Commission paid to NR for services rendered outside India not liable to tax even after withdrawal of Circular No. 23

Summary – The Agra ITAT in a recent case of Nuova Shoes., (the Assessee) held that Sections 5(2) and 9 not having undergone any change in cases which directly follow with situations covered by Circular Nos. 23, 7 and 163, clarification in Circular No. 23 will prevail even after its withdrawal and, thus, export commission payable to a non-resident for services rendered outside India was not liable for withholding tax

Facts

- The assessee was in the business of manufacture and export of footwear to various countries. It paid commission to non-resident commission agents for services rendered outside India. It claimed this payment as an expenditure.
- The Assessing Officer observed that the Central Board of Direct Taxes had issued the **Circular No. 7, dated 22-10-2009** withdrawing its **Circular No. 23, dated 23-7-1969**, **Circular No. 163, dated 29-5-1975** and **Circular No. 786, dated 7-2-2000**, which were based on Circular No. 23 which was issued in the context of section 9, which deems certain incomes to accrue or arise in India for non-residents. He opined that assessee should have deducted tax at source under section 195 on payments of commission made to non-residents agents with effect from 22-10-2009.
- The assessee replied that the non-resident agent had carried out all his activities outside India, did not render any service in India and did not have Permanent Establishment (PE) in India and hence, no part of his income accrue or arise in India and, that such payments were, therefore, held to be not taxable in India. Assessing Officer observed that withholding of tax is mandatory under section 195 on export commission paid to a non-resident agent, since commission was deemed to accrue or arise in India. The Assessing Officer, thus, held that provisions of section 195 were applicable in respect of payments of commission with effect from 12-10-2009 to 31-3-2010, and on the basis of same, certain amount was disallowed under section 40(*a*)(*i*) and added to the income of the assessee. He further observed that the Circular No. 786 has been withdrawn, therefore, the income arising to the foreign agents on account of export commission fell under section 5(2)(*b*) as the income had accrued in India when the right to receive the income became vested.
- Commissioner (Appeals) allowed assessee's appeal:
- On appeal:

Held

- In respect of payment made to non-resident agents, no TDS has been deducted as these agents have procured export orders for the assessee-firm and assisted in the timely realization of the payments. The commission is declared in the GR issued by the assessee for the purpose of export of goods. The

same is within the limits prescribed by Reserve Bank of India and all remittances have been made through proper banking channels. The non-resident agent has carried out all his activities outside India, did not render any service in India and did not have Permanent Establishment (PE) in India. Residing in the foreign countries with whom India has entered into a DTAA and under the article 7 of the said DTAA, the income received is being taxed in their hands in their country. That the assessee has remitted payments to them outside India through proper banking channels. These agents have carried out business activity of procurement of export orders and timely realization of payments for the assessee outside India. As the income received by these agents was business income, the same cannot be taxed under the Income-tax Act, 1961 in the absence of business connection and permanent establishment in India. These non-resident commission agents offer to tax the income received on account of the transactions with the assessee as their business income in their country of residence and that the role and responsibilities of these agents are as under to procure orders from buyers to negotiate price and other terms and intimate the same to the assessee to re-negotiate the terms/price if necessary, based on the instructions of the assessee and follow up in getting purchase orders from customers and forward the same to the assessee follow up regarding LC opening, shipment and payment.

- Against the aforesaid services rendered, these agents raise a debit note/invoice for commission at the agreed rate and the amount is remitted through proper banking channels to their bank account in their country of residence.
- The Assessing Officer has invoked the provisions of section 5(2) and section 9(1)(*i*), however he has not dwelt beyond merely mentioning these circular without bringing anything on record about business connection or permanent establishment of such agents in India. The Assessing Officer in his order has also not disputed the fact that the foreign agents are located outside India and have no permanent establishment in India. Therefore, it is not a case where the non-resident agents are carrying on any business activity in India. Rather, it is the assessee who has engaged the services of foreign agents outside India on pure commercial and business terms for its sales outside India and also to pursue the payments to be made by the purchasers as located abroad.
- The Assessing Officer completed assessments under section 143(3) for the assessment years 2011-12 and 2012-13 wherein the Assessing Officer has not made any disallowance in respect of the payment of commission to the foreign agents residing in the country, with which India has entered into DTAA.
- The Assessing Officer's contention that the CBDT, *vide* **Circular No. 7, dated 22-10-2009**, had withdrawn its **Circular Nos. 23, dated 23-7-1969**, **163, dated 29-5-1975** and **786, dated 7-2-2000**, which were based on Circular No. 23; that the Circular No. 23 was issued in the context of section 9 which deemes certain incomes to accrue or arise in India for non-residents; and that in view of this, the assessee should have deducted tax at source under section 195 on payments of commission made to non-residents agents with effect from 22-10-2009. Assessing Officer has not made out any case that whether the issue of Circular No. 7 of 2009 by CBDT by which the earlier circulars were

withdrawn, will make any difference as to bring the commission payments within the ambit of tax as he has not adverted to the admitted position that there exists no business connection or permanent establishment of such agents in India.

- It is not disputed that the withdrawal of the Circular Nos. 23 and 786 has been made on 22-10-2009 *vide* CBDT Circular No. 7 of 2009 and mere withdrawal of the circular does not negate the principles of income deemed to accrue or arise in India or outside India. The CBDT has not stated that any part of the circulars in contrary to law or that the circulars were wrongly issued or that the law has undergone changes holding their withdrawal. Thus, in respect of cases, which directly follow with the situations covered by the circulars, the liability to tax should continue to be in accordance with section 9 and its intent. The relevant sections, namely section 5(2) and section 9, not having undergone any change in this regard, the clarification in Circular No. 23 still prevail even after the withdrawal. No tax is, therefore, deductible under section 195 and consequently, the expenditure on export commission payable to a non-resident for services rendered outside India is not liable for withholding tax.
- In the case of the assessee, the applied section is section 9(1)(*i*). Therefore, the *Explanation* to section 9(2) is not applicable, since it does not talk of clause (*i*) of sub-section (1) of section 9. Otherwise as it has been held that the non-resident did not have any business connection in India and there was no liability to withhold tax under section 195. Moreover, the Assessing Officer has himself accepted that payments made prior to withdrawal of the Circular do not call for any disallowance under section 40(a)(*i*).
- In view of the aforesaid, the order of the Commissioner (Appeals) is found to be well reasoned. The department has not been able to dislodge the detailed well reasoned findings recorded therein. Therefore, the grievance sought to be raised by the department was shorn of merit and it is rejected as such. The findings of the Commissioner (Appeals) is confirmed.