IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :31.03.2021

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

Tax Case Appeal Nos.904 & 905 of 2014

The Commissioner of Income Tax,
Chennai. ... Appellant in both TCAs

v.

M/s. Farida Shoes Private Limited,
151/4, Mount Poonamallee,
Ramapuram, Chennai - 600 089. ... Respondent in both TCAs

Tax Case Appeals in T.C.A.Nos.904 & 905 of 2014 filed under Section 260A of the Income Tax Act, 1961 against the common order of the Income Tax Appellate Tribunal, Chennai "A" Bench, dated 11.04.2013, passed in I.T.A.Nos.359/Mds/2013 and 360/Mds/2013 for the Assessment Year 2008-2009.

TCA.No.904 of 2014: As against the order dated 24.11.2012 by the Office of the Commissioner of Income Tax (Apepals)-IX, in I.T.A.No.80/11-12/A-IX Assessment year 2008-09 and as agiainst the order dated 27.10.2011 by the Office of the Additional Commissioner of Income Tax-Company Range-II, Assessment year 2008-09.

TCA.No.905 of 2014: As against the order dated 27.11.2012 by the Office of the Commissioner of Income Tax (Apepals)-IX, in I.T.A.No.89/11-12/A-IX Assessment year 2008-09 and as agiainst the order dated 28.12.2010 by the Office of the Deputy Commissioner of Income Tax Circle-II(3), Assessment year 2008-09.

For Appellant in both TCAs : Mr. S. Rajesh, Standing Counsel

For Respondent in both TCAs : Mr. M.P. Senthil Kumar

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

Challenging the common order passed in I.T.A.Nos.359/Mds/2013 and 360/Mds/2013 in respect of the Assessment Year 2008-2009 on the file of the Income Tax Appellate Tribunal, Chennai “A” Bench, (for brevity, the Tribunal), the Revenue has filed the above appeals.

2.2. The appellant has raised the following substantial questions of law in the above appeals:-

T.C.A. No.904 of 2014

"(i) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the disallowance of Rs.5,62,13,826/- being payment made towards overseas agent commission paid to non-resident under section 40(a)(i) for non deduction of TDS u/s.195 is to be allowed?

T.C.A. No.905 of 2014

"(i) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the disallowance of Rs.2.30,48,595/- being payment made towards overseas agent commission paid to non-resident under section 40(a)(i) for non deduction of TDS u/s.195 is to be allowed?

T.C.A. Nos.904 & 905 of 2014

(ii) Whether the finding of the Tribunal is proper especially when the agent's service is technical in nature and would fall under the purview of section 9(1)(vii) and that the explanation to sec.9 (2) would apply"

(iii) Whether the finding of the Tribunal is proper especially when the commission payment made by the assessee to the non-resident outside India for the services rendered under section 9(1)(vii) of the Income Tax Act is deemed to have arisen in India as per Explanation inserted by Finance Act 2010 with retrospective effect from 01.06.1976 which clearly states that the income of the non-resident shall be deemed to have accrued or arises in India under clause

(v) or clauses (vi) of sub-section (1) of section 9 and shall be included in the total income of the non-resident whether or not he is a resident or place of business of connection in India or has rendered service in India?"

3. When the appeals were taken up for hearing, Mr. S.Rajesh, learned Standing Counsel appearing for the appellant fairly submitted that the questions of law involved in the present appeals were decided against the Revenue in the Judgment reported in [2018] 94 taxmann.com 449 (Madras) [Evolv Clothing Co. (P.) Ltd. v. Assistant Commissioner of Income-Tax, Company Circle-II(1), Chennai , wherein, the Hon'ble Division Bench of this Court held as follows :

"........... 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 CIT v. EON Technology (P.) Ltd. [2011] 15 Taxmann.com 391/203 Taxman 266/[2012] 343 ITR 366 (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.

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. ...."

4. Mr. M.P. Senthil Kumar, learned counsel appearing for the respondent submitted that in view of the Judgment of the Hon'ble Division Bench cited supra the questions of law may be decided against the revenue and the appeals may be dismissed.

5. In view of the submissions made by the learned counsel on either side, following the ratio laid down in by the Hon'ble Division Bench in the Judgment reported in [2018] 94 taxmann.com 449 (Madras) [cited supra] , the questions of law are decided against the Revenue and the Tax Case Appeals are dismissed. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

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

2. The Commissioner of Income Tax Appeals-IX,
   Chennai.

3. The Additional Commissioner of Income Tax-Company Range-II,
   Chennai.

4. The Deputy Commissioner of Income Tax Circle-II(3),
   Chennai.

+1cc to Mr.M.P.Senthilkumar, Advocate, SR.No.20934.

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SSN(CO)
CSR 29.04.2021