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Commission earned by NR agent for services rendered abroad not taxable in India in absence of PE in India

Summary – The Mumbai ITAT in a recent case of Gujarat Reclaim & Rubber Products Ltd., (the Assessee) held that where non-resident agent did not have PE in India, Commission paid by assessee to non-resident agent for rendering services in foreign countries cannot be disallowed under section 40(a)(i). Since non-resident shipping companies were separately taxed under section 172, TDS was not required to be deducted from freight expenses paid to them.

Facts

- During the assessment years 2007-08 and 2008-09, the assessee paid commission of Rs. 17.29 lakh and 32.73 lakh respectively to non-resident agents for rendering services in respect of procuring export orders from various countries.
- The Assessing Officer invoked the provisions of section 40(*a*)(*i*) and disallowed the commission expenses on grounds that the assessee had not deducted tax at source.
- In appeal, the assessee contended that the non-resident agents did not have any business connection in India and thus, tax was not required to be deducted. The Commissioner (Appeals) in assessment year 2007-08 confirmed the disallowance whereas in Assessment year 2008-09 deleted the disallowance made by the Assessing Officer.
- The assessee had also claimed the ocean freight expenses paid to a non-resident shipping company aggregating to Rs. 58.82 lakh.
- The Assessing Officer invoked the provisions of section 40(*a*)(*i*) and disallowed the ocean freight expenses on ground that the tax was not deducted by the assessee.
- In appeal, the assessee contended that shipping income was taxable under section 172 which itself was a self-contained code. Also, as per the Board Circular No. 723, provision of section 194(*c*) and 195 was not applicable as provision of section 172 applied on shipping income. The Commissioner (Appeals) rejected the contention of the assessee and confirmed the order of the Assessing Officer.
- On appeal.

Held

- There is no dispute with reference to the fact that the assessee paid commission at 5 per cent on FOB value of the shipment of the product to the foreign agents and is also not in dispute that the agent is not authorised to market the products to any third party and it does not have any business connection in India. Their services are also not utilised in India. Therefore, respectfully following the decision of the Delhi High Court in the case of *CIT* v. *EON Technology (P.) Ltd*. [2011] 203 Taxman 266/15 taxmann.com 391 and also the Coordinate bench decision in the case of *Armayesh*

Global v. *ACIT* (*supra*), the income of the non-resident cannot be considered as accrued or arisen or deemed to accrue or arise in India as the services of the said agents were rendered/utilized outside India and the commission was also payable/paid outside India.

- Further, in the absence of permanent establishment in India, the income of the said agents cannot be subjected to tax in India and hence the assessee was not liable to deduct tax on payments made to the said agents. Therefore, provisions of section 40(*a*)(*i*) have no application on the given facts.
- Discussion made by the Commissioner (Appeals) in the assessment year 2008-09 is correct both on facts and on law, the same is upheld and the revenue ground on this issue in assessment year 2008-09 is dismissed and assessee's grounds in assessment year 2007-08 are allowed.
- With regard to the Ocean Freight Expenses, the ITAT observed that the Assessing Officer without assigning any specific reasons had disallowed the expenses under section 40(*a*)(*i*). There is no dispute with reference to the fact that the Ocean freight was paid to foreign shipping companies.
- In view of the CBDT Circular No. 723 dated 19-9-1995, the assessee company is not required to deduct tax at source from the ocean freight paid by it of Rs. 58,82,475 to Transmode Overseas Partners, Germany, because the said company is liable to tax under section 172.
- Since the Circular is binding on the authorities and since the incomes are being taxed under section 172 separately, there is no need for deducting any tax under the provisions of the TDS and therefore, disallowance under section 40(*a*)(*i*) does not arise.