

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI**

श्री चंद्र पूजारी, लेखा सदस्य एवं श्रीजी. पवन कुमार, न्यायिक सदस्यके समक्ष

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. Nos.265 & 266/Mds/2016

निर्धारण वर्ष /Assessment years : 2011-12 & 2012-2013.

Dignity Innovations,
G-15, 1st Main Road,
Ambattur Industrial Estate,
Chennai 600 058.

Vs. ITO, Business Ward XIII(2)/
ACIT, Non –Corporate Circle 7(1),
Chennai 600 034.

[PAN AAFFD 9329L]
(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Shri. M. Karanakuran, Advocate
प्रत्यर्थी की ओर से /Respondent by : Shri. P. Radhakrishnan, IRS, JCIT.

सुनवाई की तारीख/Date of Hearing : 31-05-2016
घोषणा की तारीख /Date of Pronouncement : 22-06-2016

आदेश / O R D E R

PER G. PAVAN KUMAR, JUDICIAL MEMBER:

These two appeals are filed by the assessee are directed against order of Commissioner of Income-tax (Appeals)-7, Chennai dated 11.01.2016 for the assessment years 2011-12 and 2012-13 passed u/s.143(3) and 250 of the Income Tax Act, 1961. Since the

issue in these appeals are common in nature, these appeals are clubbed, heard together, and disposed of by this common order for the sake of convenience. We take up ITA No.265/Mds/2016 of assessment year 2011-12 for adjudication.

2. The assessee has raised the following grounds of appeal:-

1. *The learned Commissioner of Income-tax (Appeals) erred in confirming the disallowance of ₹ 45,31,247 made under section 40(a)(i) of the Act.*
2. *The appellants submit that the foreign agent of the appellant having no permanent establishment in India had rendered services outside India in procuring export orders for the appellants and no part of the commission received by it is chargeable to tax in India and therefore there is no requirement to deduct TDS under section 195 of the Act.*
3. *The learned Commissioner of Income-tax erred in holding that the services rendered by the non-resident agent of the appellant would tantamount to technical and managerial services by ignoring the principles laid down by the jurisdictional Madras High Court in the case of CIT Vs. Faizon Shoes Private Ltd. (367 ITR 155) that the services rendered by a commission agent outside India cannot be considered as technical or managerial services within the meaning of section 9 of the Act.*
4. *The Commissioner of Income-tax (Appeals) without affording reasonable opportunity has concluded that the appellant did not furnish any document, correspondence or evidence to show that the non-resident agent was a mere go between and has not rendered any technical or managerial services and thus violated the principles of natural justice and fair play.*
5. *The lower authorities have failed to consider the modus operandi of the export of the garments through the non-resident agent and erroneously concluded that the services rendered are technical in nature.*

6. *The appellant submits that the lower authorities erred in holding that the services rendered by the non-resident agent to the appellants are services falling under section 9(1)(vii) of the Act and same is against the principles laid down by various High Courts and Tribunals.*
7. *The appellants submit that there is no requirement to deduct tax at source under section 195 when the payment by the appellants to the non-resident for all services rendered outside India is not chargeable to tax in India as laid down by the Surpeme Court in the case of GE Technology Centre P Ltd. (327 ITR 456)”.*

3. The Brief facts of the case are that the assessee is in the business of export of garments and filed return of income with total income of ₹3,94,370/- and the case was selected for scrutiny under CASS and notice u/s.143(2) of the Act was issued. In compliance to notices, the Id. Authorised Representative appeared from time to time and filed details, bank statements, copy of books, commission payments statements, sundry creditors and debtors details. On perusal of the profit and loss account, the Id. Assessing Officer found that an amount of ₹69,84,280/- was claimed as deduction towards commission payments and the Id. Authorised Representative produced list of clients to whom commission was paid and TDS deducted as per provisions of Income Tax Act and in respect of balance amount of ₹45,31,427/-, the assessee paid the commission to Andre .K. Hong Kong being a foreign agent and no TDS was made on such payments. The Id. Authorised Representative furnished letter dated 06.02.2014 explaining that the assessee firm is in manufacture and export of

ready made garments and a sum of ₹45,31,427/- was paid as export commission to Andre H.K. Buying office Ltd (Agent) through the buyer of goods to the foreign Agent. The assessee firm did not pay commission to foreign agent directly as there is a overriding terms of contract between foreign buyer and assessee while accepting the purchase order. The assessee firm has agreed to add commission of foreign agent based on the selling price of the assessee's goods exported and the invoices is prepared including commission to foreign buying house at Hong Kong. At the time of export of the buying house (foreign agent) shall deduct the commission and shall pay the export value net of commission to the assessee firm being the export sale proceeds received after deduction of commission by the foreign buying house. The Id. Assessing Officer found that the assessee has passed entries in the Books of account at gross export sales value as turnover/ sales and debited the profit and loss account with the commission amount deducted by the foreign buyer house and there being no dispute as the foreign agents are non-resident and commission is paid for services rendered outside India and is not liable for taxation in India, further commission payments are not covered under the provisions of 9(1)(ii) of the Act and foreign agent does not have permanent establishment in India and no part of income arise or accrues in India. The commission is paid by the buyer to the

foreign agent on behalf of exporter and the invoice raised includes commission percentage of agent. The Id. Assessing Officer verified the invoice copy were the assessee company raised invoice on consignee LA HALLE, PARIS, FRANCE reflecting at the bottom 5% commission is to be paid to ANDRE H.K Buying Office Limited, Hong Kong. The Id. Assessing Officer referred to the agency agreement between the assessee company and foreign agency ANDRE H.K Buying Office Limited, Hong Kong. On perusal of the agreement as per the terms on export of goods to LA HALLE, PARIS, FRANCE, the commission is payable on invoice value in Euros currency. The assessee also filed delivery release note issued for product inspection of goods exported. The Id Assessing Officer is of the opinion that invoice raised by the assessee includes commission payment to the foreign agent paid by the buyer on behalf of the assessee company as per the agreement between foreign agent and assessee and the delivery release note is issued to the foreign agent on checking the quality and quantity of the goods exported. The Id. Assessing Officer relied on the provisions of Sec. 9(1) (i) of the Act and observed that though the non-resident is rendering services and receiving payments outside India but the source of income from India and the foreign agent is liable to be taxed in India and also supported the findings with the decision of Authority of Advance Ruling (AAR) in the case of SKF Boilers and Driers P. Ltd

(AAR order No.983-984 of 2010) and disallowed foreign agent commission of ₹45,31,247/- under the provisions of Sec. 40(a)(i) of the Act for non deducting of TDS alongwith other additions and Assessed income vide order u/s.143(3) of the Act dated 24.03.2014. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

4. In the appellate proceedings, the Id.Authorised Representative argued the grounds and highlighted the findings of the Id. Assessing Officer and explained the background of the partnership firm in export business. The Methodology adopted being the foreign buyers place bulk orders with its nominated foreign buying house, M/s. Andre H.K. Limited, Hong Kong (foreign agent) and the said agent would distribute the order to various exporters in India. The foreign buyer M/s. HALLE, France will fix the selling price for goods of Indian Manufacturer and commission payable to agent M/s. Andrew H.K. Limited, Hong Kong. The invoice raised by the exporter includes commission payable to the foreign agent. Further, Id. Authorised Representative submitted that the services of the agent are in the nature of brokerage and does not involve managerial and technical services as per the provisions of Sec. 9(1)(vii) of the Act and explained the services are purely as per terms of Agency agreement executed

between Indian exporter and foreign agent. The foreign agent does not have permanent establishment in India and not liable for taxation and relied on the decision of jurisdictional High Court in the case of *CIT vs. Faizan Shoes Pvt. Limited* in TC(A) 789 of 2013 and substantiated the arguments that foreign Agent commission is paid for procurement of orders outside India and does not involve any specialized technical services which are taxable in India. But the Id. Commissioner of Income Tax (Appeals) discussed at para 5 of his order and dismissed the appeal as under:-

"5. I have considered the matter. The Assessing Officer, in the order for A.Y. 2012-2013 has brought on record detailed facts and correspondence governing the issue. It is seen therefrom that the foreign agent has monitored and supervise the products on or readymade garments right from its inception i.e. the design to the final delivery to the foreign buyers and not merely acted as an agent to procure orders. The correspondences, and evidences brought on record by the Assessing Officer indicate that the agent has monitored the sizes, buttons, quality of stitching, quality of cloth, color, etc. The agent has also provided design and sketch of the outfits required by the foreign buyers and its various specifications. All these activities go beyond the scope of a commission agent merely involved in securing orders, and enters into the realm of technical supervision into the manufacturing processes. The appellant either before the Assessing Officer or in this appeal has not been able to establish that the agent was a mere expeditor for the completion of export commitment. The appellant has also not been able furnish documents, correspondences, evidences, etc. to convince me that the agent was a mere go between, and has not rendered any technical or managerial services. Apart from merely stating that the services preformed were not in the nature of technical services, the appellant firm has not been able to refute the contentions and the findings of the Assessing Officer. The reliance on the ratio of Faizan Shoes (supra) also does not help the appellant, as in that case, the agent was under an

obligation to render services for completion of export, such as opening letters of credit, etc, and the nature of technical services was not dear from the order of the Assessing Officer. In distinction, in the appellant's case, the Assessing Officer has in his assessment order clearly established the nature of technical services rendered, and reproduced the necessary supporting evidences in his order. As such, I agree with the disallowance made by the Assessing Officer, and do not find any reason to interfere with the same. The grounds of appeal, therefore fails”.

Aggrieved by the Commissioner of Income Tax (Appeals) order, the assessee assailed an appeal before Tribunal.

5. Before us, the Id. Authorised Representative of assessee reiterated the submissions made in the assessment and appellate proceedings and argued the grounds as the Id. Commissioner of Income Tax (Appeals) has erred in confirming the disallowance u/s.40(a)(i) of the Act irrespective of the fact that foreign agent does not have permanent establishment in India and rendered services outside India being in the nature of procurement of export orders and commission is not chargeable to tax in India. The foreign agent is non-resident agent and no technical and managerial services were obtained. The Id. Commissioner of Income Tax (Appeals) has distinguished the jurisdictional High Court decision and brought the services of foreign agent within the purview of technical and managerial services under the provisions of Sec. 9 (1) (vii) of the Act and concluded the proceedings without offering opportunity to furnish documents to substantiate that foreign agent services are not technical

services and overlooked the principles laid down were the payments to Non Resident Indian outside India is not chargeable to tax in India as per the Apex Court decision in *GE Technology Centre P. Ltd* 327 ITR 456 and filed documents to substantiate the claim and prayed for allowing the appeal.

6. Contra, the Id. Departmental Representative relied on the Order of Commissioner of Income Tax (Appeals) and the provisions of Sec. 9(1) (vii) of the Act and opposed the grounds.

7. We heard the rival submissions, perused the material on record and judicial decisions cited. The Id. Authorised Representative submitted that the assessee company is a manufacturer of readymade goods and exports to LA HALLE, France through Andre H.K. Buying Office Limited, Hong Kong. The foreign agent is helping the assessee to get foreign orders and based on the requisition and Design pattern of the foreign buyer and the assessee shall manufacture readymade goods and works purely on trading and no technicalities are involved. The assessee pays the foreign commission in Euros through its buyer abroad to the foreign agent at Hong Kong and receive the export proceeds after adjustment of commission payment. The Id. Authorised Representative demonstrated before us with a copy of invoice raised by the assessee company on consignee LA HALLE,

France with agents name printed alongwith details of quantity and prices. Further, the invoice raised disclosures 5% commission to be paid to Andre H.K. Buying Office Limited, Hong Kong and produced copy of agency agreement being in force for a period of three years explaining the terms of agreement and commission payable @5% of the invoice value. On perusal of the agreement, we found that commission is payable by assessee company in Euros and US Dollors as per the value mentioned in Invoice and agent shall provide designs for manufacturing for consignee LA HALLE, France. The Id. Departmental Representative argued that the technical services are rendered by the foreign agent and provisions of sec. 9(1)(vii) of the Act are applicable. We on verification of the clauses of the agency agreement found that the relation between the assessee and the foreign agent in principle for procurement of orders and export of garments. The Id. Authorised Representative relied on the decision of Co-ordinate Bench in the case of ACIT vs. M/s. M.M. Forgings Ltd in ITA No.2679/Mds/2014, assessment year 2011-2012 dated 19.06.2015 observed at para 13 as under:-

'We have heard both the sides and perused the material on record. In our opinion, this issue is squarely covered by the earlier order of the Tribunal in the assessee's own case for the assessment year 2010-2011 in ITA No.2311/Mds/2013

vide order dated 28.03.2014. In the said order, the Tribunal observed as under:-

“5. We have heard both parties and gone through the case file. As already stated hereinabove, the CIT(A), whilst deleting the impugned addition u/s 40(a)(i) pertaining to overseas payments made by the assessee on account of commission, warehousing and other charges, has followed order of the 'tribunal'(supra) qua the very issue. On being granted opportunity, the Revenue has failed to prove that these expenses are liable to be taxed in India as income in the hands of concerned payees or any services had been rendered in India. The Revenue submits that the 'tribunal's' order has not been become final and its appeal is pending before the hon'ble high court. In our considered opinion, mere pendency of an appeal involving the same issue against the order of the 'tribunal' is no ground to adopt a different approach in the impugned assessment year. Thus, we agree with the findings of the CIT(A) under challenge and reject grounds raised by the Revenue.”

Similar view was also taken by the Mumbai Bench in the case of *Vilas N. Tamhankar* in *ITA No.4522/Mum/2013 for the assessment year 2009-2010, vide order dated 21.11.2014*, and same view was also taken by the jurisdictional High Court in the case of *CIT vs. Faizan Shoes Pvt. Ltd*, *367 ITR 155 (Mad)* and further in the case of *Brakes India Ltd. vs. DCIT (LTU) (144 ITD 403)* the co-ordinate Bench of the Tribunal, it was held that

47. In our opinion, nature of services mentioned above will come not within the definition of “fees for technical services” given under explanation 2 to Section 9(1)(vii) of the Act. By virtue of such services, the concerned recipients had not made available to the assessee any new technic or skill which assessee could use in its business. The services rendered by the said parties related to clearing, warehousing and freight charges, outside India. The logistics service rendered was essentially warehousing facility. In our opinion, this cannot be equated with managerial, technical or consultancy services. Even if it is considered as technical service, the fee was payable only for services utilized by the assessee in the business or profession carried on by the said non-residents outside India. Such business or profession of the

non-residents, earned them income outside India. Thus, it would fall within the exception given under sub-clause (b) of Section 9(1) of the Act. In any case, under Section 195 of the Act, assessee is liable to deduct tax only where the payment made to non-residents is chargeable to tax under the provisions of the Act. In the circumstances mentioned above, assessee was justified in having a bonafide belief that the payments did not warrant application of Section 195 of the Act. In such circumstances, we are of the opinion that it could not have been saddled with the consequences mentioned under Section 40(a)(i) of the Act. Disallowances were rightly deleted by the Id. CIT(Appeals). No interference is called for''..

We found the jurisdictional High Court decision was considered and the provisions of Sec.40(a)(i) of the Act by the Co-ordinate Bench. In the present case, the Id. Assessing Officer observed that the agent inspects the goods before release for exports and the persons of the agencies shall check the quality control in respect of goods manufactured by the assessee as per Design pattern and observed that foreign agent has permanent establishment in India and disallowed commission u/sec. 40(a)(i) of the Act for non deduction of TDS. But prime facie nothing was brought on record even during the hearing proceedings that there is establishment of the foreign agent in India. We, considering the apparent facts, agency agreement, invoice copy, legal provisions and judicial decisions, found that it would be appropriate to set aside the disputed issue to the file of Id. Assessing Officer to verify whether the services of foreign agent comes within the purview of technical services and foreign agent does not

have establishment or office in India. We set aside the order of Commissioner of Income Tax (Appeals) and remit the disputed issue to the file of Id. Assessing Officer and the assessee shall be provided with adequate opportunity of hearing for filing the details on disputed issue before passing the order on merits. The appeal of the assessee is allowed for statistical purpose.

8. Consequently, the appeal of the assessee in ITA No.266/Mds/2016 for assessment year 2012-2013 is allowed for statistical purpose.

9. In the result, the appeals of the assessee in ITA Nos. 265 & 266/Mds /2016 are allowed for statistical purpose.

Order pronounced on Wednesday, the 22nd day of June, 2016, at Chennai.

Sd/-

(चंद्र पूजारी)

(CHANDRA POOJARI)

लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-

(जी. पवन कुमार)

(G. PAVAN KUMAR)

न्यायिक सदस्य/JUDICIAL MEMBER

चेन्नई/Chennai

दिनांक/Dated: 22.06.2016

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |