

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.11.2017
DELIVERED ON : 14.06.2018

CORAM:

THE HON'BLE MS. INDIRA BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE M.SUNDAR

Tax Case (Appeal) No.572 of 2013

M/s.Evolv Clothing Company Pvt Ltd.,
New No.471, M.K.N. Road,
Alandur, Chennai – 600 016.

.. Appellant

Vs.

The Assistant Commissioner of Income Tax,
Company Circle-II (1),
Chennai – 600 034.

.. Respondent

PRAYER: Appeal under Section 260A of the Income Tax Act, 1961
against the order of the Income Tax Appellate Tribunal, "A" Bench,
Chennai, dated 11.03.2013 passed in I.T.A.No.2100/Mds/2012.

For Appellant

: Mrs.Nalini Chidambaram
Senior Counsel
for Ms.C.Uma

For Respondent

: Mr.Karthik Ranganathan

JUDGMENT

Ms.INDIRA BANERJEE, CHIEF JUSTICE

This appeal is against an order dated 11.3.2013 passed by the Income Tax Appellate Tribunal, 'A' Bench, Chennai, allowing the appeal of the Revenue, being I.T.A.No.2100/Mds/2012, reversing an order of the Commissioner of Income Tax (Appeals)-I, Coimbatore, dated 23.8.2012 in Appeal No.449/11-12, and restoring an order of assessment dated 19.12.2011 passed by the Assessing Officer in relation to the assessment year 2009-2010.

2. The appellant assessee carries on business of export of garments. The appellant assessee claims to have entered into Agency Agreements with a non-resident Italian Agent for procuring export orders for the appellant at a commission. During the financial year 2008-2009, relevant to the assessment year 2009-2010, the appellant paid a sum of Rs.3,74,09,773/- as commission to the said foreign agent.

3. According to the appellant assessee, since no amount of agency commission was chargeable to tax in India, the appellant assessee did not deduct tax at source (TDS) before payment of commission to the foreign agent. According to the appellant assessee, the foreign agent rendered service akin to the service of a broker to

the appellant assessee, procuring orders upon market survey with regard to demand for the products of the appellant in the foreign country.

4. The Assessing Officer passed the assessment order disallowing the entire commission under Section 40(a)(i) of the Income Tax Act, 1961 (hereinafter referred to as "*the IT Act*") holding that from the agreement copies filed by the appellant assessee, it was very clear that Commission was paid to the foreign agents for (i) marketing the products of the assessee company; (ii) to procure orders for the assessee company; (iii) systematic market research with regard to the needs of the products, etc.

5. Referring to the meaning of 'fee for technical services' as per Explanation (2) of Section 9(1)(vii) of the Income Tax Act, the Assessing Officer arrived at the finding that it could not be said that the payments made by the company were solely for the purpose of overseas commission and there was ambiguity in determining whether any part of income accrued to the non-resident in India.

6. The Assessing Officer found that the provisions of the Income Tax Act made it clear that income could be deemed to accrue or arise in India even if the non-resident did not have residence or place of business in India or business connection in India and even if the non-

resident Indian had not rendered services in India. The Assessing Officer held that the exceptions provided under Section 9(1)(vi)(b) / 9(1)(vii)(b) applied to utilisation of services in business outside India and did not cover the case of the appellant assessee. Section 9(1)(vi)(b) relating to royalty is not attracted in this case. The Assessing Officer was of the view that the appellant assessee was liable to comply with the provisions of Chapter XVII of the IT Act relating to deduction of tax at source (TDS).

7. The Assessing Officer proceeded on the basis that the situs of the rendering of services was not relevant. It was the situs of the payer and the situs of the utilization of services which determine taxability of such services in India, as long as services are utilized in India. The Assessing Officer found that the business of the assessee was situated in India and payments also made from India. ***"From the agreement copies filed by the assessee, it is clear that commission was paid to the foreign agents for:***

(i) marketing the products of the assessee company;

(ii) to procure orders for the assessee company;

(iii) systematic market research with regard to the needs of the products."

8. The Assessing Officer found that it could not be said that the payments made by the appellant assessee were solely for the purpose of overseas commission and there was ambiguity in determining whether any part of income accrued to the non-resident in India.

9. The Assessing Officer also took note of withdrawal of Board Circular No.786, dated 7.2.2000, which dealt with payment of export commission and Circular No.23 of 1969 which dealt with liability to tax under Section 9 of the Income Tax Act, 1961 on non-resident's income accruing or arising through or from business connection in India, and the clarification issued vide Circular No.7 of 2009, dated 22.10.2009.

10. Sections 190 and 191 of the IT Act are set out hereunder:

"Section 190. Deduction at source and advance payment.-

(1) Notwithstanding that the regular assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction or collection at source or by advance payment or by payment under sub-section (1A) of section 192, as the case may be, in accordance with the provisions of this Chapter.

(2) Nothing in this section shall prejudice the charge of tax on such income under the provisions of sub-section (1) of section 4.

Section 191. Direct payment.-

In the case of income in respect of which provision is not made under this Chapter for deducting income-tax at the time of payment, and in any case where income-tax has not been deducted in accordance with the provisions of this Chapter, income-tax shall be payable by the assessee direct.

Explanation.—For the removal of doubts, it is hereby declared that if any person including the principal officer of a company,—

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of section 192, being an employer,

does not deduct, or after so deducting fails to pay, or does not pay, the whole or any part of the tax, as required by or under this Act, and where the assessee has also failed to pay such tax directly, then, such person shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default within the meaning of sub-section (1) of section 201, in respect of such tax.”

11. The Assessing Officer, in effect, found that though the assessee company had no business outside India, the assessee company had made payments from sources which were taxable in India. The non-residents did not file any return in India or pay Indian taxes in respect of the services rendered by them, nor obtained exemption under Section 195(2) of the IT Act. The amounts paid to

the non-residents were, therefore, to be deemed to be income that had arisen in India under Section 9(1)(vii) of the IT Act, for which the appellant ought to have deducted TDS under Section 195 of the IT Act. The amount of Rs.3,74,09,773/- paid to the non-residents was disallowed under Section 40(a)(i) of the IT Act and added to the income of the appellant.

12. The appellant filed an appeal against the aforesaid order of assessment, which, as stated above, was allowed by the Commissioner of Income Tax (Appeals)-I, Coimbatore, by an order dated 23.8.2012. The Commissioner of Income Tax (Appeals)-I, Coimbatore, *inter alia*, observed, and in our view, rightly that from the Service Agreement of the appellant with the agents abroad, it was clear that the service rendered by the agents was of brokerage, to procure orders and to do market research abroad. These were ordinarily the tasks which any agent or broker undertook incidental to brokerage service.

13. The Commissioner of Income Tax (Appeals)-I, Coimbatore, also took note of the fact that none of the commission agents had any place of business in India and even if they did, Explanation 1 to Section 9(1)(i) of the IT Act would attract liability to Indian tax for a non-resident with business connections in India, only on income attributable to his operations in India. There could, therefore, be no liability under the domestic law. The above view would be fortified, if

there were a Double Taxation Avoidance Agreement (DTAA).

14. The Commissioner of Income Tax (Appeals)-I, Coimbatore, held that if the commission agent did not have permanent establishment in India or if they did have one, but had no activity in India for earning such income, there would be no tax liability, as held by the Supreme Court in *CIT v. Toshoku Ltd.*, reported in (1980) 125 ITR 525 (SC).

15. In *Toshoku Ltd.*, supra, the Supreme Court held as under:

"Section 9(1)(i) of the Act provides that 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 shall be deemed to accrue or arise in India. The Explanation to this clause 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 this 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 and in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export.

....

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 cl.(a) of the Explanation to s.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, right in answering the question against the department."

16. Relevant parts of the order of the Commissioner of Income-tax (Appeals) is extracted hereinbelow:

"From the service agreement with the agents abroad, it is clear that the service rendered is essentially brokerage service even as stated in the very first clause "to procure orders" and in reference to market research abroad or co-ordination with the supplier or to ensure timely payment or making available its office space for visit by the suppliers. These are ordinarily the tasks, which any agent or a broker undertakes incident to brokerage service. Also, none of the commission agents have any place of business in India. Even if there be any, Explanation 1 to section 9(1)(i) of the Act would attract liability to Indian tax for a non-resident with business connections in India, only on income attributable to his operations in India. There can, therefore, be no liability under the domestic law. If there is also a Double Tax Avoidance Agreement, this inference is further buttressed, if they do not have permanent establishment in India or if they do have one, if they have no activity in India for earning such income. The law on the subject is settled at the level of the Supreme Court itself in CIT v. Toshoku Ltd. (1980) 125 ITR 525 (SC) and had been conceded in a number of circulars.

In the case of CIT v Toshoku (1980) 125 ITR 525 (SC), the company upheld non-liability by relying on a Board Circular in following words:

....

As could be seen from the judgment, the Supreme Court did not rely on the Board's clarification as a concession, but as a clarification. It dealt with the issue on merits after referring to section 9 of Income-Tax Act, 1961 and held that, if any payments are for services rendered outside India, they cannot be deemed to be income which has either accrued or arisen in India in the light of the section. As the issue

was decided on merits by the Apex Court not on the basis of the Board Circular, the withdrawal Circular of the Central Board of Direct Taxes would not in any way affect the legal position enunciated above, viz., that no part of remittance is liable to tax in India. Incidentally, the Board Circular No.26 dated 17th July, 1953 has not been withdrawn by Circular No.7 of 2009 dated 22nd October, 2009, hence cannot have implication for the present asst year 2009-10.

A positive Circular No.786, dated 7th February, 2000 (2000) 241 ITR (st.) 132 in favor of non-deduction has, however, been withdrawn. Though this Circular had been issue with the concurrence of Comptroller and Audit General of India, it has been withdrawn without his concurrence. The fact that this Circular along with another Circulars has been withdrawn makes no difference to the law not only because Circular No.26 dated 17th July, 1953 has not been withdrawn, but also because the reasons for withdrawal of the two Circulars have not been indicated in Circular No.7 dated 22.10.2009. Not all Circulars relating to non-resident taxation have been withdrawn.

Liability to tax does not depend upon Circulars, but on the statute. It is only where there is relaxation of liability by way of benevolent Circulars; such Circulars will be binding on the tax administration. Circulars, therefore, cannot justify liability, where there is none in the statute.

The only amendment to section 9, after the decision of the Supreme Court and a number of other decisions apart from a number of cases, where the Income-tax Department has followed this view, is by insertion of Explanation to section 9(2) to provide that the incomes under clauses (v), (vi) and (vii) [of section 9(1)] relating to interest (v), royalty (vi) and technical fees (vii) would be liable to tax irrespective of the place of residence or place of business or business connection. The amendment, therefore, relates only to income from technical service, royalty and interest and not to business income of non-residents from activities abroad. In fact, even in the case of business connection under the domestic law and permanent establishment in India under the Double Tax Avoidance Agreement, where there is one, the Income liable to tax in India is what is attributable to activities in India.

This amendment, therefore, does not make any difference to any income other than interest, royalty and technical fees. In other words, there is no change in law for any other income as for business, which includes commission on sales. There has also been no modification to any Double Tax Avoidance Agreement as well to require a different view.

Section 195 attracts tax only on chargeable income, if any paid to the non-resident where there is no liability on the payment, the question of tax deduction does not arise. Where no part of the income is chargeable in India, even clearance under section 195(2) or 195(3) is not necessary.

The matter has also now been settled at the level of the Supreme Court itself overruling the decision of the Karnataka High Court in Samsung Electronics Co. Ltd.'s case (supra) on this point in GE India Technology Centre P.Ltd. v. CIT [2010] 327 ITR 456 (SC), so that there is no scope for requiring clearance from the Assessing Officer in cases where there is no liability for the non-resident where the payment is not received by the non-resident in India, in following words:

....

In cases of such patent instances of non-deduction, where there is no liability in India, the question of any disallowance under section 40(a)i) or 40(a)(ia) does not arise, because there can be no inference of failure to deduct tax at source, where no tax need be deducted under the law. ..."

17. As observed above, the Revenue appealed to the learned Tribunal contending that the Commissioner of Income Tax (Appeals)-I, Coimbatore, had wrongly deleted the addition made by the Assessing Officer under Section 40(a)(i) of the IT Act for not deducting TDS in respect of the payment made by the assessee to its overseas agent.

18. By the order under appeal, the learned Tribunal reversed the

order of the Commissioner of Income-tax (Appeals) *inter alia* holding as hereinbelow:

"10. ... In view of the different stands adopted by the parties, the issue which arises for our consideration is as to whether the 'systematic research' giving rise to payment in question made by the assessee could be termed as 'fee for technical services' or not. Before proceeding further, we deem it appropriate to refer the relevant statutory provisions i.e. section 9 of the "Act" sub-section 1(i), (vii) and Explanation (2) which read as under:

....

Similarly, in the Finance Act, 2010, the legislature also inserted Explanation 2 in the aforesaid provision with effect from 01.06.1976 which reads as under:

..... Section 9, sub-section 1(i) prescribes that the income would be deemed to accrue and arises in India, whether directly or indirectly, if it is through or from any business connection. Then, in sub-section (1)(vii) income by way of 'fee for technical services' is defined. In other words, section 9(1)(i) is a general provision whereas, clause (vii) is in the nature of specific provision. Thereafter comes the Explanation substituted by the Finance Act, 2010 with retrospective effect from 01.06.1976. This explanation makes it categoric that in cases covered by clause (vii) or for that section 9, sub-section (1)(vi) – (vii), it would not be necessary for the non-resident to have residence or place of business or business connection in India. To simplify, in case of 'fee for technical services', the mandate of the legislative is that clause (vii) would have overriding effect by virtue of aforesaid

explanation to section 9(1)(i).

11.Proceeding on this analogy, now we deal with assessee's agreement. There is no issue between the parties that the assessee has paid for 'systematic research' made by the overseas entity. Its only contention is that the 'systematic research' does not fall under the definition of 'technical services'. In Explanation 2 of clause (vii) (supra) of section 9(1) with effect from 01.04.1977, fee for 'technical services' means any consideration paid for 'technical' or 'consultancy' services. Further, the legislature itself provides for some conditions which are admittedly not applicable this case. In these facts and circumstances, we hold that the word 'technical' services would imply an operation involving skilled precision which 'systematic research' also involves. Therefore, we find that assessee's agreement in question leading to payment in hand made to the overseas entity amounts to fees for 'technical' services. Hence, the assessee was liable to deduct TDS as per the provisions of the "Act", failure of which would entail disallowance under section 40(a)(ia) of the "Act".

12.We have also perused the case law submitted by the assessee. Admittedly, in the circular relied upon by the assessee as well as in the case law, the aforesaid explanation substituted by the Finance Act, 2010, was not subject matter of the dispute. Hence, it is not applicable qua facts of the case.

13.As sequel to our above discussion, the Revenue succeeds in the present appeal and the order of the Assessing Officer is restored."

19. From the judgment and order of the learned Tribunal under appeal, it appears that the Revenue only contended that the payee in question had rendered technical services in the nature of systematic research to the appellant and received fee in lieu thereof, which was liable to be taxed as per Article 13 (Clause 4) of the Indo-Italian Double Taxation Avoidance Agreement (DTAA).

20. The learned Tribunal took note of the agreement between the appellant and the payee which, inter alia, provided as follows:

"The SECOND PARTY agrees to undertake and carryout the following services on behalf of the FIRST PARTY:

- 1. To procure orders for the FIRST PARTY and to negotiate the terms of such orders and contracts with said foreign buyers but the terms thereof shall be subject to prior, written concurrence of the FIRST PARTY.*
- 2. To carry out systematic market research with regard to the needs of the products in the territory and to send to the FIRST PARTY reports and suggestions for adopting necessary measure in order to increase sale of the products.*
- 3. To co-ordinate with the FIRST PARTY for the timely completion of all export obligations and to render all assistance in the fulfillment of the terms of the supply contract.*
- 4. To take all necessary efforts and ensure timely payment by the buyers for all exports performed by the FIRST PARTY which have been negotiated by the SECOND PARTY.*

5. To render all other assistance to the FIRST PARTY and its representatives while on visits to the territory and to make available the agency office for all secretarial and other assistance."

21. On consideration of the terms and conditions of the said agreement, the learned Tribunal formulated the question of whether systematic research giving rise to payment in question made by the assessee could be termed as "fee for technical services" or not. The question was answered in the affirmative. The learned Tribunal held that the word "technical services" would imply an operation involving skilled precision, which "systematic research" also involves. The learned Tribunal, thus, concluded that the assessee's agreements in question leading to payment to the overseas entity amounted to fees for technical services, for which the appellant was liable to deduct TDS, failure of which would entail disallowance under Section 40(a)(ia) of the IT Act.

22. The appeal was admitted by a Division Bench comprising *Chitra Venkataraman and K.B.K.Vasuki, JJ.* The substantial questions of law on which the appeal was admitted need to be re-framed and are re-framed as follows:

(i) Whether commission paid by an exporter to a non-resident agent and/or a foreign agent for service provided outside India for procuring orders is taxable in India?

- (ii) Whether rendering of the service of market survey abroad would tantamount to rendering of technical service so as to attract taxes in India?*
- (iii) Whether an assessee is liable to deduct TDS on commission paid to overseas agents operating abroad?*
- (iv) Whether the amendment of the Income Tax Act with retrospective effect from 1.6.1976 by the Finance Act, 2010 clarifying that income of non-resident would be deemed to accrue or arise in India under Clause (v) or clause (vi) or clause (vii) of sub-section(1) and be included in the total income of the non-resident whether or not the non-resident has a residence or place of business or business connection in India, and whether or not the non-resident has rendered services in India is attracted in the facts and circumstances of this case?*

23. The first question necessarily and obviously has to be answered in favour of the appellant/assessee and against the Revenue, the question being covered by the judgment of Supreme Court in Toshoku Ltd., supra. The issue before the learned Tribunal was whether the appellant/assessee had paid for systematic research or for procuring export orders. It was all along the contention of the appellant/ assessee that the foreign agent was paid for procuring orders and assessing the market. The learned Tribunal erred in concluding that there was no issue between the parties that the assessee had paid for systematic research. For the sake of

convenience, the second, the third and the fourth questions are dealt with together.

24. The learned Tribunal found, on facts, on perusal of the agreement copies filed by the appellant/assessee that commission was paid to the foreign agents for (i) marketing the products of the assessee company; (ii) to procure orders for the assessee company; and (iii) for systematic market research with regard to the needs of the products, etc.

25. There is no factual finding of any activity on the part of the payee in India. The Assessing Officer proceeded on the basis that the business of the appellant/assessee was in India and payments were made from India.

26. Having found that the payments were for marketing the products of the assessee company, for procuring of orders for the assessee company and for systematic research with regard to the demand for the products of the assessee. The Assessing Officer erred in arriving at the conclusion that payments made by the appellant assessee could not be said to have been made for the purpose of overseas commission. The Assessing Officer as also the learned Tribunal misinterpreted the Explanation 2 of Section 9(1)(vii) of the IT Act, whereunder "fee for technical services" means any managerial,

technical or consultancy services. It is nobody's case that the service rendered by the overseas agent was either managerial or technical. As held by the Appellate Commissioner, payment for research with regard to need for products was incidental to the job of procuring orders on commission basis. Consultancy services contemplate comprehensive expert technical advisory services based on technical expertise and research, of business and marketing strategies as a whole, including adoption of cost effective measures, organizational and infrastructural requirements, business management, personnel management and other strategies, for business efficacy of a business entity as a whole and not mere market survey of the need for any particular product. The amendment with retrospective effect from 1.6.1976 by insertion of Explanation to Section 9(2) can only apply to income by way of interest, by way of royalty and by way of fees for technical services and not to brokerage or job wise commission on activities incidental to procurement of orders. सत्यमेव जयते

27. The Assessing Officer, in effect, held that income could be deemed to accrue or arise in India under Section 9(1)(vii) of the IT Act even if the non-resident did not have place of business or business connection in India or had not rendered services in India. The exceptions provided under Section 9(1)(vi)(b) / 9(1)(vii)(b) of the IT Act, which apply to utilization of services of business outside India, did not cover the assessee's case.

28. The Assessing Officer had also taken note of withdrawal of two circulars: (i) Circular No.786, dated 7.2.2000, dealing with payment of export commission, opining that withdrawal, being procedural in nature, would apply to proceedings pending; and (ii) Circular No.23 of 1969, which exhaustively dealt with subject of "Non-residents Income accruing or arising through or from business connection in India – Liability to tax – Section 9 of the Income Tax Act, 1961".

29. From the Service Agreement with the agents abroad, it is clear that the service rendered is essentially brokerage service. The very first clause of the agreement states "to procure orders". The reference to market research abroad or co-ordination with the supplier or to ensure timely payment or making available its office space for visit by the suppliers, were ordinarily things which any agent or broker undertook incidental to brokerage service.

30. There is no finding that any of the commission agents had any place of business in India. Explanation 1 to Section 9(1)(i) of the IT Act would attract liability to Indian tax for a non-resident with business connections in India, only in respect of income attributable to his operations in India. In this case, there is nothing which shows that the income in question was attributable to operations in India. That

was not even the factual finding of the Assessing Officer. The Assessing Officer proceeded on the basis that the situs of the rendering of services was not relevant. It was only the situs of the payer and the situs of the utilization of services which determine taxability of such services in India.

31. Section 195 of the IT Act attracts tax only on chargeable income, if any, paid to a non-resident. Where there is no liability, the question of tax deduction does not arise. Where no part of the income is chargeable in India, even clearance under Section 195(2) or 195(3) of the IT Act is not necessary. The decision of the Karnataka High Court in *Commissioner of Income Tax (International Taxation) v. Samsung Electronics Co. Ltd.*, reported in (2010) 320 ITR 209 (Kar), has been overruled by the Supreme Court in *GE India Technology Centre P. Ltd. v. CIT*, reported in (2010) 327 ITR 456 (SC). The Supreme Court held as under:

"This reasoning flows from the words 'sum chargeable under the provisions of the Act' in Section 195(1). The fact that the Revenue had not obtained any information per se cannot be a ground to construe Section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read Section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue

in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression "sum chargeable under the provisions of the Act" from Section 195(1)."

32. Where there is no liability in India, there can be no question of disallowance under Section 40(a)(i) or Section 40(a)(ia) of the IT Act on the ground of non-deduction of tax at source. Moreover, where a non-resident has no permanent establishment in India, there can be no liability either under the domestic law or under Double Taxation Avoidance Agreement. In any case, even if a non-resident Indian did have a permanent establishment, but income was earned without availing of such permanent establishment, the income for services rendered abroad could not have been liable for tax deduction at source.

33. Under Section 9(1)(vii)(b), income by way of fees for technical services payable by a person, who is a resident, is taxable income except where the fees are payable in respect of 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. In view of Explanation (2) to Section 9(1)(vii), technical services means any consideration, including lumpsum consideration, for 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. Service of market survey only to ascertain the demand for the product in the market is incidental to the function of a commission agent of procuring orders and is, in any case, not managerial, technical or consultancy service.

34. In *GE India Technology Centre P. Ltd.*, supra, the Supreme Court clearly held that no tax is deductible under Section 195 of the IT Act on commission payments and consequently the expenditure on export commission payable to non-residents for services rendered outside India becomes allowable expenditure. In *Toshoku Ltd.*, supra, the Supreme Court held that payments to agents for performance of services outside India are not liable to be taxed in India.

35. In *Commissioner of Income Tax, Delhi-IV, New Delhi v. EON Technology (P) Ltd.*, (2011) 15 Taxmann.com 391 (Delhi), the High Court of Delhi held that payment of sales commission to non-resident who operates outside the country would not attract tax, if payment was remitted abroad directly. Merely because an entry had been made in the books of accounts of the appellant/assessee, that would not mean that the non-resident agent had received payment in India and, therefore, disallowance under Section 40(a)(i) of the IT Act was found uncalled for.

36. The expression "fees for technical services" has been defined in Explanation (2) of Section 9(1)(vii) of the Income Tax Act to mean any consideration (including any lumpsum consideration) for the rendering of any managerial, technical or consultancy services (*including the provision of services of technical or other personal*) 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. Explanation (B) to Section 40(a)(i) provides that the expression "*fees for technical services*" in Section 40(a)(i) shall have the same meaning as in Explanation 2 to Clause (vii) of sub-section (1) of Section 9.

37. On a reading of Explanation (2) to Section 9(1)(vii), fees for technical services means consideration, including lumpsum consideration for rendering any managerial, technical or consultancy services.

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38. In the instant case, the Assessing Officer has, in the assessment order, accepted that the appellant assessee has paid commission charges to overseas agents. It is not the case of the Assessing Officer that any lumpsum consideration has been made for any specific managerial, technical or consultancy services.

39. On a overall reading of the Explanation, it is apparent that fees for technical services does not contemplate commission which is order specific and computable at a small percentage of the order value. Section 40(a)(i) does not contemplate order wise commission based on the order value.

40. For the reasons discussed above, the appeal is allowed and the questions framed are answered in favour of the assessee against the Revenue. No costs. Consequently, connected miscellaneous petition is closed.

(I.B., CJ.) (M.S., J.)

14.06.2018

Index : Yes

Internet : Yes

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To:

1. The Registrar
Income Tax Appellate Tribunal
'A' Bench, Chennai
2. The Assistant Commissioner of Income tax,
Company Circle – II(1),
Chennai – 600 034.

(25)

THE HON'BLE CHIEF JUSTICE

AND

M.SUNDAR,J.

(sasi)



T.C.(A) No.572 of 2013

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