IN THE INCOME TAX APPELLATE TRIBUNAL, RAJKOT BENCH, RAJKOT
BEFORE DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER
AND
SHRI DINESH MOHAN SINHA, JUDICIAL MEMBER

आयकरअपीलसं./ITA Nos.173&174/RJT/2023

(निर्धारणवर्ष / AYs: (2011-12& 2012-13)

(Hybrid Hearing)

M/s Orbit Bearing India Pvt. Ltd., Plot No.2233-35, A and B GIDC, Lodhika, Kalwad Road, Rajkot – 360021.	**Vs.**	The Additional CIT, Range – 1(2), Rajkot
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AAACO2476K**		
(Appellant)		**(Respondent)**

Appellant by : Shri Mehul Ranpura, AR

Respondent by : Shri Ashish Kumar Pandey, Sr. DR

Date of Hearing : 01/05/2024
Date of Pronouncement : 17/05/2024

आदेश / O R D E R

PER DR. A. L. SAINI, AM:

Captioned two appeals filed by the assessee, pertaining to Assessment Years (AYs) 2011-12 and 2012-13, are directed against the separate orders passed by the Learned Commissioner of Income Tax (Appeals), [in short 'ld. CIT(A)'], National Faceless Appeal Centre (NFAC),Delhi, which in turn arise out of separate assessment orders passed by Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. Since, the issues involved in these two appeals are common and identical; therefore these appeals have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

3. First, we shall take assessee`s appeal in ITA No.174/RJT/2023 for assessment year (AY).2012-13, wherein the grounds of appeal raised by the assessee are as follows:

> *"1. The grounds of appeal mentioned hereunder are without prejudice to one another.*
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> *2. The ld. Commissioner of Income-tax (Appeal), National Faceless Appeal Centre, Delhi [hereinafter referred to as the "CIT(A)]erred on facts as also in law in confirming disallowance made of Rs.20,63,547/-, u/s 40(a)(ia) of the Income-tax Act, 1961 [hereinafter referred as to the 'Act'] on the alleged ground of failure to deduct tax at source on the payment of sale commission to non-resident as per provision of section 195 of the Act. The disallowance confirmed is unjustified and uncalled for, which deserves to be deleted, may kindly be deleted.*
>
> *3. The ld. CIT(A) erred on facts as also in law in confirming disallowance made of Rs.2,15,785/- u/s 40(a)(ia) of Act on the alleged ground of failure to deduct tax at source on the payment of sale promotion expenses to non-resident as per provision of section 195 of the Act. The disallowance confirmed is unjustified and uncalled for, which deserves to be deleted, may kindly be deleted.*
>
> *3. Your honour's appellant craves leave to add, to amend, alter, or withdraw any or more grounds of appeal on or before the hearing of appeal."*

4. Ground No.2 raised by the assessee, relates to disallowance made by the Assessing Officer to the tune of Rs.20,63,547/-, under section 40(a)(ia) of the Act, on the alleged ground of failure to deduct tax at source on the payment of sale commission to non-resident as per provision of section 195 of the Act.

5. The relevant material facts, as culled out from the material on record, are as follows.During the assessment proceedings, the assessing officer (A.O.) noticed that the assessee has claimed sales commission amounting to Rs.20,63,547/-. The assessee has submitted the details of sales commission before the assessing officer, however, the assessing officer noted that all these payments are made to foreign entities, and the assessee has not deducted tax at source on the payment of the said

commission as required u/s 194H of the Income tax Act, 1961.Thus, assessing officer noticed that there is no tax deduction at source on these payments and when the assessee was asked to justify and explain why no tax has been deducted, the assessee has stated that they have paid sales commission to NR agent for services rendered out of India, (in foreign country) and payment thereof due and paid out of India, more over agents have no business connection in India, therefor income thereof is not accrued or arised in India therefore not liable to TDS u/s 195 of the Act. However, assessing officer, rejected the contention of the assessee and then refer the provisions of section 195(1) of the Act, which reads as follows:

"any person responsible for paying to a non-resident, not being a company, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the head Salaries shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force. "

The assessing officer noted that as per Explanation- 2 inserted below the section, vide Finance Act 2012 with retrospective effect from 1 April 1962, it was explained that for the removal of doubts, it is clarified that the obligation to comply with sub-section (1) and to make deduction there under applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, **resident or non-resident,** whether or not the non-resident person has (i) A residence or place of business or business connection in India; or (ii) Any other presence in any manner whatsoever in India. Failure to deduct tax at source makes the expenditure disallowable u/s 40(a)(ia), Explanation 1 below section 195 itself was inserted, vide FinanceAct 2012 with retrospective effect from 1st April, 1962 and mentioned in clear words that " ***it applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-***

resident, whether or not the non-resident person has a residence or place of business or business connection in India or any other presence in any manner whatsoever in India."

6. In view of the above, the assessing officer(A.O.) noted that the tax has to be deducted by payer on the payment of export commission to the non-residents whether or not the non-resident person has a residence or place of business or business connection in India or any other presence in any manner whatsoever in India. So far as the bearings of the DTAA, on such payment is concerned, the DTAA covers taxation of income earned by residents of the treaty signing countries as per method prescribed in the agreement. It has nothing to do with section 195(1) as it deals with deduction of tax at prescribed percentage of total payment made by a resident to non-resident. If the payer of such payment does not deduct tax on such payment, as the section provides, his expenditure is disallowable. The issue that the payee has no tax liability in India under the DTAA is irrelevant for deducibility of tax under section 195(1) by the resident payer. The issue is akin to deduction on commission paid to a resident by a resident where payer has to deduct tax without considering the fact whether payee has taxable income or not. The effect of retrospective insertion in section 195 makes the liability of deduction of tax mandatory extended to all persons, resident or non-resident, whether or not the non-resident person has (i) A residence or place of business or business connection in India; or (ii)Any other presence in any manner whatsoever in India. The assessing officer also noted that all the aforesaid payments are made to their commission agents outside India and that all the agents have performed and rendered the services outside India, therefore, the assessing officer noted that contention of the assessee does not bear any legal force in view of the Explanation -2 below the Section 195(1) inserted vide Finance Act, 2012 with retrospective effect from 1st April

1962. The effect of retrospective insertion in section 195 makes the liability of deduction of tax mandatory extended to all persons, resident or non-resident, whether or not the non-resident person has (i) A residence or place of business or business connection in India; or (ii)Any other presence in any manner whatsoever in India. Since the assessee has made payments of commission and has claimed it as deduction, the assessee was required to deduct the tax at source on the amount of the said payment. However, as stated above the assessee has failed to deduct the tax at source on the amount of said payment.The assessing officer also rejected the contention of the assessee to the effect that"the payments have been made to non residents and that the payees foreign nationals who have rendered the services by way of bookings of orders of its products outside India." Therefore, the AO has not accepted this contention of the assessee.

7. The assessing officer also noted with regards to the argument put forth by the assessee that the provision of Section 195 of the Act primarily deals with the deduction of tax at source on the amount of payments in the case of non-resident and which is chargeable under the provisions of Income tax Act, 1961 and that since the said income in the hands of a non-resident is not chargeable to tax in India, there is no requirement of deducting any tax at source in India, this argument of the assessee, was rejected by the assessing officer in view of the Explanation- 2 below the Section 195(1) inserted vide Finance Act, 2012 as discussed above and therefore, assessing officer stated that it is not tenable. In conclusion, the assessing officer held that since the assessee has failed to deduct tax at source on the commission payments as required u/s 194H, the expenses to the extent above are not allowable, as business expenditures in view of the provisions of Section 40(a)(ia) of the Income tax Act,1961. Accordingly, expenses claimed of Rs.20,63,547/- by way of sales commission was

disallowed by the assessing officer as required by section 40(a)(ia) of the Act and added to the total income of the assessee. Therefore, AO has not accepted this contention of the assessee.

8. Aggrieved by the order of Assessing Officer, the assessee carried the matter in appeal before Ld. CIT(A), who has confirmed the action of the Assessing Officer. The ld CIT(A) observed that income is arising on account of commission payable to commission agent, which is deemed to accrue and arise in India and is taxable under the Act, in view of the specific provision of section 5 (2)(b) read with section 9(1)(i) of the Act. Therefore, as per the provisions of section 195, the assessee was under obligation to deduct tax at source for payment to non-resident commission agent at the rate of tax as provided under the Finance Act. The ld CIT(A) further noted that payments made outside India from a business in India will be considered as income accruing in India and is therefore subject to deduction of TDS. Therefore, the addition made by the assessing officer was upheld by ld CIT(A).

9. Aggrieved by the order of Ld. CIT(A), the assessee is in appeal before us.

10. Shri Mehul Ranpura, Learned Counsel for the assessee, argued that it was not necessary to deduct the TDS as per the provisions of section 195 of the Act, as the payment of sales commission was made to non-resident and such non-resident does not have any business connection in India. Learned Counsel also stated that similar payments were allowed to the assessee, by the assessing officer, in the previous assessment years. Therefore, assessee`s claim may be allowed for this current assessment year also.

11. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

12. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the ld. CIT(A) and other material brought on record.We note that assessing officer made disallowance of Rs.20,63,547/-, u/s 40(a)(ia) of the Income-tax Act, 1961, on the alleged ground of failure to deduct tax at source on the payment of sale commission to non-resident as per provision of section 195 of the Act. We find that assessee has paid sales commission expenses to non-resident who does not have any business connection in India and does not file return of income in India. The expenses were paid in connection with export of the goods and services. The assessee submitted the details of expenses incurred on account of sales commission and sales promotion, on account of export turnover, which is reproduced below:

ORBIT BEARINGS INDIA PRIVATE LIMITED

DETAILS FOR EXPORT AND THEIR EXPENSES

F.Y.	A.Y.	EXPORT TURNOVER	EXPENSES (Selling & Promotion exp.)
2012-13	2013-14	3097,93,183	70,04,952
2013-14	2014-15	5350,09,405	63,29,976
2014-15	2015-16	7075,67,631	234,77,685
2015-16	2016-17	7972,32,407	410,96,385
2016-17	2017-18	12111,57,709	528,93,085
2017-18	2018-19	22804,76,416	480,65,980

The assessee also submitted before us, copies of invoices of sales promotion expenses incurred for the assessment year under consideration, which are placed in the assessee`s paper book page No. 1 to 11. The Ld Counsel also submitted before us, a copy of assessment order framed under section 143(3) of the Act, for assessment years (AY) 2013-14 and 2018-19, which are placed at paper book page nos.12 to 16 and contended that assessee has been incurring this type of expenses every year and no additions were made by the Assessing Officer in the assessment years 2013-14 and 2018-19. Therefore, ld Counsel contended that the Income Tax Department has accepted the nature of the assessee's expenditure, incurred by him, which do not require deduction of TDS, hence addition made by the Assessing Officer may be deleted. We find merit in the submissions of ld. Counsel for the assessee and noted that the non-resident to whom the payment was made, does not have any permanent establishment in India or business connection in India. Moreover, the similar payments were made by the assessee in the subsequent assessment years, that is, assessment year 2013- 14 and assessment year 2018-19, and the Department has accepted the same, therefore based on this factual position, we delete the addition made by the assessing officer.

13. In the result, ground No.2 raised by the assessee, is allowed.

14. Ground No.3 raised by the assessee, relates to disallowance of Rs.2,15,785/-, under section 40(a)(ia) of the Act, on the alleged ground of failure to deduct tax at source on the payment of sale promotion expenses to non-resident as per provision of section 195 of the Act.

15. Succinct facts qua the issue are that during the assessment proceedings, the assessing officer noticed that assessee has claimed sales commission expenses amounting to Rs.20,63,547. During the assessment proceedings, the assessee has submitted the details of sales commission

before the assessing officer. However, the assessing officer noted that all these payments were made to foreign entities, and the assessee has not deducted tax at source on the payment of commission, as required under section 194H of the Income Tax Act 1961. Therefore, assessing officer noted that there is no tax deduction at source on these payments and when the assessee was asked to justify and explain that why no tax has been deducted, the assessee has stated that they have paid sales commission to Non-Resident, for services rendered out of India, that is, in foreign country and payment thereof due and paid out of India, moreover agents have no business connection in India,therefore income thereof is not accrued or arised in India and hence not liable to TDS under section 195 of the Act. However, the assessing officer rejected the claim of the assessee and stated that assessee has failed to deduct tax at source on the commission payments as required under section 194H of the Act, and assessing officer also noted that these expenses were not allowed as business expenditure in view of the provisions of 40(a)(ia) of the Act, hence, assessing officer, disallowed, sales promotion expenses of Rs.2,15,785/-.

16. On appeal, Ld. CIT(A) has confirmed the action of the Assessing Officer. The Ld. CIT(A) observed that income is arised on account of commission payable to commission agent which is deemed to accrue and arise in India and is taxable under the Act in view of the specific provision of section 5 (2)(b) read with section 9(1)(i) of Act. Therefore, as per the provisions of section 195 of the Act, the assessee was under obligation to deduct tax at source for payment to non-resident commission agent at the rate of tax as provided under the Finance Act.

17. Aggrieved by the order of Ld. CIT(A), the assessee is in appeal before us. The assessee argued before ld CIT(A) that assessee has taken

part in business fare held in USA and paid to non-resident for providing services in the form of stall on rent and other allied expenses of business at USA. It was stated that services were provided to assessee, outside India, by a non-resident, who does not have a business connection in India. It is also mentioned that the amount is paid to them by way of demand draft or cheque payable at Germany. The assessee has claimed that income is neither accrued or deemed to be accrued in India. Therefore, the receipt of payment to non-resident is not chargeable to tax under provisions of Act. The ld. Counsel for the assessee, argued in the same manner, as the assessee has argued before the ld. CIT(A).On the other hand, Learned Senior Departmental Representative (Ld. Sr. DR) for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

18. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position. We note that assessee has taken part in business fare held in USA and paid to non-resident for providing services in the form of stall on rent and other allied expenses of business at USA and these services were provided to the assessee, outside India, by a non-resident, who does not have a business connection in India. We note that Coordinate Bench of ITAT Rajkot in the case of DML Exim Private Ltd,118, taxmann.com 491 (Rajkot-Trib), held that where commission was paid by assessee to foreign parties, for rendering services abroad for soliciting customers for its export business activities, assessee was not liable for short direction of tax at source and therefore disallowance under section 40(a)(ia) of the Act was not permissible. The Hon'ble Jurisdiction High Court of Gujarat in the case of MGM exports, vide Tax appeal No. 309 of 2018, on identical facts held as follows:

"6. The second issue relates to the addition made by the Assessing Officer of a sum of Rs. 5.05 lacs under section 40(a)(ia) of the Income Tax Act, 1961 on the ground that the assessee had not deducted tax at source on foreign commission payments. The Tribunal however, recorded that the non-resident agent of the assessee was operating at his own level and no part of the income arose or accrued in India.
7. In the recent order in Tax Appeal No. 290 of 2018, we had dealt with similar situation making following observations:
"It can thus be seen that while confirming the order of CIT [A], the Tribunal relied on judgment of the Supreme Court in the case of G.E India Technology Centre P. Limited vs. Commissioner of Income-Tax & Anr., reported in [2010] 327 ITR 456 (SC). In such judgment, it was held and observed that the most important expression in Section 195 [1] of the Act consists of the words, "chargeable under the provisions of the Act". It was observed that, "A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not chargeable to tax under the Act." Counsel for the Revenue, however, drew our attention to the Explanation 2 to sub-section [1] of Section 195 of the Act which was inserted by the Finance Act of 2012 with retrospective effect from 1st April 1962. Such explanation reads as under:-

Explanation 2 – For the removal of doubts, it is hereby
clarified that the obligation to comply with sub-section (1) and to make deduction there under applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has -
[i] a residence or place of business or business connection in India; or
[ii] any other presence in any manner whatsoever in India.
It is indisputably true that such explanation inserted with retrospective effect provides that obligation to comply with subsection [1] of Section 195 would extend to any person resident or non-resident, whether or not non-resident person has a residence or place of business or business connections in India or any other persons in any manner whatsoever in India. This expression which is added for removal of doubt is clear from the plain language thereof, may have a bearing while ascertaining whether certain payment made to a non-resident was taxable under the Act or not. However, once the conclusion is arrived that such payment did not entail tax liability of the payee under the Act, as held by the Supreme Court in the case of GE India Technology Centre P. Limited [Supra], sub-section [1] of Section 195 of the Act would not apply. The fundamental principle of deducting tax at source in connection with payment only, where the sum is chargeable to tax under the Act, still continues to hold the field. In the present case, the Revenue has not seven seriously contended that the payment to foreign commission agent was not taxable in India.
Tax Appeal is therefore dismissed."

19. Therefore, considering the above factual position and applicable case law on facts, we allow ground no. 3 raised by the assessee.

20. Now, we shall take assessee's appeal in ITA No.173/RJT/2023, for A.Y. 2011-12 wherein the grounds of appeal raised by the assessee are as follows:

> *"1. The grounds of appeal mentioned hereunder are without prejudice to one another.*
>
> *2. The ld. Commissioner of Income-tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter referred to as the "CIT(A)"] erred on facts as also in law in confirming disallowance made of Rs.9,85,935/- u/s. 40(a)(ia) of the Act on alleged ground of failure to deduct tax at source on payment of sales promotion expenses to non-resident person as per provision of section 195 of the Act. The disallowance confirmed is unjustified and uncalled for, which deserves to be deleted, may kindly be deleted.*
>
> *3. Your Honour's appellant craves leave to add, to amend, or withdraw any or more grounds of appeal on or before the hearing of appeal."*

21. We note that grounds of appeal raised by the assessee in ITA No.173/RJT/2023 for assessment year 2011-12 is similar and identical to ground No.3 raised by the assessee in ITA No.174/RJT/2023 for assessment year 2012-13, therefore our adjudication in ground No.3 in assessee's appeal in ITA No.174/RJT/2023 for assessment year 2012-13, is applicable mutatis mutandis to this appeal also, hence we allow assessee's appeal in ITA No.173/RJT/2023.

22. In the result, assessee`s appeal in ITA No.173/RJT/2023 for assessment year 2011-12, is allowed.

23. In the combined result, appeals filed by the assessee (in ITA No.173/RJT/2023 and in ITA No.174/RJT/2023) are allowed.

A copy of the instant common order be placed in the respective case file(s).

Order is pronounced in the open court on 17/05/2024

Sd/-	Sd/-
(DINESH MOHAN SINHA)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Rajkot
दिनांक/ Date: 17/ 05/2024

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr. CIT
5. DR/AR, ITAT, Rajkot
6. Guard File

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Rajkot