Commission paid to agent for services rendered outside India wasn't taxable if he didn't have any PE in India

Summary – The Chennai ITAT in a recent case of TVS Srichakra Ltd., (the Assessee) held that Assessee was not liable to deduct tax at source when non-resident selling agents provided services outside India on payment of commission

Facts

- The assessee-company was engaged in services of non-resident agents to procure its export orders in various countries. It claimed certain expenditure under the head 'commission and discount'. It contended that the said amount was not liable for TDS as the services were rendered outside India.
- The Assessing Officer disagreed with this and disallowed the claim under section 40(a)(*i*).
- The Commissioner (Appeals) held that the payment was made in foreign exchange to non-resident for commission to its sales abroad and that the agents have no business places in India. Accordingly, the exports were outside India and no part of income could be taxed in India and he deleted the disallowance under section 40(a)(*i*).
- On appeal:

Held

- According to section 40(*a*)(*i*) it is clear that the disallowance shall be made in case of any payment made which is chargeable under this Act and is payable outside India or in India to a non-resident not being a company or to a foreign company on which tax is deductible at source. Therefore, the first condition required to be fulfilled is the payment must be chargeable under the Act, thereafter the question of deduction of tax will arise. Section 195(1) also prescribes that tax has to be deducted while making payment to non-resident which is chargeable under the provisions of the Act. Therefore, the condition precedent for deduction of tax is the income must be chargeable under the provisions of the Act. In this case, the agreement entered into by the assessee with foreign agents revealed that they have been appointed to act as commission agents outside India in their respective countries. The Assessing Officer had disallowed commission payment under section 40(*a*)(*i*) since there was no TDS made on this payment.
- It was evident from the assessment order, excepting the above inference by the Assessing Officer, there is nothing on record to suggest that the income is chargeable to tax in India or the payment has been received by the non-resident agents in India or by any other person on their behalf. There is also no finding by the Assessing Officer that the non-resident agents have a permanent establishment in India or have any business connection in India, by virtue of which the payment of commission would have accrued or arose in India. The facts on record clearly suggest that the non-resident agents did not carry out any business operations in India and had acted as selling agents of

the assessee outside India. Therefore, the commission earned by them for services rendered by them outside India cannot be considered as income chargeable to tax in India. The Assessing Officer has not established the fact on record that any one of the non-resident agents is carrying on business through a permanent establishments. Therefore, when the commission paid to the non-residents are not chargeable to tax under the provisions of the Act, no deduction of tax is required to be made under section 195(1).

- In the present case, the Assessing Officer has failed to bring any material on record on the basis of which it could be concluded that commission paid to foreign agents is chargeable to tax in India. Unless the income is chargeable to tax in India, then tax is not required to be deducted under section 195(1). From the facts on record, no definite conclusion can be made that the commission paid to foreign agents is chargeable to tax in India.
- In the present case, the foreign concern was acting as the selling agent for the assessee and no services rendered by it within the taxable territory, the amount payable as commission was not liable to tax and as the income is arising or accruing to a foreign concern in India, there is no disallowance under section 40(*a*)(*i*) on the ground that the tax was not deducted at source under section 195 or remittances made to a foreign concern. Accordingly, the appeal is dismissed.