Kumar Beerla
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Ajit U. Amdekar

सुनवाई की तारीख / **Date of Hearing**	:	23.09.2014
घोषणा की तारीख / **Date of Pronouncement**	:	21.11.2014

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-29, Mumbai ('CIT(A)' for short) dated 01.03.2013, allowing the assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2009-10 vide order dated 12.12.2011.

2. The instant appeal by the Revenue raises the issue of the validity in law of the disallowance in the sum of Rs.91,05,348/-, effected u/s.40(a)(i), since deleted by the first appellate authority.

3. The facts of the case are brief and undisputed. The assessee made the impugned payment to one, Sangeeta Choudhary, a resident of Canada, without deducting tax at source. No application u/s.195(2) was made to the Assessing Officer (A.O.), in whose view there was thus a contravention of section 195 of the Act and, consequently, the non-*obstante* provision of section 40(a)(i) would get attracted, proscribing allowance of deduction of any sum, notwithstanding the fact that it may otherwise be deductible under the provisions of the Act, where tax is deductible at source thereon under Chapter XVII-B, which is either not been deducted or, after deduction, not paid during the relevant year or within the time allowed u/s.200(1). The disallowance u/s.40(a)(i) was, accordingly, made by him relying on the decision in the case of *Transmission Corpn. of A.P. Ltd. vs. CIT* [1999] 239 ITR 587 (SC).

In appeal, the assessee relied heavily on the decision by the apex court in the case of *GE India Technology Centre (P.) Ltd. vs. CIT* [2010] 327 ITR 456 (SC), which was found by the ld. CIT(A) to be squarely covering the assessee's case. The disallowance having been deleted thus; aggrieved, the Revenue is in appeal.

4. We have heard the parties, and perused the material on record.

The payment to the payee, Sangeeta Choudhary, even as clarified before the assessing authority, was for sales and marketing support outside India. No part of the services, toward which payment had been made to her, was rendered in India; the payee also having no place of business or establishment in India. There was thus, as per the assessee, no question of any part of the impugned sum being chargeable to tax in India; further relying on the decision in the case of *GE India Technology* (supra). The facts being not in dispute, the issue arising is primarily legal, i.e., whether the provision of s. 40(a)(i) is attracted in the facts of the case. Section 40(a)(i), overriding sections 30 to 38, provides that where any interest, royalty, fees for technical services or other sum chargeable under the Act, is paid either outside India or in India to a non-resident (not being a foreign company) or to a foreign company, on which tax is deductible at source under Chapter XVII-B, and such tax has not been deducted or, after deduction not been

paid during the previous year or in the subsequent year before the expiry of the time allowed u/s. 200(1), the said amount shall not been allowed in computing the business income. The first thing, therefore, that we would need to see is whether the provisions of Chapter XVII-B are attracted to the impugned payment. The payments to a non-resident being covered under section 195, we begin by reproducing the same in its relevant part, the interpretation of which is in issue:

'**Other sums.**

195. (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) *or section 194LD* or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries" shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (*23D*) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode;

Provided further that no such deduction shall be made in respect of any dividends referred to in section 115-O.

(2) Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.'

The ld. CIT(A) having allowed relief to the assessee on the basis that the decision by the apex court in *GE India Technology* (supra), rendered after considering the decision in the case of *Transmission Corpn. of A.P. Ltd.* (supra), covers the assessee's case, so that no tax was deductible u/s. 195, what we are required to, in order to decide the Revenue's

appeal there-against, do is to examine the validity of the said finding, and toward the same, the said decision.

As explained by the apex court therein, if the interpretation being accorded by the Revenue to section 195, i.e., that the moment payment to a non-resident is made, the obligation to deduct the tax at source (TAS) arises, is accepted, the same would imply obliterating the words 'chargeable under the provisions of the Act' occurring in section 195(1). Section 195 falls under Part B of Chapter XVII of the Act, titled 'collection and recovery of tax'. As explained therein, the Act forms one integrated code, and the charging sections cannot be read *de hors* the machinery sections. Due weight has to be given to every word in the section. The interpretation by the Revenue was, in its view, guided more by administrative convenience, and which would though imply deduction of tax even on payments *qua* which there was no territorial nexus with India or otherwise were not chargeable to tax in India. Administrative considerations could not be the basis of the interpretation of the statutory provisions, even as the law contemplates adequate safeguards in the form of section 40(a)(i) and section 195(6); the latter being inserted on the statute by Finance Act, 2008 w.e.f. 01.04.2008. The hon'ble court also explained the decision in the case of *Transmission Corpn. of A.P. Ltd.* (supra). Section 195 contemplates deduction of tax at source not only on amounts, whole of which are pure income payments, but also covers payments which have an element of income imbedded or incorporated therein. Where, therefore, the payer entertains a doubt as to the amount on which the tax is to be deducted or otherwise considers that the same is not deductible on the gross amount on the footing that only a part thereof represented income chargeable to tax in India, it was necessary for him to approach the A.O. u/s.195(2) and obtain permission for deduction at source of tax at a lesser amount. Section 195(2), thus, gets attracted only in case of composite payments, a part of which have an element of income chargeable to tax in India. The observations by it in *Transmission Corpn. of A.P. Ltd.* (supra) that if no such application was filed, income tax on such sum was to be deducted and that it was the statutory obligation of the person responsible for paying this sum to

deduct income tax thereon before making the payment, it was explained, were made in that context.

In our view too, the said decision by the apex court, which we find to be in consonance with the decisions rendered earlier, as in *CIT vs. Cooper Engineering Ltd.* [1968] 68 ITR 457 (Bom); *CIT vs. Eli Lilly & Co. (India) (P.) Ltd.* [2009] 312 ITR 225 (SC); *Vijay Ship Breaking Corpn. vs. CIT* [2009] 314 ITR 309 (SC) and, rather *Transmission Corpn. of A.P. Ltd.* (supra) as well, squarely covers the facts of the instant case. The Revenue, to enable us to disturb the like finding by the ld. CIT(A), ought to have explained as to how it is infirm or does not amount to a correct reading of the said decision, or is otherwise not applicable in the facts of the case. In fact, the assessee having admittedly neither deducted tax at source nor made any application u/s.195(2) to the A.O., on the footing that no part of the relevant payment represents income chargeable to tax in India, the Revenue ought to, in our view, have impugned the said basis, on which the assessee's case rests. *And which it has failed to in any manner*. If, as maintained throughout by the assessee, no part of the services, for which payment has been made, stand rendered in India, how we wonder could he be faulted in holding it to be not chargeable to tax in India. This in fact is also the requirement and an essential ingredient of s. 40(a)(i), so that the A.O., invoking the same, is in fact obliged in law to render a finding as to the chargeability of the impugned sum to tax under the Act, which is absent in the instant case.

We are conscious that *Explanation* 2 to section 195(1) has since been co-opted on the statute, i.e., by Finance Act, 2012 w.e.f. 01.04.1962, and which reads as under:

> '**Other sums.**
>
> **195**. (1) …….
>
> *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—
>
> (*i*) a residence or place of business or business connection in India; or

(*ii*) any other presence in any manner whatsoever in India.'

The same, however, in our view, would not operate to disturb the law as enunciated in *GE India Technology* (supra), except where the basis of the payer's belief, i.e., as to the non-chargeability of the payment to tax in India, is on the ground that the payee has no place of business or business connection or otherwise any presence whatsoever in India. In the present case, the edifice of the assessee's case is the rendering of the services outside India. Therefore, though for a consideration for marketing and sale support services and, thus, only in the nature of commission or service charges, the same has no nexus with India. All that, in our clear view, the said *Explanation* does is to remove the issue of the determination of the tax incidence on the basis of whether the payee is a tax resident in India from being a consideration for non-deduction of tax at source u/s.195. The payee in the instant case, being admittedly a resident of Canada, with the services being rendered thereat, the issue of place of business in India is not an issue. The assessee's stating of the payee having no place of business or establishment in India, is only toward and in support of its contention of the services being rendered wholly outside India. There is in fact no charge by the Revenue of the payee having any place of business or otherwise business connection in India. The said explanation would, therefore, be of no consequence. We decide accordingly.

5. In the result, the Revenue's appeal is dismissed.
परिणामतः राजस्व की अपील खारिज की जाती है ।

Order pronounced in the open court on November 21, 2014

Sd/-	Sd/-
(Joginder Singh)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 21.11.2014

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**