IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 08.04.2021

CORAM:

THE HON'BLE MR.JUSTICE M.DURAISWAMY
AND
THE HON'BLE MRS.JUSTICE R.HEMALATHA

T.C.A.NO.687 OF 2014

Commissioner of Income Tax VIII,
121, Mahatma Gandhi Salai,
Chennai - 600 034. ... Appellant

v.

M/s.Habeen Tanning Company,
Railway Station Road,
Ammanankuppam Village,
Gudiyatham, R.S.Post, Gudiyatham
PAN : AAA FH 0373 B ... Respondent

Appeal preferred under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras, "C" Bench, dated 07.02.2014 in I.TA.No.1029/Mds/2013 for the assessment year 2008-2009.

filed against the proceedings passed by the Commission of Income Tax - VIII, Chennai-34 in C.No.21(23)/CIT-VIII/2011-12, dated 18.02.2013 against the order passed by the Deputy Commissioner of Income Tax Circle-1, Vellore.

For Appellant : Mr.M.Swaminathan,
Senior Standing Counsel

For Respondent : Mr.Aasim Shezad and
Mr.Vedhavel
for M/s.BFS Legal

JUDGMENT
(Judgment was delivered by M.DURAISWAMY, J.)

Challenging the order passed in I.TA.No.1029/Mds/2013 in respect of the assessment year 2008-2009 on the file of the Income Tax Appellate Tribunal, Chennai, "C" Bench, the Revenue has filed the above appeal.

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

> "(i) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the Tribunal was justified in cancelling the order of the CIT under section 263 without considering that the CIT had validly exercised his powers under section 263 of the Income Tax Act, 1961?
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> (ii) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the jurisdiction of the CIT while invoking section 263 of the Income Tax Act is confined only to those issues which form part of the Show Cause Notice ?
>
> (iii) Whether the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the CBDT Circular No.7 of 2009 will not apply to assessments completed after issuance of the said Circular ;and that the assessee can claim the benefit of earlier circulars, which were withdrawn by Circular No.7 of 2009 ?"

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 which are raised in the above appeal were decided 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 :-
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> '6. Before adverting 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 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 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 assessees 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 assessees 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 assessees 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 assessees 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 assessees 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 assessees 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 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. Mr.Aasim Shezad, learned counsel appearing for the respondent-assessee submitted that the Hon'ble Supreme Court in the Judgment reported in (2000) 2 Supreme Court Cases 718 [Malabar Industrial Co. Ltd. v. Commissioner of Income Tax, Kerala State] had decided the issue in favour of the assessee. Para 10 of the Judgment of the Hon'ble Supreme Court reads as follows:-

" .... 10. The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the Income Tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. (See Rampyari Devi Saraogi v. CIT [(1968) 67 ITR 84 (SC)] and in Tara Devi Aggarwal v. CIT [(1973) 3 SCC 482 : 1973 SCC (Tax) 318 : (1973) 88 ITR 323] .)"

5. Having regard to the submissions made by the learned counsel on either side, following the ratio laid down by the Hon'ble Supreme court in the Judgment reported in (2000) 2 Supreme Court Cases 718 [cited supra] and the Hon'ble Division Bench of this Court reported in [2015] 57 taxmann.com 87 (Madras) [cited supra] 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 IV)

//True Copy//

Sub Assistant Registrar

Rj

To

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

2. The Commissioner of Income Tax VIII, Chennai-34.

3. The Deputy Commissioner of Income Tax, Circle I, Vellore.

+1cc to M/s.BFS Legal, Advocate, S.R.No.22361
+1cc to Mr.M.Swaminathan, Advocate, S.R.No.22347

T.C.A.No.687 of 2014

GMI(CO)
CS/10/06/2021