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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 02.03.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE S.VIMALA

T.C.A. NO. 92 OF 2015

Commissioner of Income Tax
Business Circle IV
Chennai.

.. Appellant/Appellant

- Vs -

M/s.Orient Express
26B, Jawaharlal Nehru Salai
Ekkaduthangal
Chennai 600 032.

.. Respondent/Respondent

Appeal filed under Section 260A of the Income Tax Act against the order dated 7.10.14 passed by the Income Tax Appellate Tribunal, 'D' Bench, Chennai, made in ITA No.1794/Mds/2013.

Against the order of the Commissioner of Income Tax Business, Circle IV, Chennai dt.21.1.2013 in PAN AAAF00565A.

Against the order of the Commissioner of Income Tax (Appeals-V) 2nd Floor, Main Building, 121 M.G.Road, Nungambakkam, Chennai-34 dt.10.5.2013 and made in ITA.No.68/12-13 (A) VI.

For Appellant : Mr. M.Swaminathan

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order passed by the Tribunal in dismissing the appeal filed by it, the appellant/Revenue is before this Court by filing the present appeal by raising the following questions of law :-

"1) Whether on facts and in the circumstances of the case, the Income Tax appellate Tribunal has failed to appreciate that the payments made by the assessee to the non-residents attract the provisions of Sec. 195 and thereby provisions of Section 40 (1) (ii)?

2) Whether on the facts and in the circumstances of the case the finding of the Tribunal is proper, especially when the agent's services are technical in nature and would fall under the purview of Section 9



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(i) (vii) and the explanation to Section 9 (2) would apply?

3) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in placing reliance on the decision of the jurisdictional High Court in the case of Commissioner of Income Tax - Vs - Faizan Shoes Pvt. Ltd. (48 Taxman.com 48) even though the facts are distinguishable since the agent has rendered managerial, technical and consultancy services to the assessee and in the cited case, the agent was merely a commission agent?"

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

The assessee is engaged in the manufacturing and exporting of leather garments. The assessee filed return of income for the assessment year 2010-2011 on 13.10.10 showing a total income of Rs.1,05,18,306/=. 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) by determining the total income at Rs.2,25,06,053/=. The assessee, in its return, claimed Rs.1,09,03,259/= as expenditure for the purpose of payment of commission to foreign agents, which was disallowed by the Assessing Officer on the ground that the assessee has not deducted TDS under Section 195 of the Act. The Assessing Officer was of the opinion that the income is deemed to be accrued in India by virtue of Section 9 (1) (i) of the Income Tax Act and, therefore, the assessee is liable to deduct TDS and disallowed the claim of the assessee.

3. Aggrieved by the said order, the assessee preferred appeal before the CIT (Appeals), who by order dated 10.5.13, allowed the appeal filed by the assessee. The relevant portion of the order of CIT (Appeals), is extracted hereunder, for better clarity :-

"5.1 Therefore, I am of the considered view that the assessee could not be put in a position where it can be visited with the rigours associated with non-deduction of tax at source. It cannot be fastened with any liability associated with non-deduction of tax at source on such payments. Keeping in view of the various judicial pronouncements mentioned supra and respectively following the ratios held in the above case laws as well as considering various submissions made by the AR of the appellant, the commission paid by the appellant does not constitute income in the hands of the non-resident agents and does not come within the purview of Sec. 195. The appellant neither received any services such as managerial, technical from the foreign agents except



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procurement of orders on commission basis which is received abroad constituting income in the hands of the agents accruing and arising outside India. Thus the relationship between the appellant and the agents is contractual and entire service is provided outside India and duly compensated by way of commission payment which is also paid outside India. No limb of activity has taken place within India and withdrawal CDBT circulars referred to in the assessment order does not in any way rendered the commission paid taxable in the hands of the foreign agents in India. For the reason discussed above, the disallowance u/s 40 (1) (ia) of Rs.1,09,03,259/- stands deleted."

4. Against the said order of the CIT (Appeals), the appellant/Revenue filed appeal before the Tribunal. The Tribunal, relying upon the decision of this Court in the case of Commissioner of Income Tax, Chennai - Vs - Faizen Shoes (P) Ltd. (2014 (48) Taxmann.com 48 (Mad)), held that the Revenue has no material to controvert the facts that the present case is in any way different from the one decided in Faizen Shoes case (supra) and, accordingly, dismissed the appeal. Aggrieved against the said order, the present appeal has been filed by the appellant/Revenue.

5. Heard Mr.M.Swaminathan, learned standing counsel appearing for the appellant/Revenue and perused the materials found in the typed set of documents as also the judgment of this Court in Faizen Shoes case (supra).

6. This Court, in Faizen Shoes case (supra), had 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 advertent 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-



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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



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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.

* * * * *

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 assesseees 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



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assesseees 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 assesseees 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 assesseees 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 assesseees 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 assesseees 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,



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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)."

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

7. 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 arise for consideration in this appeal. Accordingly, the order passed by the Tribunal is confirmed and this appeal is dismissed.

Sd/-

Assistant Registrar

True Copy

Sub Assistant Registrar



To

1. Commissioner of Income Tax
Business Circle IV
Chennai.

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2. The Assistant Registrar,
Income Tax Appellate Tribunal
'D' Bench, III Floor, Rajaji Bhavan,
Besant Nagar, Chennai-90.
3. The Commissioner of Income Tax (Appeals-V)
2nd Floor, Main Building,
121 M.G.Road, Nungambakkam, Chennai-34

+1 cc to M/s.M.Swaminathan, Advocate,SR.11476.

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T.C.A. NO. 92 OF 2015