

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 31.03.2021

CORAM:

THE HON'BLE MR. JUSTICE M.DURAI SWAMY
AND
THE HON'BLE MRS. JUSTICE T.V. THAMILSELVI

T.C.A.No.299 of 2014

The Commissioner of Income Tax,
Chennai. ... Appellant/Appellant

Vs.

M/s.Tamil Nadu Newsprint and Papers Limited,
No.87, Anna Salai,
Chennai - 600 032. ... Respondent/Respondent

Appeal preferred under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras, "A" Bench, dated 02.12.2011 in I.TA.No.555/Mds/2011 for the assessment year 2007-08 and against the O/o. The Commissioner of Income Tax (Appeals) -III, Chennai-34 and made in 641/09-10/A-III, Order date 20/12/2010 and against the Assistant Commissioner of Income Tax, Company Circle-III(I) Chennai-34 and made in PAN No.AAACT2935J/31021-T order date 22/12/2009 for the assessment Year 2007-2008.

For Appellant : Mr.M.Swaminathan,
Senior Standing Counsel
assisted by
Ms.V.Pushpa,
Junior Standing Counsel

For Respondent : Mr.R.Vijayaraghavan

JUDGMENT

(Judgment was delivered by M.DURAI SWAMY, J.)

Challenging the order passed in I.TA.No.555/Mds/2011 in respect of the assessment year 2007-08 on the file of the Income Tax Appellate Tribunal, Chennai, "A" Bench, the Revenue has filed the above appeal.

2.The above appeal was admitted on the following substantial questions of law:

"1)Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that

the disallowance made u/s 40(a)(i) amounting to Rs.87.72 lakhs is not proper?

2) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in not considering the retrospective amendment to the Income Tax Act by Finance Act 2010 to Section 9(1)?

3) Whether the amended explanation to 9(2) relating to the income of the non-resident shall be deemed to accrue or arise in India and shall be included in the total income of the non-resident whether or not he has a resident or place of business or business connection in India or has done services in India?

4) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the deduction under Section 80-IA is to be done without setting off losses on optional basis in spite of clear provisions of Section 80-IA stipulating that the said undertaking should be considered as only source of income of the assessee for the purpose of determining eligible profit?"

3. When the appeal is taken up for hearing, Mr. M. Swaminathan, learned senior standing counsel appearing for the appellant - Revenue fairly submitted that the questions of law nos. 1 to 3 are covered, against the Revenue, by a decision of the Hon'ble Division Bench of this Court reported in [2015] 57 taxmann.com 87 (Madras) [Commissioner of Income Tax, Chennai Vs. Fluidtherm Technology (P). Ltd.], wherein the Hon'ble Division Bench held as follows:

"...

7. This Court, in the case of CIT v. Faizan Shoes (P.) Ltd. [2014] 367 ITR155 / 226 Taxman 115/ 48 taxmann.com 48 (Mad.), 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 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-

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 subsection(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 subsection (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 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 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, 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 of 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 (P.) 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."

4. Further, the learned senior standing counsel appearing for the appellant - Revenue submitted that the 4th question of law is covered by a decision of the Hon'ble Division Bench of this Court, against the Revenue, in the judgment reported in

[2020] 114 taxmann.com 642 (Madras) [Commissioner of Income Tax, Salem VS. Chola Spinning Mills (P.) Ltd.] wherein the Hon'ble Division Bench held as follows:

"...

3. The Division Bench of this court in Prabhu Spinning Mills (P.) Ltd. (supra) held as under:-

"3. Even according to the learned Standing Counsel for the Department, this Court has consistently followed the decision in M/s.Velayudhaswamy Spinning Mills (P) Ltd. v. Asstt. CIT [2012] 21 taxmann.com 95/340 ITR 477, despite the Honourable Supreme Court ordering notice.

4. Interestingly, on the basis of the decision in Velayudhaswamy Spinning Mills (supra), the Central Board of Direct Taxes has issued Circular No.1/2016 dated 15.2.2016. It will be useful to extract the circular in entirety, which is as follows :

"Circular No.1/2016

Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
North Block, New Delhi, the 15th
February, 2016

Subject: Clarification of the term 'initial assessment year' in Section 80IA(5) of the Income Tax Act, 1961.

Section 80IA of the Income-tax Act, 1961 ('Act'), as substituted by Finance Act, 1999 with effect from 1.4.2000, provides for deduction of an amount equal to 100% of the profits and gains derived by an undertaking or enterprise from an eligible business (as referred to in Sub-Section (4) of that Section) in accordance with the prescribed provisions. Sub-Section (2) of Section 80IA further provides that the aforesaid deduction can be claimed by the assessee, at his option, for any ten consecutive assessment years out of fifteen years (twenty years in certain cases) beginning from the year in which the undertaking commences operation, begins development or starts providing services etc. as stipulated therein. Sub-Section (5) of Section 80IA further provides

"Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of Sub-Section (1) apply shall, for the purposes of determining the quantum of deduction under that Sub-Section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."

In the above sub-section, which prescribes the manner of determining the quantum of deduction, a reference has been made to the term 'initial assessment year'. It has been represented that some Assessing Officers are interpreting the term 'initial assessment year' as the year in which the eligible business/manufacturing activity had commenced and are considering such first year of commencement/operation etc. itself as the first year for granting deduction, ignoring the clear mandate provided under Sub-Section (2) which allows a choice to the assessee for deciding the year from which it desires to claim deduction out of the applicable slab of fifteen (or twenty) years.

The matter has been examined by the Board. It is abundantly clear from Sub-Section (2) that an assessee who is eligible to claim deduction u/s 80IA has the option to choose the initial/first year from which it may desire the claim of deduction for ten consecutive years, out of a slab of fifteen (or twenty) years, as prescribed under that Sub-Section. It is hereby clarified that once such initial assessment year has been opted for by the assessee, he shall be entitled to claim deduction u/s 80IA for ten consecutive years beginning from the year in respect of which he has exercised such option subject to the fulfillment of conditions prescribed in the section. Hence, the term 'initial assessment year' would mean the first year opted for by the assessee for claiming deduction u/s 80IA. However, the total number of years for claiming deduction should not transgress the prescribed slab of fifteen or twenty years, as the case may be and the period of claim should be availed in continuity.

The Assessing Officers are, therefore, directed to allow deduction u/s 80IA in accordance with this clarification and after being satisfied that all the prescribed conditions applicable in a particular case are duly satisfied. Pending litigation on allowability of deduction u/s 80 IA shall also not be pursued to the extent it relates to interpreting 'initial assessment year' as mentioned in Sub-Section (5) of that section for which the Standing Counsel/DRs be suitably instructed. The above be brought to the notice of all Assessing Officers concerned."

5. Therefore, admittedly, the second question of law is covered by the above circular. Hence, the appeals deserve to be dismissed.

6. Accordingly, the above tax case appeals are dismissed. No costs."

4. Accordingly, the present Appeals are disposed of on the same terms. No costs."

5. Mr. Vijayaraghavan, learned counsel appearing for the respondent - assessee submitted that in view of the judgments, cited supra, the questions of law may be decided against the Revenue and the appeal may be dismissed.

6. Having regard to the submissions made by the learned counsel on either side, following the ratio laid down by the Hon'ble Division Bench of this Court reported in [2015] 57 taxmann.com 87 (Madras) [Commissioner of Income Tax, Chennai Vs. Fluidtherm Technology (P). Ltd.] [2020] 114 taxmann.com 642 (Madras) [Commissioner of Income Tax, Salem VS. Chola Spinning Mills (P.) Ltd.] the questions of law are decided against the appellant - Revenue and in favour of the respondent - assessee. Accordingly, the Tax Case Appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar

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To

1. The Income Tax Appellate Tribunal,
Chennai, "A" Bench

2. The Commissioner of Income Tax,
(Appeals)-III, Chennai-34.

3. The Assistant Commissioner of Income Tax,
Company Circle III(1), Chenani-34.

+1cc to Mr.M.Swaminathan, Advocate SR.No.21062

+1cc to Mr.Subbaraya Aiyar, Advocate SR.No.21756

T.C.A.No.299 of 2014

RR(CO)
GMY(17/06/2021)



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