

No withholding tax on commission paid to foreign agents if services were rendered abroad

Summary – The Delhi ITAT in a recent case of Divya Creation., (the Assessee) held that where assessee-firm made payments of commission to those agents, since those agents had their offices situated abroad and, moreover, services were also rendered by them outside India, assessee was not required to deduct tax at source while making payments in question

Facts

- The assessee-firm was engaged in the business of manufacturing and export of plain and studded Gold and Silver jewellery.
- During the course of assessment proceedings, the Assessing Officer noted that the assessee had paid certain commission to its foreign agents for promoting its sale abroad.
- The Assessing Officer finding that assessee did not deduct tax at source while making payment of commission, disallowed same under section 40(a)(i).
- The Commissioner (Appeals) confirmed said disallowance.
- On second appeal:

Held

- The Commissioner (Appeals) while upholding the action of the Assessing Officer, held that income arising to the agent on account of export commission very much falls within the ambit of provisions contained in section 5(2)(b) as the income has accrued in India when the right to receive the same came into existence. According to him although the non-resident agent has rendered services and procured orders abroad but the right to receive the commission certainly arises in India when the order gets executed by the assessee. According to him, the mere fact that the agent is to render services abroad and the commission is to be remitted to him abroad are wholly irrelevant for the purpose of determining the income since income is from a source in India.
- The identical issue had come up before the Ahmedabad Bench of the Tribunal in the case of *Dy. CIT (IT) v. Welspun Corpn. Ltd.* [\[2017\] 77 taxmann.com 165](#). The Tribunal in the said decision has held that the payments made by the assessee for services rendered by non-resident agents could not be held to be fees for payment for technical services. These payments were in the nature of commission earned from services rendered outside India which had no tax implications in India.
- The High Court in the case of *CIT v. Model Exims* [\[2014\] 363 ITR 66/222 Taxman 94/42 taxmann.com 446 \(All.\)](#) has held that failure to deduct tax at source from payment to non-resident agents, who have their own offices in foreign country, cannot be disallowed, since the agreement for procuring orders did not involve any managerial services. It was held that the *Explanation* to section 9(2) is not applicable. It was further held that the situation contemplated or clarified in the *Explanation* added

by the Finance Act, 2010 was not applicable to the case of the assessee as the agents appointed by the assessee had their offices situated in the foreign country and that they did not provide any managerial services to the assessee.

- Section 9(1)(vii) deals with technical services and has to be read in that context. The agreement of procuring orders would not involve any managerial services. The agreement did not show the applicability or requirement of any technical expertise for functioning for selling agent, designer or any other technical services.
- Further, Delhi High Court in the case of *CIT v. EON Technology (P.) Ltd.* [\[2012\] 343 ITR 366/203 Taxman 266/15 taxmann.com 391](#) has also taken similar view where it has been held that non-resident commission agents based outside India rendering services of procuring orders cannot be said to have a business connection in India and the commission payments to them cannot be said to have been either accrued or arisen in India.
- In view of aforesaid it is held that the assessee is not liable to deduct tax under the provisions of section 195 on account of foreign agency commission paid outside India for promotion of export sales outside India. Accordingly, the order of the Commissioner (Appeals) is set aside and the ground raised by the assessee is allowed.
- In the result, the appeal filed by the assessee is allowed.