

IN THE HIGH COURT OF BOMBAY AT GOA***TAX APPEAL NO.19 OF 2013***

The Commissioner of Income Tax,
Aaykar Bhavan, Patto Panaji-Goa.

.... Appellant.

V/s.

M/s. Sesa Goa Ltd.
Sesa Ghor, 20 EDC Complex,
Patto Plaza, Panaji – Goa, 403001.
PAN: AACCS7101B

.... Respondent

Ms. Susan Linhares, Advocate for the appellant.

Mr. R. G. Ramani, the learned Senior Counsel along with Ms. S. Patil, Advocate for the respondent.

**Coram : M. S. SONAK &
NUTAN D. SARDESSAI, JJ.**

Date : 27th February, 2020.

Oral Judgment: (Per M.S. Sonak, J.) :

Heard Ms. Susan Linahres, the learned Standing Counsel for the Income Tax Department – appellant and Mr. R. G. Ramani, the learned Senior Counsel appears along with Ms. S. Patil, the learned Counsel for the respondent.

2. By our Order dated 15.10.2013, this appeal was admitted on the following substantial questions of law.

“i. Whether ITAT is correct in deciding the addition towards payment of commission to foreign agents where TDS was not deducted u/s. 40(a)(ia) ignoring the decision of AAR in the case of Rajiv Malhotra INRE(AAR) 284 ITR 564 and SKF Boilers and Driers Pvt. Ltd.?”

ii. Whether ITAT is correct in law in taking a view that the disallowance of commission under Section 37 is incorrect since the Commission has been incurred by the Assessee wholly and exclusively for the purpose of business of the Assessee?”

3. Insofar as the first substantial question of law is concerned we find the matter is entirely covered by the decision of the Hon'ble Apex Court in the case of ***GE India Technology Centre (P) Vs. CIT***,¹. In this decision, the Hon'ble Apex Court has held that the duty to deduct tax at source arises only when remittance to non-residents contain wholly or partly taxable income, i.e. income chargeable under **Section 195** of the Income Tax Act, 1961.

4. The view taken in ***GE India Technology (P) Limited*** (supra) was once again reiterated in another decision of the Hon'ble Apex Court in the case of ***C.I.T. Vs. Toshoku Ltd.***²

5. In ***Commissioner of Income Tax-10 Vs. Gujarat Reclaim & Rubber Products Ltd., Income, Tax Appeal No.2116***

¹(327 ITR 456)

²(125 ITR 525)

of 2013 with Income Tax Appeal No.169 of 2014 decided on 8.12.2015 by the Division Bench of this Court has followed *Toshoku Limited* (supra) and in *The Principal Commissioner of Income Tax Vs. Sesa Goa Ltd., Tax Appeal No.68 of 2016* decided on 16.8.2017, another Division Bench of this Court has followed *GE India Technology (P) Limited* (supra) and *Toshoku Limited* (supra) to reiterate that the commission earned by non-resident (foreigner) agent who carried on the business of selling Indian goods outside India, cannot be said have deemed to be income which has accrued and/or arisen in India so as to require any tax deduction at source under section 195 of the ITR.

6. For all the aforesaid reasons, the first substantial question of law is required to be answered against the appellant - Revenue and in favour of the respondent - assessee.

7. Insofar as the second substantial question of law is concerned, we find that both the Commissioners (Appeals) as well as the ITAT have recorded concurrent findings of fact that the commission have been incurred by the assessee wholly and exclusively for the business of the assessee. No perversity is pointed out in the business so as to give arise to any substantial question of law.

8. Besides, we find that the ITAT has also relied upon

several rulings of the Apex Court and other Courts in order to answer this question in favour of the assessee. The record indicates that for the A.Y 2005-2006 and A.Y 2009-10, as well similar view was taken in favour of the assessee.

9. For the aforesaid reasons, we answer even the second substantial question of law against the appellant – Revenue and in favour of the respondent - assessee.

10. Resultantly, this appeal is required to be dismissed and is hereby dismissed. There shall be no order as to costs.

NUTAN D. SARDESSAI, J. M. S. SONAK, J.
*af**