आयकर अपीलीय अधीकरण, न्यायपीठ – "D" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**D**" KOLKATA*

Before **Shri Aby.T Varkey, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.1667/Kol/2016 Assessment Year :2012-13

M/s Bengal Tea & Fabrics Ltd., '***Century Towers***', 4th Floor, 45, Shakespeare Sarani, Kolkata-17 [**PAN No.AABCB 1006 D**]	**V/s**.	DCIT, Circle-4, 'Aayakar Bhawan', P-7, Chowringhe Square, Kolkadta-69
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri S. Jhajharia, AR
प्रत्यर्थी की ओर से/By Respondent	Shri Arindam Bhattacherjee, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	04-01-2018
घोषणा की तारीख/Date of Pronouncement	28-02-2018

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-6, Kolkata dated 20.05.2016. Assessment was framed by DCIT, Circle-4, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 22.10.2014 for assessment year 2012-13 and assessee has raised following grounds:-

> *"1. For that in view of the facts and circumstances of the case the Ld. CIT is wholly wrong and unjustified in confirming the arbitrary disallowance of Rs.15,42,693/- made in the assessment u/s. 40(a)(ia) of the I. Tax Act on a/c of the payment of export commission made by the assessee company to two*

non-resident agents for services rendered outside India, in relation to export of cotton yarn, without deduction of tax at source u/s. 195 of the Act.
2. For that in view of the facts and circumstances of the case the Ld. CIT is wholly wrong and unjustified in confirming the said disallowance of commission payment without considering the facts and the explanation of the assessee company that (i) the non-resident agents had procured the export orders for the assessee outside India and rendered the requisite services also outside India to earn the said commission and (ii) those agents had no business place / establishment / connection in India and (iii) the commission payable / paid to them cannot be deemed to have accrued and arisen in India through or from any business connection in India.
3. For that in view of the facts and circumstances of the case the Ld. CIT is wholly wrong and unjustified in confirming the said disallowance of commission payment on a wrong impression based on mere assumption and presumption that the export orders procured by the non-resident agents were executed by the assessee company in India and as such the Commission amount payable by the assessee to the non-resident agents shall be deemed to have accrued and arisen to them only in India.
4. For that your petitioner craves the right to put additional grounds and / or to alter / amend / modify the present grounds before or at the time of hearing."

Shri S. Jhajharia, Ld. Authorized Representative appeared on behalf of assessee and Shri Arindam Bhatttacherjee, Ld. Departmental Representative appeared on behalf of Revenue.

2. The interconnected issue raised by the assessee is that Ld. CIT(A) erred in confirming the order of Assessing Officer by sustaining the disallowance of ₹15,42,693/- on account of non-deduction of Tax Deducted at Source (TDS) u/s 195 r.w.s 40(a)(ia) of the Act.

3. Briefly, stated facts are that assessee in the present case is a limited company and engaged in manufacturing tea, cloth and yarn. The assessee during the year inter alia has paid Commission to the parties based on Hong Kong as detailed under:-

Sl.	Name of party	Amount
1.	Sino Shiny International Ltd.	13,96,245
2.	Koreteks Co.Ltd	1,46,448
		15,42,693

During the course of assessment proceedings, AO observed that there was no DTAA with Hong Kong and therefore commission in the hands of foreign parties were taxable in India in pursuance to provision of Section 5(2)(b) r.w.s 9(1)(i) of the Act. Accordingly, assessee was under obligation to deduct the

TDS on the amount of commission paid to the aforesaid parties but assessee failed to do so. Therefore, AO disallowed the same and added to the total income of assessee.

3. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that commission was paid to various parties in connection with direct exports to the parties referred by them. The services were rendered by these agents from their respective countries. Therefore, the commissions earned by them were not chargeable to tax and consequently there was no liability to deduct the tax u/s 195 of the Act.

Moreover, the commission was paid to all agents in terms of foreign currency. None of the agents has place of business in India and business connection in India. The AO relied upon the decision of AAR in the case of *SKF Boilers and Driers Pvt. Ltd.* (2012) 343 ITR 385 was rendered in relation to opinion of the Advance Ruling Authority. Such opinion of advance ruling authority is binding on the concerned party which sought such opinion. The assessee also submitted that the provision of Section 5(2)(b) r.w.s. 9(1)(i) as relied by the AO are not applicable to the instant facts of the case as the party had no business connection, property in India or no source or income liable to tax in India. However, Ld. CIT(A) disregarded the contention of assessee confirmed the order of AO by observing as under:-

> *"5.2 I have considered the facts of the case and the appellant's submission. The facts are not disputed. The appellant paid total commission of Rs.15,42,673/- to non-resident agents without deducting tax at source. It is the appellant's case that the gents do not have any place of business or business connection in India. The commission paid to them cannot be deemed to accrue or arise in India within the meaning of section 9(1)(i) of the Act. the AO relied upon the decision of AAR in the case of SKF Boilers and Driers Pvt. Ltd. (2012) 343 ITR 385 in which it has been held as under:-*
>
> > 'It is the appellant's contention that the agents have rendered services abroad and would be entitled to receive commission abroad for the services rendered to foreign clients of the applicant. As the services are rendered outside India, and the payment is receivable by the agents abroad no income would arise under the provisions of section 5(2)(b) read with section 9(1) of the Act. Section 5(2)(b) deals with the scope of total income whereby the income of a non-resident includes all income from whatever source derived, which accrues or arises or is

deemed to accrue or arise in India during such previous year. Under section 9(1)(i), income accruing or arising directly or indirectly, through or from any business connection in India or source of income in India shall be deemed to accrue or arise in India. We are concerned with the source of income of the two non-resident agents who had earned Commission from the business activity of the applicant. Section 5 and 9 of the Act thus proceed on the assumption that income has a situs and the situs has to be determined according to the general principles of law. The words '**accrue**' or '**arise**' occurring in section 5 have more or less a synonymous sense and income is said to accrue or arise when the right to receive it comes into existence. No doubt the agents rendered services abroad and have solicited orders, but the right to receive the commission arises in India when the order is executed by the applicant in India. The fact that the agents have received rendered services abroad in the form of soliciting the orders and the commission is to be remitted to them abroad are wholly irrelevant for the purpose of determining the situs of their income. We follow the ruling of this Authority in Rajive Malhotra, In re [2006] 284 ITR 564 / 155 Taxman 101 (Delhi). We therefore hold that the income arising on account of commission payable to the two agents is deemed to accrue and arise in India, and is taxable under the Act in view of the specific provision of Section 5(2)(b) read with section 9(1)(i) of the Act. The provision of section 195 would apply, and the rate of tax will be as provided under the Finance Act for the relevant year.'

The facts of the instant case are similar. The appellant has stated that the case is not a binding precedent, but as the facts are similar, the ruling, definitely, has a persuasive value. The circular 786 dated 02/02/2007 and circular 23 dated 23.07.1969 of the Board relied upon by the appellant have now been withdrawn by CBDT vide circular no. 7 of 2009 dated 221.10.2009. The appellant has paid Commission to the non-resident agents which have arisen only when the orders procured by them were executed in India. Thus, the Commission income has arisen in India. As mentioned by the Assessing Officer, there is no DTAA between India and Hong Kong, the country of resident of the agents. In the judgement of Hon'ble Supreme Court in the case of Carborandum Co. V CIT (1978) (108 ITR 335 (SC) relied upon by the appellant, the facts were different. The assessee company had been paid technical fee by an Indian company for making services of foreign personnel available to Indian Company outside taxable territory. It was held that the service rendered by the assessee in that connection was wholly and solely rendered in the foreign territory. Hence, its income could not be deemed to accrue or arise in India. The case of the appellant is different as the Commission income has arisen only on execution of the orders in India. In the decision of ITAT in the case of Gujrat Reclaims Rubber Products Ltd. relied upon by the appellant, the date of Commission payment was prior to the date of withdrawal of the aforesaid circular no 786 and circular no. 23 by circular no 7 dated 22.10.209. Moreover, Explanation 2 to section 195 introduced with retrospective effect from 01.04.1962 clarifies that's the obligation to make deduction under sub-section (1) of section 195 shall be deemed to have

always applied and extended to all persons, resident or non-resident, whether or not the non-resident persons has –

(i) A residence or place of business or business connection in India; or

(ii) Any other presence in any manner whatsoever in India.

Thus, the appellant cannot escape its liability to deduct tax merely for the reason that the non-resident agents have no residence or place of business or business connection in India. As the commission has arisen only on execution of orders in India, the income from commission is deemed to arise in India. I, therefore, hold that the app was liable to deduct tax at source on the payment of Commission of Rs.15,42,763/- and having failed to do, is not eligible for deduction of same in view of provisions of section 40(a)(ia) of the Act. Hence, the disallowance of Rs.15,42,763/- u/s. 40(a)(ia)is confirmed."

Aggrieved by this, the assessee has come up in appeal before us.

4. Ld. AR for the assessee reiterated the same submissions that were made before Ld. CIT(A) and relied on the order of Delhi ITAT in the case of Divya Creation Vs. ACIT in ITA No. 5603/Del/2014.

On the other hand, Ld. DR vehemently relied on the order of Authorities Below.

5. We have heard the rival contentions of both the parties and perused the material available on record. In the instant case, assessee has made payment to various agents based in foreign countries on account of export made to the parties referred by them and no addition was made in respect of those parties based in the country other than Hong Kong in view of the fact that there was DTAA with those countries. However, AO was of the view that the payment made to the foreign agents based on Hong Kong was made without deducting TDS u/s 195 of the Act. As per the AO assessee was liable to deduct TDS on such payment of commission due to the fact that there was no DTAA with Hong Kong. The view taken by AO was subsequently confirmed by Ld. CIT(A). At this juncture, we find important and relevant to reproduce the provision of Section 195 of the Act which reads as under :-

"Other sums.

[71]195. *[72][(1) [73]Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest [74][***] or any other sum chargeable under the provisions of this Act (not being income chargeable*

under the head "Salaries" [75][***]) 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 :"

A plain look at the above statutory provision makes it clear that the assessee is liable to deduct TDS on the payment to Non Residents on any sum chargeable under the provision of this act. Now, the question arose whether payment made to the foreign agent based in Hong Kong is chargeable to tax in India. For this purpose, we need to refer the provision of Sec. 5(2) of the Act which reads as under:-

Scope of total income.

*[47]**5.** [48](1) Subject to[49] the provisions of this Act, the total income[49] of any previous year of a person who is a resident includes all income from whatever source derived which—*

XXXXXXXXXXXXXX

(2) Subject to[49] the provisions of this Act, the total income[49] of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received[50] or is deemed to be received[50] in India in such year by or on behalf of such person ; or

(b) accrues[50] or arises[50] or is deemed to accrue or arise to him in India during such year.

It is beyond doubt the payment for the commission was not received by the foreign agents in India. Therefore, the same cannot be taxed in India as per clause (a) of sub-section (2) of section 5 of the Act. Similarly, we further note that the income was received by the foreign agents on account of services rendered by then in their respective countries. Therefore, we conclude that such income has not accrued or arisen in India and consequential not chargeable to tax in India.

Now coming to the fact that whether such commission income by the foreign agents were deemed to accrue or arise in India in terms of provision of Section 9 of the Act, which reads as under:-

Income deemed to accrue or arise in India.

*[65]**9.** [66](1) The following incomes shall be deemed[67] to accrue or arise in India :—*

[68](i) all income accruing or arising, whether directly or indirectly, through or from any business connection[69] in India, or through or from any property[69] in India, or through or from any asset or source of income in India, [70][* *] or through the transfer of a capital asset situate in India.*

[71][Explanation 1].—For the purposes of this clause—

(a) in the case of a business of which all the operations[72] are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations[72] carried out in India ;

(b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export ;

[73][* *]*

[74][(c) in the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India ;]

From the above proposition, we find that income shall be deemed to accrue or arise in India if it fulfils any of the conditions :-

i) Business connection in India; or

ii) From any property in India; or

iii) From any asset or source of income in India or

iv) Transfer of capital asset situated in India

From the above, we note that the case of assessee is not falling in any of the category as discussed above.

Similarly, it is not the case of Revenue that payment was made by assessee on account of technical services rendered by the foreign agents. Therefore, in our considered view, assessee was not liable to deduct TDS u/s 195 of the Act. In holding so, we find support and guidance from the judgment of Hon'ble Madras High Court in the case of *CIT vs. Farida Leather Co.* reported in 66 taxman.com 321 (Mad) wherein it was held as under:-

> ***"9.2** The underlying principle is that, the tax withholding liability of the payer is inherently a vicarious liability on behalf of the recipient and therefore, when the recipient / foreign agent does not have the primary liability to be taxed in respect of income embedded in the receipt, the vicarious liability of the payer to deduct tax does not arise. This vicarious tax withholding liability cannot be invoked, unless primary tax liability of the recipient / foreign agent is established. In this case, the primary tax liability of the foreign agent is not*

established. Therefore, the vicarious liability on the part of the assessee to deduct the tax at source does not exist."

We also find support and guidance from the order of ITAT Ahmedabad Bench in the case of *DCIT (International Taxation) vs. Welspun Corporation Ltd.*, reported in 77 taxmann.com 165 (Ahd), wherein it was held as under;-

***"33.** There are a couple of rulings by the Authority for Advance Ruling, which support taxability of commission paid to non-residents under section 9(1)(i), but, neither these rulings are binding precedents for us nor are we persuaded by the line of reasoning adopted in these rulings. As for the AAR ruling in the case of SKF Boilers & Driers (P.) Ltd. In re [2012] 343 ITR 385/206 Taxman 19/18 taxmann.com 325 (AAR - New Delhi), we find that this decision merely follows the earlier ruling in the case of Rajiv Malhotra, In re [2006] 284 ITR 564/155 Taxman 101 (AAR - New Delhi) which, in our considered view, does not take into account the impact of Explanation 1 to Section 9(1)(i) properly. That was a case in which the non-resident commission agent worked for procuring participation by other non-resident entities in a food and wine show in India, and the claim of the assessee was that since the agent has not carried out any business operations in India, the commission agent was not chargeable to tax in India, and, accordingly, the assessee had no obligation to deduct tax at source from such commission payments to the non-resident agent. On these facts, the Authority for Advance Ruling, inter alia, opined that "no doubt the agent renders services abroad and pursues and solicits exhibitors there in the territory allotted to him, but the right to receive the commission arises in India only when exhibitor participates in the India International Food & Wine Show (to be held in India), and makes full and final payment to the applicant in India" and that "the commission income would, therefore, be taxable under section 5(2)(b) read with section 9(1)(i) of the Act". The Authority for Advance Ruling also held that "the fact that the agent renders services abroad in the form of pursuing and soliciting participants and that the commission is remitted to him abroad are wholly irrelevant for the purpose of determining situs of his income". We do not consider this approach to be correct. When no operations of the business of commission agent is carried on in India, the Explanation 1 to Section 9(1)(i) takes the entire commission income from outside the ambit of deeming fiction under section 9(1)(i), and, in effect, outside the ambit of income 'deemed to accrue or arise in India' for the purpose of Section 5(2)(b). The point of time when commission agent's right to receive the commission fructifies is irrelevant to decide the scope of Explanation 1 to Section 9(1)(i), which is what is material in the context of the situation that we are in seisin of. The revenue's case before us hinges on the applicability of Section 9(1)(i) and, it is, therefore. important to ascertain as to what extent would the rigour of Section 9(1)(i) be relaxed by Explanation 1 to Section 9(1)(i). When we examine things from this perspective, the inevitable conclusion is that since no part of the operations of the business of the commission agent is carried out in India, no part of the income of the commission agent can be brought to tax in India. In this view of the matter, views expressed by the Hon'ble AAR, which do not fetter our independent opinion anyway in view of its limited binding force under s. 245S*

of the Act, do not impress us, and we decline to be guided by the same. The stand of the revenue, however, is that these rulings, being from such a high quasi-judicial forum, even if not binding, cannot simply be brushed aside either, and that these rulings at least have persuasive value. We have no quarrel with this proposition. We have, with utmost care and deepest respect, perused the above rulings rendered by the Hon'ble Authority for Advance Ruling. With greatest respect, but without slightest hesitation, we humbly come to the conclusion that we are not persuaded by these rulings."

The principles laid down in the above cited judgments are squarely applicable to the instant facts of the case. Thus, it can be safely concluded that assessee paid Commission to foreign agent is not the income chargeable to tax in India. Once an income is not chargeable to tax in India then the question of deducting TDS under the provision u/s 195 of the Act does not arise. Accordingly, the order of Ld. CIT(A) is set aside and grounds raised by the assessee are allowed.

6. **In the result, assessee's appeal stands allowed**

Order pronounced in the open court 28/02/2018

Sd/- Sd/-
(Aby. T. Varkey) (Waseem Ahmed)
(Judicial Member) (Accountant Member)
Kolkata,
*Dkp
दिनांकः- 28/02/2018 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-M/s Bengal Tea & Fabrics Ltd., 'Century Towers', 4th Floor, 45, Shakespeare Sarani, Kolkata-17
2. प्रत्यर्थी/Respondent-DCIT, Circle-4, Aayakar Bhawan, P-7, Chowringhee Sq. Kol-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Sr. Private Secretary, Head of Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता ।