IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 24.03.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

T.C.A. NO. 137 OF 2015

The Commissioner of Income Tax
Chennai. .. Appellant

- Vs -

M/s.Fluidtherm Technology Pvt. Ltd.,
132, 3rd Main Road, Industrial Estate,
Ambattur, Chennai - 600 058.
.. Respondent

Appeal filed under Section 260A of the Income Tax Act against the order dated 22.05.2014 passed by the Income Tax Appellate Tribunal, 'A' Bench, Chennai, made in ITA No.199/Mds/2014 for the assessment year 2009-10 arising out of the order of the Commissioner of Income Tax (Appeals) II Chennai-34 for the assessment year 2009-2010 dated 23.9.2013 in ITA.No.519/2013-14 preferred against the order of the Assistant Commissioner of Income Tax, Nungambakkam, Chennai-34 dated 16.12.2011 in PAN/GIR/No.AAACF0874G.

For Appellant : Mr. T.R.Senthil Kumar
Standing Counsel

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

This Tax Case (Appeal) is filed by the appellant/Revenue as against the order passed by the Income Tax Appellate Tribunal for the assessment year 2009-10 raising the following questions of law :-

> "1) Whether under the facts and circumstances of the case, the Income Tax appellate Tribunal was correct in deleting the disallowance made under Section 40(a)(ia) by the assessing officer towards export commission paid by the assessee to the non-resident on which it had failed to deduct TDS?

2) Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was correct in holding that the assessee has no liability to deduct tax at source under Section 195 on the payment made to non-resident towards export sales commission?

3) Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was correct in holding that the non-resident has no business connection for the export sales commission received from the assessee?

4) Whether under the facts and circumstances of the case, the Income Tax Appellate Tribunal was correct in holding that the assessing officer did not establish the existence of business connection and therefore there is no liability to deduct tax at source, without appreciating the fact that the onus is on the assessee to show that it is not liable to deduct at source?"

2. The facts, in a nutshell, are as hereunder :-

The assessee is doing business of strategic and consultancy services limited and filed its return of income for the assessment year 2009-10 declaring an income of Rs.1,42,51,852/-. The return was processed under Section 143 (1) of the Act. Thereafter, the case was selected for scrutiny and notice under Section 143 (2) was issued and served on the assessee. The Assessing Officer, after calling for details from the assessee, completed the assessment under Section 143 (3) and assessed the total income at Rs.1,73,25,104/- by making disallowances under Section 40(a)(ia) of the Income Tax Act.

3. Aggrieved by the said order, the assessee preferred appeal before the Commissioner of Income Tax (Appeals), who by following the decision of the Tribunal in the case of M/s.Farida Shoes P. Ltd. (ITA No.159/Mds/2013 dated 11.4.2013) and M/s.Delta Shoes P. Ltd. (ITA No.909/Mds/2013 dated 31.7.2013) allowed the appeal filed by the assessee. The relevant portion of the order of Commissioner of Income Tax (Appeals), is extracted hereunder, for better clarity :-

"In the present appeals of the assessee also the facts and circumstances are exactly identical to those involved in the case of M/s.Farida Shoes P. Ltd. for A.Y. 2008-09 (except the type of product exported). Therefore, since the issue involved in the present appeals is the same and the facts are exactly identical, the above decision of the ITAT, (M/s.Farida Shoes P. Ltd., in ITA No.159/Mds/2013 dated 11.04.2013), is equally applicable to the facts of the present appeals of the instant assessee for the A.Y.2009-10 under consideration. Therefore, respectfully following the decision of ITAT, in the case of M/s.Farida Shoes P. Ltd. (in ITA No.159/Mds/2013 dated 11.04.2013), I hold that the above transactions of sales commission payments to the non-resident for procuring the export orders, are not assessable to tax in India and consequently the assessee company is not under any obligation to deduct the TDS on the above commission payments u/s.195 of the Act. Therefore, the provisions of sec.40(a)(i) have no application in the present case. Accordingly, the additions made by the Assessing Officer in the assessment year under consideration, on account of disallowance of commission payments for non-deduction of TDS u/s.40 (a)(i) r.w.s. 195 of the Act, are not justified and deleted."

4. Against the said order of the Commissioner of Income Tax (Appeals), the appellant/Revenue filed appeal before the Tribunal. The Tribunal while agreeing with the findings of the Commissioner dismissed the appeal holding as follows:

"When the non-resident agent has rendered all services outside India and payments were also received outside India, having no PE or business connection in India, there is no reason to hold that the foreign agent has earned any taxable income in India out of the commission paid by the assessee. Where no such tax liability is fastened on the payee who received the commission, there is no obligation on the part of the payer to deduct the tax in India."

5. Aggrieved against the said order, the present appeal has been filed by the appellant/Revenue.

6. Heard Mr.T.R.Senthil Kumar, learned standing counsel appearing for the appellant/Revenue and perused the materials found in the typed set of documents.

7. This Court, in the case of Commissioner of Income Tax – Vs – Faizan Shoes Pvt. Ltd. (48 Taxman.com 48), had an occasion to consider a similar issue and after exhaustive analysis of the different provisions of the Income Tax Act and also taking into consideration the law laid down by the Supreme Court with regard to the said provisions, held as follows :-

"6. Before adverting the merits of the case, it would be apposite to refer to section 9(1)(i), section 9(1)(vii) and section 9(2) of the Act, which read as under :

Section 9. Income deemed to accrue or arise in India.—(1) The following incomes shall be deemed to accrue or arise in India—

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India ; . . .

(vii) income by way of fees for technical services payable by—

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 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'.

(2) Notwithstanding anything contained in sub-section (1), any pension payable outside India to a person residing permanently outside India shall not be deemed to accrue or arise in India, if the pension is payable to a person referred to in article 314 of the Constitution or to a person who, having been appointed before the 15th day of August, 1947, to be a Judge of the Federal Court or of a High Court within the meaning of the Government of India Act, 1935, continues to serve on or after the commencement of the Constitution as a Judge in India.

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or not,—

(i) the non-resident has a residence or place of business or business connection in India ; or

(ii) the non-resident has rendered services in India."

7. On a reading of section 9(1)(vii) of the Act, we are not inclined to accept the plea taken by the learned senior standing counsel appearing for the Revenue that commission paid by the assessee to the non-resident agent would come under the term "fees for technical services". In the case on hand, for procuring orders for leather business from overseas buyers — wholesalers or retailers, as the case may be, the non-resident agent is paid 2.5 per cent. commission on FOB basis. That appears to be a commission simpliciter. What is the nature of technical service that the so-called nonresident agent has provided abroad to the assessee is not clear from the order of the Assessing Officer. The opening of letters of credit for the purpose of completing export obligation is an incident of export and, therefore, the non-resident agent is under an obligation to render such services to the assessee, for which commission is paid. The non-resident agent does not provide technical services for the purposes of running of the business of the assessee in India. The services rendered by the non-resident agent can at best be called as a service for completion of the export commitment. We are, therefore, of the considered opinion that the commission paid to the non-resident agent will not fall within the definition of fees for technical services.

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9. The Explanation to section 9(2) of the Act was substituted by the Finance Act, 2010, with retrospective effect from June 1, 1976. The above said explanation would come into play only if the said amount paid would fall under the headings :

(i) income by way of interest as set out in section 9(1)(v) of the Act ; or

(ii) income by way of royalty as set out in section 9(1)(vi) of the Act ; or

(iii) income by way of fees for technical services as set out in section 9(1)(vii) of the Act.

10. While dealing with section 9(1) of the Act, the Supreme Court in CIT v. Toshoku Ltd. [1980] 125 ITR 525(SC), on considering a transaction where tobacco was exported to Japan and France and sold through non-resident assessees who were paid commission, held as under :

"8. The second aspect of the same question is whether the commission amounts credited in the books of the statutory agent can be treated as incomes accrued, arisen, or deemed to have accrued or arisen in India to the non-resident assessees during the relevant year. This takes us to section 9 of the Act. It is urged that the commission amounts should be treated as incomes deemed to have accrued or arisen in India as they, according to the department, had either accrued or arisen through and from the business connection in India that existed between the non-resident assessees and the statutory agent. This contention overlooks the effect of clause (a) of the Explanation to clause (i) of sub-section (1) of section 9 of the Act which provides that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under that clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. If all such operations are carried out in India, the entire income accruing therefrom shall be deemed to have accrued in India. If, however, all the operations are not carried out in the taxable territories, the profits and gains of business deemed to accrue in India through and from business connection in India shall be only such profits and gains as are reasonably attributable to that part of the operations carried out in the taxable territories. If no operations of business are carried out in the taxable territories, it follows that the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India (see CIT v. R. D. Aggarwal and Co. [1965]

56 ITR 20(SC) and Carborandum Co. v. CIT [1977] 108 ITR 335(SC) which are decided on the basis of section 42 of the Indian Income-tax Act, 1922, which corresponds to section 9(1)(i) of the Act).

9. In the instant case, the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by clause (a) of the Explanation to section 9(1)(i) of the Act. The commission amounts which were earned by the non-resident assessees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the Department."

11. The facts of the present case are akin to the facts of the decision in Toshoku Ltd.'s case, referred supra. In the instant case also the assessee engaged the services of non-resident agent to procure export orders and paid commission. That apart, the Commissioner of Income-tax (Appeals) as well as the Tribunal have correctly applied the principle laid down in GE India Technology Centre (P.) Ltd.'s case, referred to supra, to hold that the assessee is not liable to deduct tax at source when the non-resident agent provides services outside India on payment of commission.

12. In the light of the above said decisions and the finding rendered by us on the earlier issue that the services rendered by the non-resident agent can at best be called as a service for completion of the export commitment and would not fall within the definition of fees for technical services, we are the firm view that section 9 of the Act is not applicable to the case on hand and, consequently, section 195 of the Act does not come into play. In view of the above finding, the decision of the Supreme Court in Transmission Corporation of A. P. Ltd.'s case, referred to supra, relied upon by the learned standing counsel for the Revenue is not applicable to the facts of the present case. We find

no infirmity in the order of the Tribunal in confirming the order of the Commissioner of Income-tax (Appeals)."

8. The above decision of this Court in Faizen Shoes case (supra) is squarely applicable to the facts of the present case.

9. In the result, this Court finds no reason to interfere with the order passed by the Tribunal. No question of law, much less substantial question of law arises for consideration in this appeal. Accordingly, the order passed by the Tribunal is confirmed and this appeal is dismissed. No costs.

Sd/-
Asst.Registrar (J)

/true copy/

Sub Asst. Registrar

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To

1. The Commissioner of Income Tax
121 Mahatma Gandhi Road
Nungambakkam, Chennai. 34

2. The Income Tax Appellate Tribunal
'A' Bench, Chennai.

3. The Assistant Commissioner of Income Tax
Company Circle II (2)
Room No.512 New Block
121 MG Road, Nungambakkam, Chennai-34

4. The Commissioner of Income Tax (Appeals)
Chennai-34

1 cc to Mr.T.R. Senthilkumar, Advocate, Sr. 16841

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