Commission paid to foreign agent for securing sales order won't fall within the ambit of 'FTS'; not liable to TDS

Summary – The Mumbai ITAT in a recent case of Khimji Visram & Sons., (the Assessee) held that where commission payments were made to foreign agents for securing sales orders payments will not fall in category of 'Fee for Technical Services' requiring withholding of tax

Facts

- The assessee was a trader as well as a commission agent in respect of cotton, cotton yarn etc. The assessee paid commission to the foreign parties against export of cotton and claimed the same as expenditure.
- The Assessing Officer noticed that the assessee did not deduct tax at source from the above said commission payments. On being questioned, the assessee submitted that the commission was paid to non-resident foreign agents for services rendered outside India and since it was not taxable in the hands of the recipients as per the DTTA entered by India with UK and Turkey, tax was not required to be deducted at source.
- The Assessing Officer, however, took the view that the impugned commission was paid to the foreign agents in connection with the services rendered for popularizing the brand of the assessee, contacting more clients on behalf of the assessee and for giving the information in respect of prospective customers to the assessee. Accordingly, the Assessing Officer took the view that the above said services rendered by the foreign commission agents would clearly fall under the category of 'managerial services' included in the definition of 'Fee for technical services' as defined in section 9(1)(vii). Accordingly, the Assessing Officer held that commission received by the foreign agents is chargeable to tax in India under section 9(1)(vii). Accordingly, the Assessing Officer disallowed the commission expenditure.
- On appeal, the Commissioner (Appeals) took the view that the foreign agents are providing composite services comprising of commission agency and services for promoting sales of the assessee in foreign countries, although nomenclature used by the assessee was 'Commission'. He further held that the payments made by assessee to foreign parties are taxable in India. Accordingly, he upheld the disallowance made under section 40(a)(i).
- On further appeal by assessee:

Held

- Both the taxing authorities have taken a view that services rendered by foreign commission agent would clearly fall in the category of 'Fee for technical services' defined under section 9(1)(vii). The assessee submitted that the impugned commission payments were made for securing sales orders only and the tax authorities have presumed that the foreign agents were rendering some other kind

of services also. He submitted that they have drawn this kind of inference on surmises and conjectures only. The contentions of the assessee are found convincing as the Assessing Officer or the Commissioner(Appeals) has not brought any material on record to substantiate their views that some other kind of services were also rendered by the foreign agents. Hence, the submission of the assessee that the commission amounts were paid for procuring sales orders was proper. Hence, by following the decision rendered by the Madras High Court in the case of *CIT* v. *Faizan Shoes (P.) Ltd*. [2014] 48 taxmann.com 48 and also the decision rendered by the Delhi bench of Tribunal in the case of *Dy. CIT* v. *Angelique International Ltd*. [2013] 55 SOT 226/28 taxmann.com 219, it was held that the payment made for technical services will not fall in the category of 'Fee for Technical Services' as defined under section 9(1)(vii).

- The assessee also made an alternative contention in respect of this issue. He submitted that the Commissioner (Appeals) has stated that there is no requirement of having a Permanent Establishment in India for taxing the income falling under the category of 'Fee for technical services' after the insertion of explanation below section 9(2). He submitted that the above said explanation was first inserted by Finance Act, 2007 with respect from 1-6-1976 and later amended by Finance Act, 2010. He submitted that, by the time the amendment was brought into the Act, he had already paid the commission amount to the foreign agents. Accordingly he submitted that the disallowance cannot be made under section 40(a)(ia) in respect of a past action on the basis of subsequent amendment brought into the Act with retrospective effect. For this proposition, he placed reliance on decisions of the co-ordinate benches of Tribunal in (a) *Kerala Vision Ltd*. v. *Asstt. CIT* [2014] 64 SOT 328/46 taxmann.com 50 (Cochin - Trib.), (b) *Infotech Enterprises Ltd*. v. *Asstt CIT* [2014] 41 taxmann.com 364/63 SOT 23 (Hyd. - Trib.) and (c) *Channel Guide India Ltd*. v. *Asstt. CIT* [2012] 139 ITD 49/25 taxmann.com 25 (Mum.) which have taken the view as canvassed by the assessee. The assessee claims that he has paid the commission amounts prior to the date of insertion of the explanation under section 9(2) with retrospective effect. However, the details of payment of commission amounts are not available on record. In any case, the ratio of the above said decisions are to be followed in the instant case also.
- The assessee has also placed reliance on the circular No. 22 of 1969, 103 of 1975 and 76 of 2007 issued by the CBDT, wherein the CBDT has expressed the view that the commission payments made to foreign agents for services rendered outside India are not liable to tax in India. However, the above said circulars were subsequently withdrawn by CBDT, *vide* its **circular No.7 of 2009 dated 22.10.2009**. The assessee submitted that the impugned commission payments were made during the currency of old circulars referred above and hence the assessee was entitled to follow the said circulars. He further submitted that the circular No.7 of 2009, which withdrew the old circulars, shall have prospective effect only, as per the decision rendered by the Allahabad High Court in the case of *CIT* v. *Model Exims Kanpur* [2013] 358 ITR 72/219 Taxman 298/38 taxmann.com 319, wherein the High Court has held that the circular No.7 of 2009 shall have prospective effect. Accordingly the

assessee submitted that he is not liable to deduct tax at source from the commission payments made to the foreign agents as per the old circulars referred above.

- Accordingly, the assessee contended that the disallowance made under section 40(a)(i) is not correct in law, since he is not liable to deduct tax at source from the commission payments.
- The contentions put forth by the assessee seem worthwhile. Accordingly, it is held that the assessee is not liable to deduct tax at source from the commission payments made to the foreign agents in the facts and circumstances of the instant case. Accordingly, the order of the Commissioner(Appeals) is set aside and the Assessing Officer is directed to delete the impugned disallowance.