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No withholding tax liability on payment of export commission to NR before withdrawal of Circular No. 786

Summary – The Mumbai ITAT in a recent case of Rapid Pack Engg. (P.) Ltd., (the Assessee) held that where CBDT Circular No. 786 dated 7-2-2000 was in force at time of remittance of amount of commission to non-resident agent, assessee was not liable to deduct tax at source on such payment

Facts

- Assessee-company, engaged in the manufacturing engineering goods used by the pharmaceutical companies for packing capsules and tablets, had remitted a commission to a company 'L' of Dubai on which no tax at source was deducted on the ground that 'L' had no permanent establishment (PE) in India and the income of the payee did not arise in India. The assessee placed reliance on the CBDT Circular No. 786, dated 7-2-2000 and submitted that tax liability of foreign agent of Indian exporter did not arise in India as no part of his income arise in India.
- The Assessing Officer did not accept the contention of the assessee and placing reliance on the *Explanation* 2 to section 9(1) held that the commission paid to non-resident fell within the ambit of section 9 and, accordingly, disallowed the same under section 40(a)(ia).
- On appeal, the Commissioner (Appeals) held that the payment in question did not fall under clauses (v) to (vii) of section 9(1) and, therefore, the *Explanation* 2 to the said section was not applicable. He also considered the provisions of DTAA between India and UAE and held that when the services were rendered outside India, as per the DTAA between India and UAE the income arising out of the transaction between assessee and the non-resident was not liable to tax in India and, therefore, not subjected to provisions of deduction of tax at source.
- On appeal before the Tribunal, the revenue submitted:
  - That the payment in question was not commission but the real nature of the payment was business income of the non-resident.
  - That so called commission paid by the assessee was more than 20 per cent and went up to 22.5 per cent and, therefore, it was a clear violation of RBI guidelines to allow the remittance of the commission only to 12.5 per cent of the invoice.
  - The benefit of the Treaty between India and UAE was not available to the recipient of the amount because L was an LLC and not having a tax resident certificate of the UAE.

Held

- As it is manifest from the grounds of appeal raised by the revenue, the grievance of the revenue is limited on the point that the Commissioner (Appeals) has not appreciated the fact that Circular No. 786 had been withdrawn by the Circular No. 7 of 2009, dated 22-10-2009, and therefore, the benefit of earlier Circulars was not applicable to the assessee on the date of order. The revenue has raised a new plea before the Tribunal regarding the nature of payment of so called commission.

- The new plea raised by the revenue involves the question which requires verification and investigation of records and facts for its adjudication and, therefore, in the absence of any finding by the authorities below or any material in support of a fresh contention, it is not possible to entertain and adjudicate the same. When the Assessing Officer has not disputed the nature of payment being commission, then in the absence of any material/record to show that the real nature of payment is not commission, a fresh plea raised by the revenue cannot be entertained. The revenue has also raised a contention that the benefit of DTAA is not available to the recipient of the amount in the absence of tax resident certificate. Since no such question was either raised by the Assessing Officer or by Commissioner (Appeals) and, therefore, there was no occasion for the assessee to produce such certificate before the authorities below. At this stage in the absence of any record to prove the contrary, the mere contention of the revenue cannot be accepted.
- *Explanation* 2 to section 9(1) is clearly in respect of the income of non-resident falling under clauses (v) to (vii) of sub-section (1) of section 9 and, therefore, if the income of the non-resident is not in the nature of interest, royalty or fee for technical services, then the said *Explanation* is not relevant for determination of the taxability of the income of non-resident in India. Therefore, there is no error or illegality in the impugned order of the Commissioner (Appeals) whereby it has been held that the *Explanation* in question is not applicable in the case of the assessee. The limit provided under the RBI guidelines for remittance of commission is relevant only for the purpose of remittance in foreign exchange and is not relevant for determination of the allowability of the expenditure under the Income-tax Act. Once the remittance was allowed even more than limit provided by the RBI guidelines, the same becomes irrelevant for the purpose of allowability of the expenditure under the Income-tax Act. So far as the withdrawal of Circular No. 786 by a subsequent Circular, viz., Circular No. 7/2009, dated 22-10-2009 is concerned, the Delhi High Court in the case of *CIT* v. *Angelique International Ltd.* [2013] 359 ITR 9/219 Taxman 104/38 taxmann.com 425 had the occasion to consider this issue and held that the Circular no. 7 of 2009, whereby the Circular No. 789 has been withdrawn did not have retrospective effect.
- Even otherwise, at the time of remittance of the amount in question the Circular No. 786 was very much in force and existence and, therefore, the assessee could not be expected to deduct tax at source on the commission paid to the non-resident agent.
- Following the decision of the Delhi High Court in the case of *Angelique International Ltd.* (*supra*) as well as the decision of Allahabad High Court in the case of *CIT* v. *Model Exims* [2013] 358 ITR 72, the order of the Commissioner (Appeals) was to be upheld.