

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.2476/Mum/2023

(निर्धारण वर्ष / Assessment Year: 2016-17)

DCIT-22(1) Room No. 322, 3 rd Floor, Piramal Chamber, Lalbaug, Mumbai-400012.	बनाम / Vs.	Creations by Shanagar 34, Auro Villa, St. Andrews Rd Santacruz (West), Mumbai-400054.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACFC7957L		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Milin Bakhai	
Revenue by:	Shri H. M. Bhatt (Sr. DR)	

सुनवाई की तारीख / Date of Hearing: 27/02/2024

घोषणा की तारीख /Date of Pronouncement: 29/02/2024

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the revenue against the order of the Ld. Commissioner of Income Tax/NFAC, [hereinafter referred to as the “CIT”], Delhi dated 16.05.2023 for assessment year 2016-17.

2. The sole issue raised by the revenue is against the action of the Ld. CIT(A) deleting the addition in respect of commission paid to foreign agent amounting to Rs.1,61,90,101/-.

3. Brief facts are that the assessee is a firm engaged in the business of manufacturing and exporting of embroidered fabrics and allied products. The orders for exports are received through agents outside the territory of India. During the year under consideration, the assessee filed its return of income on 16.10.2016 by declaring a total income of Rs.7,74,27,070/-. Later on, the case of the assessee was selected for



ITA N. 2476/Mum/2023
A.Y. 2016-17
Creations by Shanagar

scrutiny. The AO completed the assessment u/s 143(3) of the Income Tax Act, 1961 (hereinafter “the Act”) on 22.12.2018 by making an addition of Rs.1,61,90,101/-. Aggrieved, the assessee filed an appeal before the Ld. CIT(A) who was pleased to delete the same by passing the impugned order by taking note of the fact that identical issue had been permeating in earlier years i.e. AY. 2010-11 and AY. 2011-12 wherein this Tribunal has decided the appeal in favour of the assessee in ITA. No.1147/Mum/2017 dated 31.04.2019. And the Ld. CIT(A) also noted the decision of the Hon’ble Karnataka High Court in the case of Puma Sports India (P.) Ltd. vs. PCIT (2021) taxmann.com 169 (Kar) wherein the Hon’ble Karnataka High Court has held on this issue as under: -

“Commission paid by assessee-company to its overseas associated enterprises (non-resident agent) for placing orders with manufacturers outside India would not be liable to TDS under section 195 as services were rendered or utilized outside India and commission was also paid outside in India”.

4. And the Ld. CIT(A) has followed the Tribunal order as well the Hon’ble High Court order (supra) and deleted the addition of Rs.1,61,90,101/-. Aggrieved by the action of the Ld. CIT(A), the revenue is before us.

5. We have heard both the parties and perused the record. We note that the assessee firm is engaged in the business of manufacturing and exporting of embroidered fabrics and allied products. The assessee, after receiving export orders from the agents stationed outside the



ITA N. 2476/Mum/2023
A.Y. 2016-17
Creations by Shanagar

territory of India, exports its products outside India, for which services of agents, the assessee paid commission. The AO noted that the assessee had made payment of Rs.1,61,90,101/- to four (4) agents outside India. The AO further noted that assessee paid commission to those parties, who were the residents of country where the India had entered into Double Taxation Avoidance Agreement (DTAA). The assessee was show-caused as to why the provision of section 195 of the Act should not be made applicable as the parties to whom the commissions were paid were rendering the services in the nature of consultancy, technical/customer relationship services. The assessee filed its reply and stated that none of the parties/agents to whom the assessee has remitted commission payment/paid commission payment had any Permanent Establishment [PE] in India and therefore, it pleaded that they were not liable to tax in India and so deduction of Tax at source was not necessary. The explanation furnished by assessee was not accepted by AO, who held that as per Explanation to section 9(2) of Finance Act, 2007, the income of non-resident shall be deemed to accrue in India and shall be included in total income whether or not the non-resident has a resident or place of business connection in India or non-resident has rendered services in India. The AO by referring to Circular No. 7 of 2009 dated 20.10.2009 disallowed the commission payment paid to non-resident, since no tax was deducted on it.

6. On appeal, the Ld. CIT(A) deleted the addition by relying on the decision of this Tribunal in assessee's own case for earlier years



ITA N. 2476/Mum/2023

A.Y. 2016-17

Creations by Shanagar

(supra). We note that there is no dispute that the services for which commission has given by assessee were rendered by non-resident agents outside India [i.e. for procuring export orders from customer outside India]. The payment to such non-resident agents are made outside India on account of sale percentage and that the non-resident does not have any geographical or Permanent Establishment in India. It is noted that Tax Treaty exists with the country of residents of non-resident, i.e, residents of non-resident, residents of Italy, France, Greece & Lebanon. The Ld. AR has drawn our attention to the order of this Tribunal in assessee's own case for AY. 2010-11 and AY. 2012-13 and brought to our notice that in those years, the Ld. CIT(A) had examined the agreements with the non-resident agents which disclosed that the foreign agents procured export order from foreign customers based on the price agreed by the assessee; and based on the export orders procured by the Agents, assessee fixed percentage of commission to the agent at the FOB value of the invoice and foreign currency after the fully payment has been received from the foreign customers. Thus, from the term of agreement, it was noted that nature of services rendered by non-residents agent was for procuring export order of products of assessee and the payments made by assessee to them are in the nature of commission which was specifically mentioned in the agreement. In the light of the aforesaid facts/agreement between assessee and foreign agents for earlier years i.e. AY. 2010-11 & AY. 2011-12 in assessee's own case, on this issue Tribunal upheld the action of Ld. CIT(A) by holding as under: -



ITA N. 2476/Mum/2023
A.Y. 2016-17
Creations by Shanagar

“8. We have considered the submission of both the parties and have gone through the orders of authorities below. There is no dispute that the assessee appointed commission agent outside India. The Assessing Officer failed to bring any material on record to show that the services provider has any business place in India or the services were not rendered outside India by those commission agents. The Hon’ble Bombay High Court in CIT vs. Gujarat Reclaim and Rubber Products Ltd. (supra) held that commission earned by non-resident agent who carried on the business of selling Indian goods outside India cannot be said to have deemed to be income which has accrued or arise in India. The Hon’ble jurisdictional High Court followed the decision of Hon’ble Supreme Court in CIT vs. Toshoku Ltd. (158 ITR 525) on identical facts held that commission earned by non-resident who carried business of selling Indian goods outside India cannot be said to have deemed income which has accrued or arising in India. Considering the fact and the legal position as discussed above, we affirm the order of Id. CIT(A). Non contrary facts or law is brought to our notice to take other view.

9. In the result, appeal of Revenue for Assessment Year 2010-11 is dismissed.”

7. Since the Ld. DR could not point out any change in facts or law, we relying on the decision of the Hon’ble Bombay High Court in the case of Gujarat Reclaim and Rubber Products Ltd (ITA. No. 2116 of 2013 & 169 of 2014 dated 08.12.2015) and the Hon’ble Supreme Court decision in the case of CIT Vs. Toshoku Ltd (158 ITR 525) uphold the impugned action of the Ld. CIT(A). It was also brought to



ITA N. 2476/Mum/2023

A.Y. 2016-17

Creations by Shanagar

our notice that the AO for AY. 2020-21 taking note of the fact that since department has not filed any appeal before the Hon'ble High Court u/s 260A of the Act against the order of this Tribunal in assessee's own case for earlier years (supra) has allowed the commission payment made to foreign agents without deducting TDS by assessment order dated 19.09.2022 passed u/s 143(3) r.w. section 144B of the Act. Therefore, the revenue appeal stands dismissed.

8. In the result, the appeal of Revenue is dismissed.

Order pronounced in the open court on this 29/02/2024.

Sd/-
(S RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 29/02/2024.
Vijay Pal Singh, (Sr. PS)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.
- 6.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai