

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 14.02.2017

Pronounced on : 27.04.2017

Coram:

The Hon'ble Mr. Justice HULUVADI G. RAMESH
AND
The Hon'ble Dr. Justice ANITA SUMANTH

T.C. (Appeal) No.121 of 2009 & MP.No.1/10

Smt. Fathima Harris ... Appellant/Petitioner

Versus

The Income Tax Officer,
Ward XIII(4)
Chennai 600 034. ... Respondent/Respondent

Appeal under Section 260A of Income Tax Act, 1961 against the order passed by the Income Tax Appellate Tribunal, 'A' Bench and Chennai, dated 10th April 2008 in ITA. No.1335/Mds/2006, for the Assessment year 2002-03, against the order of Commissioner of Income Tax (Appeals) XII, 121, Mahatma Gandhi Road, Chennai 34, made in ITA.No.117/05-06, dated 22/03/06 for the Assessment year 2002-03, against the order of Income Tax Officer, Ward XIII(4), Chennai-6, made in PAN.No/GIR.No.AAA PF 6916 D, dated 30.03.05, for the assessment year 2002-03.

For Appellant ... Mr.R.Vijayaraghavan
For M/s.Subbaraya Aiyar

For Respondents .. Mr.M.Swaminathan &
Mr. K.Sureshkumar

JUDGMENT

(Judgment of this Court was delivered by ANITA SUMANTH, J.)

The appellant is the proprietrix of M/s.Niyaz Apparels engaged in the exports of garments. In the financial year relevant to assessment year 2002-03, the appellant effected payments of commission of an amount of Rs.66,96,570/- to various entities for the procurement of export orders. This included an entity by the name and style of M/s.Textile Services Limited,

based in New Delhi to which an amount of Rs.17,84,293/- was paid and claimed as expenditure in the computation of income for the purposes of the Income tax Act 1961 (in short 'Act'). When the return of income was taken up for scrutiny, the assessing officer was of the view that tax ought to have been deducted from the commission payment in view of the mandate in section 40 (a)(i) of the Act, in the absence of which, the expenditure claimed was liable to be disallowed and added back to the taxable income. The appellant submitted that the payments of commission were, in all cases except Textile Services, made to entities situated outside India, and in the absence of a business connection, there was no liability to taxation in this regard. The assessing officer accepted the submission as regards the overseas commission agents, however adding back the amount of commission paid to Textile Services, Delhi, for non-compliance of the provisions of section 40(a)(i) of the Act.

2. The order of assessment dated 31.3.2005 was assailed in appeal before the Commissioner of Income Tax (Appeals) ('CIT (A)'). In appeal, the appellant produced an agreement executed between itself and M/s. Textile Services Limited, Hong Kong, pursuant to which, commission was paid for exports booked through this concern to M/s. Textile Services Ltd, Delhi. The appellant contended vide a written submission dated 22.12.2005 that since the services were rendered outside India, the payments of commission would not be liable for deduction of tax at source. Though sought, no other details evidencing the nature of services rendered or activity carried on by the Indian entity were furnished. Reliance was placed on Circular No.786 dated 7.2.2005 issued by the Central Board of Direct Taxes.

3. The CIT(A) appears to have sought a remand report from the assessing officer for verification of the details furnished including the address of the entity in Delhi and the assessing officer confirmed the position that the export sales had been effected through the Indian concern that had received the commission payments as well. In this view of the matter, the CIT (A) confirmed the disallowance since according to her, the transaction would come within the sweep of 40(a) of the Act. Reliance on the Circular was negatived on the ground that the payment in the instant case had been made to an Indian recipient.

4. In further appeal before the Income Tax Appellate Tribunal ('Tribunal'), the thrust of the appellants' submission was that the payment of commission was for the rendition of services outside India and that accordingly the same would not be liable to tax. The tribunal considered the transaction in the light of the circular issued by the CBDT dated 7.2.2000, and the facts as found by the lower authorities and dismissed the

appeal as against which the present appeal is filed at the instance of the assessee raising the following substantial question of law for determination:

'Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the commission paid to an agent in India is liable for TDS u/s 40(a)(i) ignoring that sub section (ia) to Section 40 was introduced only w.e.f. 01.04.2004?'

5. We have heard Sri.Vijayaraghavan, learned counsel appearing for the appellant and Sri.M.Swaminathan and K.Sureshkumar, learned counsels appearing for the department.

6. The following facts are not in dispute. An agreement had been entered into by the appellant with M/s.Textile Services Limited, Hong Kong for canvassing of export orders. Commission was paid on various dates between 2.7.2001 to 25.1.2002 amounting to Rs.17,84,293/-. The amount was paid to M/s Textile Services Limited, an agent of the foreign entity based in Delhi. Concurrent orders of the authorities confirm the position that the commission has actually been received in India and no details were forthcoming to establish that the Indian entity received the same for onward transmission to Hong Kong. The inevitable conclusion in law is that the commission payments are liable to tax in India.

7. Reliance is placed on Circular No.786 dated 7.2.2000, the relevant portion of which states as follows:

'The deduction of tax at source under section 195 would arise if the payment of commission to the non-resident agent is chargeable to tax in India. In this regard attention to C.B.D.T. Circular No.23, dated 23rd July, 1969, is drawn, where the taxability of "Foreign Agents of Indian Exporters" was considered along with certain other specific situations. It had been clarified then that where the non-resident agent operates outside the country, no part of his income arises in India. Further, since the payment is usually remitted directly abroad it cannot be held to have been received by or on behalf of the agent in India. Such payments were therefore held to be not taxable in India. The relevant sections, namely, section 5(2) and section 9 of the Income Tax Act, 1961, not having undergone any change in this regard, the clarification in Circular No.23 still prevails. No tax is therefore deductible under section 195 and consequently, the

expenditure on export commission and other related charges payable to a non resident for services rendered outside India becomes allowable expenditure. On being appraised for this position, the Comptroller and Auditor General have agreed to drop the objection referred to above.'

The commission, in the present case, has been received in India by an agent of the foreign entity. Circular No.786 dated 7.2.2000 is thus inapplicable to the instant case.

8. The argument advanced before us on behalf of the assessee is to the effect that the provisions of section 40(a) (ia) of the Act, in terms of which the aforesaid disallowance has been effected, has been inserted only with effect from 1.4.2004 and as such would not be applicable to assessment year 2002-03. However, we note that the disallowance has been effected in terms of sub-clause (i) of section 40(a) relating to a non-resident and therein lies the fallacy in the argument of the learned counsel.

9. The case of the department is that the amount represents commission payable to the Hong Kong entity and received by the Indian entity as an agent of the foreign entity. The liability to tax is thus, that of the non-resident, in terms of section 195 of the Act that reads as follows;

'195. (1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section of this Act 194LC) (or section 194LD) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "salaries" shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:'

10. The liability to deduction of tax at source is in terms of section 40(a)(i) of the Act. The argument of the learned counsel as well as the substantial question of law sought to be raised appear to be a clever afterthought, particularly since this argument was not raised either at time of assessment or first appeal but for the first time before the Tribunal even though all earlier orders were passed after the insertion of sub clause (ia) of section 40. In the light of the admitted position that the commission payments have been received by the Indian agent on behalf of the Hong Kong entity in India, we find no

infirmity in the order of the lower authorities and answer the substantial question of law against the appellant and in favour of the Revenue. Consequently, connected M.P.No.1/2010 is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

msr

To

1. The Income Tax Officer,
Ward XIII (4),
Chennai-34.
2. The Income Tax Appellate Tribunal,
'A' Bench, Chennai.
3. The Commissioner of Income Tax,
(Appeal) XII 121,
Mahatma Gandhi Road,
Chennai-34
4. The Income Tax Officer,
Ward XIII (4),
15, Shaffee Mohammed Road,
Chennai-600 006.
5. The Assistant Registrar,
The Income Tax Appellate Tribunal,
III floor, Rajaji Bhavan,
Besant Nagar,
Chennai-600 090.

+1cc to M/s.Subbaraya Aiyar & Padmanabhen,
Advocate, S.R.No.26239.

PRE DELIVERY JUDGMENT IN
T.C.(Appeal) No.121 of 2009

SKV(CO)
CS/02/06/17