

Commission paid to foreign agents on export of goods not taxable in absence of any business connection in India

Summary – The Delhi ITAT in a recent case of Vipin Kumar Gupta, (the Assessee) held that where assessee paid certain amount as commission to export agents, in view of fact that all activities of agents were performed overseas and, moreover, they did not have any office or business operation in India, commission income could not be said to accrue or arise in India in terms of section 9(1)(i)

Facts

- The assessee was engaged in the business of trading of fabrics, manufacturing and trading of readymade garments in the domestic market as well as in the international market. During relevant year, the assessee paid commission on export sales to its two agents appointed in UAE.
- The assessee's case was that since agents were non-resident situated outside India and, the payment had been made for services rendered outside India, no income was deemed to accrue or arise to the agents in India, hence, provisions of section 195 were not applicable.
- The Assessing Officer rejected the assessee's explanation. He took a view that payments made to non-resident agents were covered under section 9(1)(i) and, thus, tax was liable to be deducted while making payment in question. Since assessee did not deduct tax at source while making commission payments, he disallowed same under section 40(a)(ia).
- The Commissioner (Appeals), however, accepted the assessee's submissions and deleted disallowance made by the Assessing officer.
- On revenue's appeal:

Held

- The assessee who is engaged in the business of manufacturing and exporting of textile and readymade garments had engaged two commission agents based at UAE to whom it has paid commission at the rates prescribed in the agency agreement for the export orders procured and facilitating sale and payment. From the perusal of the scope of services to be performed by these agents, it is seen that all the activities of the agents were rendered overseas for selling of goods outside India.
- The Assessing Officer could not establish that these foreign agents has either any office or any business operation in India and his observation in this regard has been repudiated by the assessee and also appreciated by the Commissioner (Appeals), therefore, such commission income cannot be reckoned to have accrued or arising to the foreign agents in India or even received by them in India.
- Accordingly, the Commissioner (Appeals) has rightly held that in terms of section 9(1)(i), assessee was not liable to deduct tax at source under section 195 and he has rightly deleted the said addition.

For taxing any payment which constitutes income for foreign entities, it is *sine qua non* that some part of the income must be attributable to the operation carried out in India which can be held to be deemed to accrue or arise in India. If no operation or business is carried out in India through any business connection by the foreign entity, then no income can be said to deemed to accrue or arise in India.

- If these agents were independent in status which is not in dispute, then *Explanation* to clause (1) of section 9 clarify that term 'business connection' includes a person acting on behalf of the non-resident who;
 - (i) has or habitually or regularly exercises in India, an authority to conclude contracts on behalf of the non-resident, unless his activities are limited to the purchase of goods or merchandise for the non-resident,
 - (ii) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non-resident or
 - (iii) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident.
- Thus, in case of an agent having an independent status and is acting in the ordinary course of his business then the aforesaid conditions have to be fulfilled. Here in this case nothing has been brought on record that any of the person was acting on behalf of these non-resident agents in India, and therefore, it can be safely inferred that there exists no business connection of these agents in India. There has to be an existence of real and intimate relations between the trade activities by a non-resident carried on outside India and the activities within India and such a relation contributes directly or indirectly to the earning of income to the non-resident in its business. This factum ostensibly has not been proved on the basis of any material on record that these non-residents had carried out any operation in India for earning income by the activities carried out within India. Thus, order of the Commissioner (Appeals) is confirmed and the appeal filed by the revenue is dismissed.
- In the result, the appeal of the revenue is dismissed.