No withholding tax on foreign agency commission as revenue failed to prove that expenses were taxable in India

Summary – The Chennai ITAT in a recent case of M.M. Forgings Ltd., (the Assessee) held that where assessee incurred foreign agency commission as well as warehousing and other charges overseas for services rendered wholly outside India, no tax liability arose under section 195 and, thus, section 40(a)(i) was not attracted

Facts

- The assessee-company was engaged in the manufacture and export of steel forgings. During the relevant year, it had incurred foreign agency commission and warehousing and other charges overseas.
- The Assessing Officer disallowed deduction on foreign commission and warehousing under section 40(*a*)(*i*) as no tax was deducted on the commission paid to the foreign agents as required under section 195.
- On appeal, the Commissioner (Appeals) directed the Assessing Officer to delete the addition made towards foreign agency commission, warehousing and other charges under section 40(*a*)(*i*) as he was of the view that vicarious tax withholding liability cannot be invoked, unless primary tax liability of the recipient is established. The non-resident agents were only procuring orders and warehousing for the assessee and no other services were rendered other than the above. Thus, the commission payment made to non-residents could not be treated as income deemed to accrue or arise in India and therefore the provisions of section 195 had no application in such cases.
- On further appeal to Tribunal:

Held

- This issue is squarely covered by the earlier order of the Tribunal in the assessee's own case for the assessment year 2010-2011 in IT Appeal No.2311 of 2013 vide order, dated 28-3-2014. In the said order, the Tribunal observed that the Commissioner (Appeals), whilst deleting the impugned addition under section 40(*a*)(*i*) pertaining to overseas payments made by the assessee on account of commission, warehousing and other charges, has followed order of the 'Tribunal' *qua* the very issue. On being granted opportunity, the revenue has failed to prove that these expenses are liable to be taxed in India as income in the hands of concerned payees or any services had been rendered in India. The revenue submits that the 'Tribunal's' order has not been become final and its appeal is pending before the High Court. However, mere pendency of an appeal involving the same issue against the order of the 'Tribunal' is no ground to adopt a different approach in the impugned assessment year. Thus, grounds raised by the revenue were rejected.

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- Similar view was also taken by the Mumbai Bench in the case of *Asstt. CIT* v. *Vilas N. Tamhankar* [2015] 68 SOT 124/55 taxmann.com 413 (Mum.) and same view was also taken by the High Court in the case of *CIT* v. *Faizan Shoes (P.) Ltd* , [2014] 367 ITR 155/226 Taxman 115/48 taxmann.com 48 (Mad.) and further in the case of *Brakes India Ltd.* v. *Dy. CIT (LTU)* [2013] 144 ITD 403/33 taxmann.com 501 (Chennai - Trib.) the co-ordinate Bench of the Tribunal held that the logistics service rendered was essentially warehousing facility which cannot be equated with managerial, technical or consultancy services. Even if it is considered as technical service, the fee was payable only for services utilized by the assessee in the business or profession carried on by the said non-residents outside India. Such business or profession of the non-residents, earned them income outside India. Thus, it would fall within the exception given under sub-clause (b) of section 9(1). In any case, under section 195, assessee is liable to deduct tax only where the payment made to non-residents is chargeable to tax under the provisions of the Act. In the circumstances mentioned above, assessee was justified in having a *bona fide* belief that the payments did not warrant application of section 195. In such circumstances, disallowances were rightly deleted by the Commissioner (Appeals). No interference was called for.
- In the result, the appeal of the revenue is dismissed.

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