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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : A : NEW DELHI

BEFORE SHRI A.D. JAIN, JUDICIAL MEMBER
AND
SHRI T.S. KAPOOR, ACCOUNTANT MEMBER

ITA No.4167/Del/2012
Assessment Year : 2009-10

DCIT,
Circle 1 (1),
Room No.390,
CR Building,
New Delhi.

Vs. Angelique International Ltd.,
104-107, Hemkunt Tower,
98, Nehru Place,
New Delhi.

PAN : AACCA4675N

(Appellant) (Respondent)

Assessee by : S/Shri Ved Jain & Venkatesh Mohan, & Smt. Rano Jain, CAs
Revenue by : Shri Prithi Lal, Sr.DR

ORDER

PER A.D. JAIN, JUDICIAL MEMBER

This is an appeal filed by the department for Assessment Year 2009-10 against the order dated 10.05.2012 passed by the CIT (A)-IV, New Delhi, taking the following grounds of appeal:-

"1. The ld. CIT (A) has erred in facts and in law in deleting addition of Rs.37,87,26,158/- u/s 40(a)(ia) on account of non-deduction of TDS on payment of Export Commission.

2. The Ld. CIT (A) has erred on facts and in law in deleting addition of Rs.1,23,57,341/-."

2. Apropos ground No.1, the Assessing Officer made an addition of ₹ 37,87,26,158, u/s 40(a) (ia) of the IT Act on account of non-deduction of tax at source. While doing so, it was observed that a perusal of the assessee's Profit & Loss Account showed that the

assessee had debited the amount of ₹ 37,87,26,158/- on account of commission/discount on sales paid. On a query as to why the export commission be not disallowed for non-deduction and non-deposit of the TDS, the assessee submitted before the Assessing Officer, the requisite details, from which, it was seen that the assessee had the aforesaid amount on commission of export, on which, the assessee had neither deducted, nor deposited TDS; that the assessee company had stated before the Assessing Officer that it was dealing in export of projects and commodities and was also into construction activities; that it stated that in the course of its export business activities, it was required to appoint agents and pay commission to its foreign agents for their services; that it was stated that these agents provided invaluable services to the assessee company in the foreign country; that it was stated that the agents provided services in the form of obtaining orders, clearance of goods, support in scheduling of timely inspection of goods and issuance of clearance, follow up and arranging payments and other miscellaneous services relating to contractual obligations during the execution of the contract; that it was stated that the Reserve Bank of India permitted payment of commission in all export dealings; that it was stated that the assessee had paid commission to its agents well within the limits prescribed by the Reserve Bank of India and all such remittances were made through permitted banking channels; that it was stated that the agents were providing services out of India and none of them had any office or place of profit or any other business connection in India that it was stated that the agents operated out of India and provided their services outside India, due to which no part of the income of the foreign agents arose in India and, consequently, no tax was to be deducted from the commission payments being made to the foreign agents of the assessee company; and that the assessee placed reliance on clause No.4 of CBDT Circular No.23 dated 23.071969,

which deals with payment of foreign agents of Indian exporters. The Assessing Officer observed that Section 9(1) (vii) of the IT Act classifies and covers all incomes accruing and arising in India, which partake the character of payment on account of fee for technical services, which includes any payment for rendering of any managerial or consultancy services rendered by the non-resident agent; that in the assessee's case, since the assessee had to sell its goods offshore, he had to engage the acumen and expertise of the outsiders/non-residents, the consideration for which was termed as 'commission'; that the payment thus made by the assessee was nothing, but a fee paid by the assessee to the outsiders/non-residents for the services rendered and it amounted to fee for technical services; that normally, the exporter appoints the agents as his selling agent and designer and technical advisor for his products; that the agent undertakes to keep the exporter fully informed about the trade activities in the area of his operation; that he also keeps the exporter informed about new design and development of new products; that the agent visits the exporter and vice versa to discuss in detail, everything connected with the agreement, i.e., production, marketing, sales promotion, customers – old and new, products and prices, etc.; that the agent should be satisfied about the capability of the exporter to fulfill the supply of goods and maintain the desired quality; that the exporter, on the other hand, should be satisfied that the agent is capable of delivering the services to the satisfaction of the exporter; that the exporter, thus, utilizes the information, data and know how, as gathered by the agent, to further his business activities; that it was, thus, presumed that there is an element of consultancy, technical and managerial services, for which the commission in question was paid for services rendered regarding the nature of products and inspection, timing and prices of products and detailed technical and other formalities; that thus, the provisions of Section 9 of the Act would come into play as soon as any

export commission was paid or became due; that as per Section 195 (1) of the Act, TDS is to be deducted on any interest or any some chargeable under the Act, which is payable to the non-resident; that according to Section 195 (2) of the Act; when the payer considers that the whole of such sum would not be income chargeable in the case of the recipient, then, the issue is to be decided by the Assessing Officer on an application by the assessee/payer; that a similar application of making the obligation on the payee is cast pay Section 195(3) of the Act, for non-deduction of TDS, or lesser deduction of TDS; that as such, there is no provision in the Act for making the payment to non-residents without deduction of TDS, in the absence of any decision/no objection certificate from the assessing authority u/s 195 (2) of the Act; that hence, the commission paid by the assessee company to the non-resident was income due to accrue or arise in India within the meaning of Section 9 of the Act; that the assessee was liable to deduct TDS on expenditure of export commission paid by it to the non-resident; that CBDT Circular No.7 dated 22.10.2009 was clarificatory in nature and would operate retrospectively, being applicable for Assessment Year 2008-09; that further, the assessee had not furnished any explanation regarding the increase in turnover due to the payment of the commission in question; that the assessee had failed to produce any agreement entered into with the non-resident agents, to whom, the commission had been paid; and that for Assessment Year 2008-09, the decision of the CIT (A) in favour of the assessee had not been accepted by the department and the matter had been carried out in appeal before the ITAT.

3. The Ld. CIT (A), following the first appellate order for Assessment Year 2008-09 in favour of the assessee, deleted the addition of ₹ 37,87,26,158/- made by the Assessing Officer.

4. The Ld. DR, challenging the aforesaid order of the Ld. CIT (A), has contended that the Ld. CIT (A) is erred in deleting the addition correctly made by the Assessing Officer on account of non-deduction of TDS by the assessee company on payment of export commission. It has been contended that while doing so, the Ld. CIT (A) has failed to consider the finding recorded by the Assessing Officer that the commission paid by the assessee was income due to accrue or arise, in India, as defined in Section 9 of the IT Act; that the Ld. CIT (A) has wrongly ignored the liability of the assessee to deduct tax on the payment of export commission; that the Ld. CIT (A) has further failed to appreciate that the assessee remained unable to produce any agreement with the payees of the commission and that the assessee had not been able to furnish any explanation regarding the increase in its turnover due to the payment of commission.

5. The ld. counsel of the assessee, on the other hand, has placed strong reliance on the impugned order in this regard. It has been contended that the payments in question were made to export agents operating in their own countries, due to which fact no income arose in India; that the commission was remitted directly to the agents; that the foreign agents of the assessee company did not have any permanent establishment in India and they rendered the services to the assessee outside India, in respect of projects carried out by the assessee company outside India; that as such, the export commission paid by the assessee can, in no manner, be treated as income deemed to accrue or arise in India within the meaning of Section 9(1)(vii)(b) of the Act; that further, the payments in question represented export commission paid to the assessee's foreign agents for procuring export orders and they cannot be termed as fees for technical services; that the Ld. CIT (A) has correctly taken into consideration all these facts while correctly deciding the matter in favour of the assessee, as was

done by the Ld. CIT (A) for Assessment Year 2008-09. The ld. counsel for the assessee has placed reliance on the following case laws:-

i) "CIT vs. EON Technology (P) Ltd.", 343 ITR 366 (Del) (copy is placed on record)

ii) "DCIT vs. Divi's Laboratories Ltd.", 131 ITD 271 (Hyd) (copy is placed on record)

6. We have heard the parties on this issue and have perused the material on record with regard thereto. The Ld. CIT (A), while deciding this matter in favour of the assessee, has followed the first appellate order for Assessment Year 2008-09, wherein, it was held as follows:-

> "7. I have gone through the order of the Ld. AO and the submissions made by the Ld. AR of the assessee. There is no dispute that commission has been paid to agents outside India for sales outside the country. There is also no material on record which would suggest that the foreign agents had Permanent Establishment in India. It is also not in dispute that the assessee has not deducted tax at source. The Ld. AO felt that under the provisions of Section 9(1) (vii), the assessee should have deducted tax and in the absence of the same, he proceeded to make an addition u/s 40(a)(ia). The assessee has disputed this.
>
> 8. At this juncture, it may be gainful for me to go through the relevant provisions of Section 195 and 9(1)(vii) and the relevant provisions of Section 195(1) states under:
>
> Section 9(1) states as follows:
>
> "The following incomes shall be deemed to accrue or arise in India :-
>
> (i) .....
>
> (vii) income by way of fees for technical services payable by-
> (a) the Government, or

(b) a person who is a resident, except where the fees are payable in respect services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India,. or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

[Provided that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.]

[Explanation 1. -For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.]

Explanation [2]. -For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".]

9. It is evident that Section 9 provides for payment of fees for technical services. Section 195 provides for deduction of TDS only on the sums chargeable. If at all the sum is chargeable, then only there can be a deduction u/s 195. In the case in hand, we have incontrovertible evidence on record that the payment of commission has been made to agents outside India for services rendered outside India. Commission has not been paid in India or for services rendered in India. The agents also do not have any Permanent Establishment in India. Any tax that would accrue or arise is only outside the country and not in India. Very importantly this payment does not also fall within the ambit of Section 9(1)(vii) of the Act as the services under consideration is not for any technical service

rendered. It is only for facilitation of the sales of the assessee outside India. In CIT Vs Sara International Ltd. [2008] 8DTR (Del) 309, the Delhi High Court has interpreted the provisions of the said section in the context of Section 194J, wherein at Page No.311 it has been stated as follows:

"The expression fees for technical services means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'salaries'. "

11. In the case in hand, the relationship between the assessee and the agents are principal to principal. The agents to not have any PE in India. For the service rendered, the agents are paid by the assessee. I am afraid that this particular service rendered by the agents cannot be construed as fees for technical services. Neither this can be taken as a job which was managerial in nature. In such circumstance, deduction cannot be made under Chapter XVII-B. This is notwithstanding the fact that there was no agreement between the assessee and the commission agents. It is settled law that for commission to be paid, there is no requirement of an agreement in writing. The withdrawal of Board circulars cannot change the statutory provisions as provided for in the Act. In CIT Vs Toshoku Ltd. [1980] 125 ITR 525 (SC) it was held that a non resident acting as an agent outside India did not carry on any business operation in India. In the said case, the Supreme Court had held that sales commission which were earned by the non resident for services rendered outside India could not be deemed to be income which had either accrued or arisen in India.

12. Here, I may gainfully refer to the Apex Court decision in Transmission Corporation of AP Ltd. Vs CIT (supra) as the same has been heavily relied upon by the Ld. AO. It was held therein that the provisions of s. 195(1) and (2) are attracted not only where the amount to be paid to the non-resident, wholly bears "income" character such as salaries, dividends, interest on securities, etc. but also to gross sums, the whole of which may not be the income or profits of the recipient, such as payments to contractors and sub-

contractors and the payment of insurance commission. It was the contention of the assessee in that case that where the whole of the amount was not taxable and only a portion of it was taxable, the provisions of s. 195 were not attracted. The Court held that, in such a situation, where a portion is taxable, it is incumbent on the assessee to approach the AO under s. 195(2) for a certificate to determine the appropriate portion of the amount on which tax is to be deducted, if the assessee does not want to deduct the amount on the entire amount.

12. In view of the discussion above, it is crystal clear that the payment of commission was not a sum chargeable to tax within the provisions of the Indian Income Tax Act. In such circumstance, the assessee could not have deducted tax at source under Chapter XVII-B. If deduction was not possible, the necessity of invoking the provisions of Section 40(a)(ia) would not arise. As such, it is held that the addition to the tune of Rs.34,41,02,001/- has no legs to stand. The same stands deleted. The assessee succeeds in Ground of Appeal No.3 and its parts."

On careful consideration of the matter, since the issue involved in the year under consideration is identical that of A.Y. 2008-09, respectfully following the order of my predecessor CIT(A) (supra), the said addition of Rs.37,87,26,158/- is deleted."

7. The assessee company, during the year, was dealing in export of produce and commodities and was into construction activity. The Assessing Officer made the addition for the reason that the assessee had failed to deduct tax at source on the payment of export commission. While deleting the addition for Assessment Year 2008-09, it was taken into account that the relationship between the assessee and its agents was on a principal to principal basis; that the agents of the assessee did not have any PE in India and it was on account of services rendered by the agents that the payments were made by the assessee to them, which payment could not be considered as if for technical services, nor could be taken as a job which was managerial in nature. There was no agreement between the assessee and the agents and no such agreement was even required, since the

transaction was of payment of commission for services rendered. The assessee was held not to be liable for TDS under Chapter XVII-B of the Act. The facts for the year under consideration also remained much the same as for Assessment Year 2008-09.

8. In "EON Technology" (supra), under similar facts and circumstances, the Hon'ble High Court held that such export commission was not income chargeable to tax in India and, hence, not liable to tax deduction at source.

9. In "Divi's Laboratories" (supra), it was held that commission paid to a non-resident agent for services rendered outside India is not chargeable to tax in India and that hence, no disallowance can be made.

10. Similar are the decisions in the following case laws relied on by the assessee:-

i) "ITO vs. M/s Planet Herbs Life Science", order of the Delhi Tribunal dated 25.05.2012, ITA No.522/Del/2011 (copy is placed on record); and

ii) "ADIT (IT) Vs. Wizcraft International Entertainment Pvt. Ltd.", a decision of the Mumbai Tribunal dated 19.11.2010, in ITA No.3208/Mum/2003 (copy is placed on record).

11. In view of the above, we do not find any error whatsoever in the order of the Ld. CIT (A) in this regard and the same is hereby confirmed. Ground No.1 raised by the revenue is accordingly rejected.

12. So far as regards ground No.2, the Assessing Officer made addition of ₹ 1,23,57,341/- on account of retention money. As per the

assessment order, it was found that the assessee had reduced the aforesaid amount from its net profit. On query, the assessee submitted that in some business transactions, a part of the income was retained by the customer to be realized after satisfactory performance of a contract or upon fulfillment of certain conditions; that it was a common business practice that a customer to retain from 2% to 10% of the contract amount; that this amount was realized after a stipulated period or upon satisfactory performance of the entire contract; and that in most of the cases, the retention money was adjusted against claim for delay in completion of contract, on quality goods or on any other ground. The Assessing Officer was not impressed by the aforesaid reply of the assessee company. It was observed that the assessee was following the mercantile system of accounting, wherein, the money retained by the authority from the contract payments made to the assessee constituted income accrued to it and was taxable in the relevant year irrespective of the fact that the actual money may not have been received by him in that year; that so, it had to be income under the mercantile system; that if, however, sums were not given due contractual application, not being perfectly/fully made, the sums not given out of the ~~deduction~~ retentions money could, at best, be considered expenses.

13. The Ld. CIT (A) deleted the addition following the CIT (A)'s orders for Assessment Years 2007-08 and 2008-09.

14. In this regard, the Ld. DR has contended that the Ld. CIT (A) has erred in deleting the addition correctly made towards retention money; that while doing so, the Ld. CIT (A) has failed to appreciate the findings of the Assessing Officer to the effect that as per the mercantile system of accounting, which was the system of accounting followed by the assessee during the year, the money retained by the assessee

company constituted income accrued to it, which was taxable in the relevant year in respect of non-receipt of the money during the year and that in case of non-payment due to non-fulfillment of contractual obligations, the sums given out of the deduction money could, at the maximum, be considered as expenses.

15. The ld. counsel for the assessee, on the other hand, has placed strong reliance on the impugned order, contending that the Tribunal, for Assessment Year 2007-08, vide order dated 13.07.2012 (copy is placed on record), in ITA No.481/Del/2011, dismissing the appeal of the department, has decided the issue in favour of the assessee.

16. With regard to this issue, it is seen that as contended by the assessee, the Tribunal, for Assessment Year 2007-08, has decided this issue in favour of the assessee. While doing so, the Tribunal has held as follows:-

> "7. We have considered the facts of the case and submissions made before us. The facts are that the customer retains money in respect of a completed contract for satisfactory performance of the contract for which the due diligence is undertaken. On demonstration of satisfactory performance of the contract, the money as released finally to the assessee, otherwise it has to repair the fault or pay liquidated damages. Ld. Counsel has cited cases as discussed above, which clearly hold that such money withheld by the customer does not accrue as income to the assessee on completion of the turn-key project, the reason being that right to receive the money does not accrue to the assessee. This money accrues as income when the stipulated condition is satisfied which may be in the nature of showing satisfactory performance of the project. Depending upon the stipulated condition , the amount accrues as income the moment the condition is satisfied and on such date the amount becomes the income. Therefore, the amount is taxable on accrual basis in the year in which stipulated condition is satisfied. The assessee on the other hand is showing the income on cash basis, which may not be correct, However, this is not the issue before us. The issue before us is whether the retention money constitutes income on completion of a project in mercantile system of accounting. We are of the view that this amount does not accrue

as income to the assessee on raising the bill after completion of the project. The income arises on performance of the conditionalities of the agreement. Thus it is held that Ld. CIT(A) was right in holding that a sum of ₹ 32,91,935/- did not accrue as income in this year. The result is that ground No. 2 is also dismissed."

17. The facts before us for the year under consideration have not been shown by the department to be any different from that of present before the Tribunal for Assessment Year 2007-08. Therefore, following the aforesaid Tribunal order in the assessee's own case for Assessment Year 2007-08, we hold that the amount in question does not accrue as income to the assessee on raising the bill after completion of the project. Rather, the income arises on performance of the conditionalities of the agreement.

18. In view of the above, the order of the Ld. CIT (A) with regard to this issue is also upheld, rejecting ground No.2 raised by the department.

19. In the result, the appeal filed by the department is dismissed.

The order pronounced in the open court on 26.10.2012.

Sd/-

[T.S. KAPOOR]
ACCOUNTANT MEMBER

Sd/-

[A.D. JAIN]
JUDICIAL MEMBER

Dated, 26/10/2012.

dk

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

TRUE COPY

By Order,

Deputy Registrar,
ITAT, Delhi Benches

सहायक पंजीकार,
Assistant Registrar,
आयकर अपीलीय अधिकरण
Income tax Appellate Tribunal
दिल्ली पीठ, नई दिल्ली
Delhi Benches, New Delhi