No withholding taxes from commission paid to NR agents for their services rendered outside India

Summary – The Lucknow ITAT in a recent case of Model Exims, (the Assessee) held that payments of commission made by assessee to its foreign agents for rendering services abroad was not taxable in India and, thus, assessee was not required to deduct tax at source while making said payments.

ORDER

1 In this appeal the order of CIT(A) is assailed on various grounds which are as under:

"1. That Ld. CIT(A) has erred in law & Facts in deleting the addition of Rs.84,47,729/- made under section 40(a)(i) on account of payment made to Non-residents without TDS on export sales without appreciating the facts brought on record by the AO.

2. That Ld. CIT(A) has erred in law and on facts in not appreciating the provisions of section 9(1)(vii) that service rendered by the non-resident agent to procure order from foreign buyers are technical or managerial in nature, which was clearly applicable on such assessee, and thus erred in coming to the conclusion that foreign agents do not fall within the meaning of "FTS" as described in section 9(1)(vii) of the I.T. Act.

3. That learned CIT (A) has ignored the provision of explanation to section 9 introduced by Finance Act 2007 with retrospective effect from 01.06.1976 to the effect that fee for service shall be taxable in India whether or not the non-resident has rendered service in India.

4. That Ld. CIT (A) has erred in law and fact in relying on the decision of High Court where the amended provisions of section 9 are not taken into consideration.

5. The Learned CIT(A) has erred in law and fact in mis-appreciating the fact that circular No. 23 stands withdrawn by subsequent circular No. 7.2009 [F. No. 500/135/2007-FTD-I], dated 22.10.2009 and, therefore, as per provisions of section 9 the same was taxable in India and accordingly tax should have been deducted at source u/s 195 of the I.T. Act.

6. That Ld. CIT(A) has erred in law & facts in deleting the addition of Rs.2,00,000/- on accounts of low G.P. by holding that addition has been made on conjecture & surmises without looking into the facts of the case and materials brought on record by the AO.

7. That the order of the Ld. CIT (A) being erroneous in law and on facts needs to be vacated and the order of the A. O. be restored.

8. That the appellant craves leave to add or amend any one or more of the ground of the appeal as stated above as and when need for doing so may arise."

Ground Nos. 1 to 4 relate to the deduction of TDS on payments of commission to foreign residents. During the course of hearing of the appeal, the learned counsel for the assessee invited our attention that this issue is squarely covered by the various orders of the Tribunal in which the effect of circular withdrawn by the CBDT was properly examined. Following these judgments the CIT(A) has adjudicated the issue by holding that appellant was not required to deduct TDS u/s 195 of the Act in respect of commission paid to foreign agents. The CIT(A) has also taken note of the fact that in the immediately preceding year i.e. assessment year 2008-09, the similar view was taken by CIT(A), which was later on approved by the Tribunal. The relevant observation of CIT(A) is extracted hereunder for the sake of ready reference:

"I have carefully considered the views expressed by the A.O. (while making the disallowance u/s 40(a)(i) for non deduction of tax at source on payment of Commission to Foreign Agent) as well as submissions made by the appellant. In view of the categorical finding of the Hon'ble ITAT in this regard, I agree with the submissions of appellant that the issuance of Circular no. 7 of 2009 dated 22-10-2009 withdrawing the circular no. 23 of 1969, 163 of 1975 and 786 of 2000 will be operative only from 22.10.2009 and not prior to that date. Thus, the withdrawal of earlier circulars with effect from 22/10/2009 has no bearing in the instant assessment year. Moreover, the reliance by the Assessing Officer on the decision in the case of *Van Oord ACZ India (P.) Ltd.* v. *Addl. CIT* [2008] 112 ITD 79 (Delhi) has no meaning since the same has been overruled by the Hon'ble Delhi High Court on 15th March, 2010.

The A.O. has also invoked the provisions of Section 9(1)(vii) on the premise that such payments also fall under FTS. In this regard she has observed that normally the exporter appoints the agents as his selling agent, designer & technical advisor for his products. He has further observed that being commission agent required managerial acumen & expertise and therefore, would be covered under Section 9(1)(vii) of the Act as managerial services. On perusal of the assessment order and assessment folder, I find that the A.O. has not brought anything on record which could demonstrate that these agents had been appointed as selling agents, designers & technical advisors. Rather on the contrary I find that the agreement is of for procuring orders and nothing else. In absence of any such evidence, this observation of the A.O. is mere conjecture and therefore, no cognizance of the same can be taken. It is a trite law that suspicion, no matter how grave, cannot take place of evidence. In this case, there is even no case of suspicion, leave aside any evidence to the effect that the agents were not only selling agents but also

designers and technical advisors. The confirmation from the respective foreign agents that the foreign agents did not have any branch or PE in India further supports the case of the appellant.

The A.O.'s observation that as a selling agent, the agent has to have managerial acumen and, therefore, hit by the provisions of Section 9(1)(vii), is baseless. The provisions of Section 9(1)(vii) deals with fees for technical services and it has to be read in that context. Thus, the aforesaid payments do not fall within the meaning of "FTS" as described in Section 9(1)(vii) of the Act.

The income of the non-resident was not chargeable to tax in India since the same wan neither received in India nor had it accrued or deemed to accrue in India. Accordingly, the appellant was not required to deduct Tax at Source u/s 195 in respect of commission paid to the Foreign Agents. A similar issue had arisen in the appellants own in the Asstt. Year 2008-09 wherein the same was decided by the CIT(A) in appeal No. CIT(A)-II/366/DCIT-I/10-11 Order dt. 30.01.2012. The Hon'ble ITAT, Lucknow while deciding the case of *Dy. CIT* v. *Sanjiv Gupta* [2011] 135 TTJ 641, has deleted the addition u/s.40(a)(i) on similar circumstances. However, the reliance is also placed on the following decisions:

1. *CIT* v. *Toshoku Ltd.* [1980] 125 ITR 525 (SC) held - that when a non-resident, with no operation of business in India, rendered services outside India to an Indian concern, then the provisions of S. 9 are not attracted.

2. *CIT* v. *Eon Technology (P.) Ltd.* (Delhi, HC) (ITA No.1167 dated 8th March, 2011) - held, that - TDS u/s 195 on commission payable to non-resident is not to be deducted for the services rendered outside India.

3. *Dy. CIT* v. *Ardeshi B. Cursetjee & Sons Ltd.* [2008] 115 TTJ 916, ITAT, Mumbai, 2008.

4. *TVS Motor Co.* v. *Asstt. CIT,* ITAT, Chennai, ITA No.697 & 757/Mds/2009.

On consideration of the decisions (*supra*) and the facts and circumstances of the case, the addition made by AO is misplaced, hence, the same is being deleted."

Since the CIT(A) has adjudicated the issue following the ratio laid down by the Tribunal and various High Courts in the cases mentioned in the order of CIT(A), we find no infirmity therein. Accordingly, we confirm the same.