INTERNATIONAL TAXATION : Where assessee appointed Ace,a France based trading company as its agent to procure export orders from France and paid it commission, since no knowledge was provided to assessee which could be further exploited while services were rendered by non-resident of procuring export orders for assessee, payment made for said services could not be held as FTS under India-France DTAA and would not be taxable in India

• For bringing services under net of Fee for Technical services (FTS) under the India-France DTAA, the 'make available' clause has to be satisfied.

[2021] 131 taxmann.com 252 (Delhi - Trib.)

IN THE ITAT DELHI BENCH 'E'

Rajinder Kumar Aggarwal (HUF)

v.

Deputy Commissioner of Income-tax, Circle-31(1), New Delhi

KUL BHARAT, JUDICIAL MEMBER
AND O.P. KANT, ACCOUNTANT MEMBER
IT APPEAL NO.2996 (DELHI) OF 2016
[ASSESSMENT YEAR: 2012-13]
OCTOBER 14, 2021

Anil Chopra, Adv. **Kshitij Khanna**, CA and **Praveen Kumar**, CA *for the Appellant.* **Gaurav Pundir**, Sr. DR *for the Respondent.*

ORDER

O.P. Kant, Accountant Member - This appeal by the assessee is directed against order dated 21/04/2016 passed by the Learned Commissioner of Income-tax (Appeals)-18, New Delhi [in short 'the Learned CIT(A)'] for assessment year 2012-13, raising following grounds:

1. That the Ld. Commissioner of Income-tax (Appeals) (Ld. CIT (A)) has erred on facts and in law in sustaining the disallowance of Rs. 1,16,99,172/- being the amount of commission paid to non-resident foreign payee, M/s Ace Trading Company, France, for procuring export orders in France, which was disallowed by the Ld. AO for non deduction of TDS thereon.
2. That the order of Ld. CIT(A) disallowing the said commission of Rs. 1,16,99,172/- is without any proper basis and is based on erroneous views and non-appreciation of the facts and law involved, without properly considering the material on record and without affording appropriate specific lawful opportunity. Moreover, they are based on suspicion, conjectures and surmises without any contrary evidence. As such the disallowance of commission made by Ld. AO and by LD CIT (A) is unwarranted and not capable of being sustained.

3. That the disallowance of the said commission by the Ld. AO and by Ld. CIT (A) is against the consistency principle. Similarly disallowance on similar facts made in AY 2010- 11 was deleted by Ld. CIT (A). Moreover, the said disallowance is contrary to binding judgments of the Hon'ble Delhi High Court in *CIT* v. *Grup Ism (P) Ltd.,* [2015] 57 taxmann.com 450 (Delhi) and *DIT (International Taxation-II)* v. *Panalfa Autoelektrik Ltd.,* [2014] 49 taxmann.com 412 (Delhi).

4. That the disallowance of commission as made by Ld. CIT (A) for impugned insufficient evidence of agreement for the purpose of ascertaining nature of services rendered by Payee is completely erroneous and without any specific opportunity in this matter to the Appellant or without any evidence to the contrary and for new reasons than the reasons adopted by the Ld. AO. The disallowance as made is unwarranted and against the principles of equity, natural justice and provisions of the Act. The disallowance is liable to be deleted in toto.

5. That the Ld. CIT(A) has erred in relying on and discussing much inapplicable case law regarding commission which has been disallowed particularly considering that the issue is directly covered by governing High Court decisions in assessee's favour.

6. That the said commission paid to non-resident, who is a tax resident of France, is business income and not fees for technical services (FTS). As such, it is neither liable for tax in India under section 9 of the Act nor under Article 7 of DTAA with France. There being no liability for TDS under section 195, Section 40(*a*)(*i*) is not applicable in this case as also held by Ld. CIT(A) on similar facts in assessee's favour prior year.

7. That the grounds of appeal as herein are without prejudice to each other.

8. That the assessment as made and the order of the Ld. CIT(A) are against law and facts of the case involved.

9. That the appellant respectfully craves leave to add, ground(s) at or before the time of hearing.

2. Briefly stated facts of the case are that the assessee was engaged in the business of manufacturing and export of leather footwear in the name of proprietary concern 'Regency Impex'. For the year under consideration, the assessee filed return of income on 27/09/2012, declaring total income of Rs. 50,52,980/-. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. The Assessing Officer completed the scrutiny assessment under section 143(3) of the Act after making certain additions/disallowances to the returned income. On further appeal, the Learned CIT(A) allowed part relief to the assessee and sustained disallowance of commission expenses. Aggrieved, the assessee is before the Tribunal raising the grounds as reproduced above.

3. Before us, the parties appeared through Videoconferencing facility. The assessee filed a paper-book containing pages 1 to 83. All the grounds raised in the appeal are related to single issue of disallowance of export commission expenses.

3.1 The brief facts *qua* the issue in dispute are that the M/s Ace Trading Company, France (In short 'Ace') was appointed by the assessee in earlier years for assistance in procuring export orders for the assessee in France. In the year under consideration also, the assessee appointed M/s 'Ace' as its agent for

procuring export orders in France. The assessee debited a sum of Rs. 1,16,99,172/- as commission paid on export sales. No tax was deducted at source by the assessee on said payment. According to Assessing Officer, the assessee was required to deduct tax at source on the said payment in accordance with provision of section 195 of the Act and due to failure on the part of the assessee, he asked as why provision of section 40(*a*)(*i*) might not be invoked, and the payment to 'Ace' might not be disallowed. It was submitted by the assessee, that commission was paid to foreign Payee, who is a tax resident of France and no TDS was attracted under section 195 of the Act, as commission paid to the foreign payee is business income as per Article 7 of the DTAA with France. Since the foreign payee had no permanent establishment in India, therefore, no income is chargeable to tax in India. Accordingly, the assessee was not required to deduct tax at source under section 195 of the Act. The assessee relied on the decision of the Hon'ble Supreme Court in the case of *CIT* v. *Toshoku Ltd.,* 125 ITR 525 (SC) where on identical facts it has been held that amount of commission earned by non-resident foreign payee for rendering services outside India could not be deemed to be income arising in India. The Assessing Officer rejected the contention of the assessee and held that as per the provisions of *Explanation* to section 9 for the purpose of clause (*vii*) (*i.e.* fee for technical services), the scope of the income includes services rendered outside India also, if the same have been utilized in India insofar as source of payment towards expenditure is in India. The relevant para of the Learned Assessing Officer is reproduced as under:

> "4.4 The provisions of section 9(1)(*vii*) have undergone change through last explanation inserted by the Finance Act 2010 with retrospective effect from 1-6-1976. As per the explanation inserted by the Finance Act 2010 the services rendered by the non-resident (fee for technical nature), though having no residence or place of business or business connection in India or rendered outside India shall be deemed to accrue/arise in India. Recent Judgment of Hon'ble ITAT Mumbai Bench in the case of *Linklaters LLP* v. *Income-tax Officer* International Taxation Ward 1(l)(2), Mumbai, ITA No. 5085/Mum/03 has clarified the position of the provisions of section 9(1)(*vii*) as on date. The relevant para of the judgment are as under:-
>
> - Taxability under the domestic law
>
> One of the arguments which is raised by the learned counsel for the assesses, in support of the conclusions arrived at by the CIT(A) to the effect that income from only such services can be brought to tax in India as are rendered through the Indian permanent establishment is that even under the domestic taw, only income relatable to the services rendered in India can be taxed in India. Learned counsel did not dispute that so far as income from the work carried out by the assessee in India is concerned, the same is taxable in India under the domestic taw, though he hastened to add that this aspect of the matter is wholly academic since under the applicable tax treaty, the income from even work done by the assesses in India cannot be brought to tax In India.
>
> On the question of taxability under the domestic law, learned counsel's basic contention is that even under the domestic law, the income of the assesses firm is taxable only to the extent the work has been carried out in India.
>
> It is thus unambiguous that the judgment of Hon'ble Bombay High Court rests on the legal premises that, under section 9(1)(*vii*), "services, which are source of income sought to be taxed in India, must be (*i*) utilized in India; and (*ii*) rendered in India" and the conceptual premises that "territorial nexus for the purpose of determining the tax liability is an internationally accepted principle".
>
> These legal premises, however, do no longer hold good In view of retrospective amendment w.e.f 1st June 1976 in section 9 brought out by the Finance Act, 2010. Under the amended *Explanation* to Section 9(1), as it exists on the statute now, it is specifically stated that the income the non-resident

shall be deemed to accrue or arise in India under clause (*v*) or cause (*vi*) or clause (*vii*) of section 9(1), and shall be included in his total income, whether or not (*a*) the non-resident has a residence or place of business or business connection in India; or (*b*) the non-resident has rendered services in India. It is thus no longer necessary that in order to attract taxability in India, the services must also be rendered in India. As the law stands now, utilization of these services in India is enough to attract its taxability in India. To chat effect, recent amendment in the statute has virtually negated the judicial precedents supporting the proposition that rendition of services in India is a sine-qua non for its taxability in India.

The paradigm shift in the legal provisions, or perhaps a mere conceptual clarity - as could perhaps be a possible point of view, is too glaring to be missed. In this view of the, matter, it cannot really be said that the change in law brought about by amendment in *Explanation* to Section 9(1)(*i*) does not affect the aforesaid decision.

In view of the above discussions, we are of the considered view that the entire fees for professional services earned by the assesses, in connection with the projects in India and which is thus sourced from India, is taxable in Indian under the domestic law. We reject the contentions advanced by the learned counsel.

Having held so, however, we may add that under the scheme of the Indian Income-tax Act, where the Government of India has entered into an agreement, with the Government of any country outside India for granting of relief, or as the case may be, for avoidance of double taxation, then, in relation to the assesses on whom such agreement applies, the provisions of this Act shall apply only to the extent they are more beneficial to that assesses. The provisions of tax treaties thus override the provisions of the Income-tax Act, except to extent provisions of the Income-tax Act are beneficial to the assesses. The taxability under demesne law is thus to be examined in conjunction with the provisions of the cab's tax treaty. The next question that we need to examine, therefore, is whether the status of taxability of this income under the provisions of the India UK tax treaty.

4.5 In the case of *Ashapura Minichem Ltd.,* it has been held by the ITAT, Mumbai that the services rendered outside India and utilized by an Indian assessee will chargeable to tax in India.

In view of the foregoing discussion it is clear that the case of the assessee is squarely covered under the provision of section 9 of the Income-tax Act, 1961."

3.2 In view of the above, the Assessing Officer held the assessee in default for non-deducting tax at source on the export commission and consequently, in default under section 40(*a*)(*i*) of the Act and held the assessee liable for disallowance of such export commission of Rs. 1,16,99,172/-paid by the assessee to M/s Ace, France. The Ld. CIT(A) also upheld the finding of the Assessing Officer. Aggrieved, the assessee is before the Tribunal raising the grounds as reproduced above.

3.3 Before us, the Learned Counsel of the assessee relied on the order of the Tribunal in the case of the assessee for assessment year 2010-11 and submitted that commission paid to same party on export sales has been held to be income not chargeable to tax in the hands of said agent in India and, therefore, there was no requirement of deducting TDS at source. Hence, the disallowance under section 40(*a*)(*i*) of the Act deleted by the Learned CIT(A) was upheld by the Tribunal in AY 2010-11. According to the assessee, there is no change in facts and circumstances as were in assessment year 2010-11 and therefore case of the assessee is fully covered by the decision of the Tribunal (*supra*). On the contrary, the Learned DR submitted that separate agreement has been made for the year under consideration and in view of the *Explanation* inserted by way of Finance Act, 2010, if the services are utilized in India then irrespective of services rendered outside India, the income is chargeable in India under domestic law.

3.4 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that the non-resident 'M/s Ace' was engaged for procuring export order for the assessee in territory of France and commission has been paid on the export sales, which were procured through said agent. The assessee has made agreement with said agent every year, though scope of the services remained same. The Learned DR could not bring before us any evidence as regard to change of scope of services rendered by the said agent in the year under consideration as compared to earlier year. The assessee has enclosed agreement with said agent on pages 82 and 83 of the paper-book. According to those agreements, the rate of the commission was 9% for the period from 01/04/2011 to 30/09/2011 and 10% for the period from 01/10/2011 to 31/03/2012. In the assessment year 2010-11, the said rate of the commission was 8% as noted by the Tribunal in ITA No. 4142/Del/2015. In the assessment year 2010-11, the Tribunal (*supra*) has dismissed the appeal of the Revenue challenging deletion of disallowance in terms of section 40(*a*)(*i*) observing as under:

> "7. We have heard both the parties and perused the material available on record. The issues involved in this appeal relates to applicability of TDS u/s 195 on payments abroad of export commission to non-resident the foreign agent for the procurement of export orders for the assessee and consequently disallowance u/s 40(*a*)(*i*) of the Income-tax Act, 1961. As pointed out by the Ld. AR the issue is covered in favour of the assessee in case of *DIT* v. *Panalfa Autoelektrik Ltd.* 378 ITR 205 wherein it is held that commission paid by the assessee to its foreign agent for arranging of export sales and recovery of payments could not be regarded as Fee for Technical Services u/s 9(1)(*vii*). In the present case, the commission was paid to ACE Trading, a non-resident agent (payee) who is a tax resident of France. The payee was simply assisting procuring export orders for the Assessee in his ordinary course of business in France. The commission was paid for activities of the payee outside India and the amount is received by the payee outside India through normal banking channels. Section 5(2) states that total income of a person, who is a nonresident, includes income from all sources which (*a*) is received or deemed to be received in India; (*b*) accrues or arises in India; or (*c*) is deemed to accrue or arise in India. In the present case, the commission income paid to the foreign agent neither accrued in India nor deemed to be accrued in India as per deeming provisions of section 9 and nor the same was received nor deemed to be received in India. Thus, there is no need to interfere with the findings of the CIT(A). The Appeal of the Revenue is dismissed.

3.5 Further, the non-resident can invoke DTAA between India and France, if provisions of the same are more beneficial to the non-resident. We find that Hon'ble Delhi High Court in the case of *Steria India Ltd.* v. *DCIT*, 255 Taxman 110 (Delhi) (HC) held that Most Favoured Nation (MFN) clause of the protocol will form an integral part of India France DTAA and it will be automatically applicable without any further notification. In view of Most Favoured Nation (MFN) clause, the beneficial provision of Convention between India and other OECD country, *i.e.*, UK automatically extends to India-France DTAA. In India UK DTAA fee for technical services (FTS) exclude the term 'managerial services' and provides for 'make available clause'. While analyzing the Fee for technical services (FTS) definition as per India France DTAA , in view of the MFN clause, the entire definition of the FTS can be imported from India UK DTAA.

3.6 If we apply the ratio of the decision of the Hon'ble Delhi High Court in the case of *Steria (India) Ltd.* (*supra*) to the facts of case in hand, we find that for bringing the services under the net of Fee for Technical Services (FTS) under the India France DTAA, the 'make available' clause has to be satisfied. But in the services rendered by the non-resident of procuring export order for the assessee, no knowledge has been provided to the assessee which could be exploited further by the assessee. In such circumstances, the services rendered by the non-resident cannot be held as 'FTS' under the India-France

DTAA. Accordingly, such services will not be chargeable in India in the hands of non-resident under DTAA and, therefore, no liability to deduct tax at source will arise. Consequently, payment to said non-resident is not liable to disallowance under section 40(*a*)(*i*) of the Act.

3.7 In view of above discussion, and respectfully following the finding of the Tribunal (*supra*), we *set aside* the order of the Learned CIT(A) and Assessing Officer on the issue in dispute and delete disallowance. The grounds of the appeal of the assessee are accordingly allowed.

4. In the result, the appeal of the assessee is allowed