

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "B", JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 94/JP/2019
निर्धारण वर्ष / Assessment Year :2014-15

Deepa Mathur, Prop. of Naq Global India, 5 th Floor, SDC Tower, Calgary Road, Malviya Nagar, Jaipur-302017.	बनाम Vs.	D.C.I.T., Circle-4, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AJCPM 2382 A		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Vikash Rajvanshi (CA)
राजस्व की ओर से / Revenue by : Smt. Rooni Pal (JCIT)

सुनवाई की तारीख / Date of Hearing : 19/12/2019
उदघोषणा की तारीख / Date of Pronouncement : 30/01/2020

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 12/12/2018 of Id. CIT(A), Ajmer for the A.Y. 2014-15. The assessee has raised following grounds of appeal:

- "1. Ld. CIT(A) has wrongly sustained disallowances of Rs. 18,94,480/- on the expenditure on Foreign Export Commission, foreign booth and sponsorship fees for foreign advertisement of products and also paid registration fees to Arab Fertilizers Association, Egypt and foreign exhibition participation fees paid to non-residents foreign parties for services rendered outside India and wrongly disallowed the same u/s 40(a)(ia) as TDS was not deducted without appreciating the fact that payments were made to foreign companies these are genuine export business transactions and not*

liable for TDS as their income is not taxable in India. Ld. CIT(A) did not consider that this issue is duly covered by various ITATs and High Courts in similar cases.

2. *The appellant prays your honor to add, amend or alter all or any of the grounds of the appeal on or before the date of hearing."*

2. The assessee is an individual and proprietor of M/s NAQ Global and engaged in the business of manufacturing and export of fertilizer improvement chemicals. During the course of assessment proceedings, the A.O. noted that the assessee has paid commission to foreign entity and also paid advertisement fee and registration charges to Arab Fertilizers Association and foreign exhibition without deduction of TDS as mandatory U/s 195 of the Income Tax Act, 1961 (in short, the Act). Accordingly, the A.O. proposed to disallow the said payment of Rs. 18,94,480/- by invoking provisions of Section 40(a)(i) of the Act. The assessee objected to the proposed disallowance made by the A.O. and submitted that the commission was paid to the foreign agent who has no PE in India and therefore, no income arises or accrued to the non-resident agent in India. The assessee, has thus, contended that the commission income is not taxable in India in the hands of the non-resident agent and therefore, the same was not liable for TDS. As regards the advertisement and registration fee, the assessee contended that the payment was made towards advertisement in AFA Magazine "Arab

Fertilizers". This payment was made outside India for advertisement of assessee's product in the foreign country. The recipient has no PE in India and therefore, the said payment is not taxable in India in the hands of recipient/non-resident. Thus, the assessee contended before the A.O. that the services were rendered outside India and the recipients in absence of PE in India are not taxable in India and consequently no TDS is required to be deducted U/s 195 of the Act. Further the commission was paid to non-resident, therefore, the provisions of Section 194H of the Act are not applicable in the case of assessee. The A.O. did not accept this contention and explanation of the assessee and held that the payment made by the assessee to non-resident are in the nature of fee for technical services as defined in Section 9(1)(vii) of the Act being the payment made for managerial acumen and expertise of non-resident, therefore, the nomenclature of payment being commission is not relevant in the opinion of the A.O.. Thus, the A.O. held that the payment is in the nature of fee for technical services and is covered by the provisions of Section 195 of the Act for the purpose of deduction of tax at source. Since the assessee has failed to deduct TDS in respect of these payments, accordingly, the A.O. has made disallowance of Rs. 18,94,480/-.

3. The assessee challenged the action of the A.O. before the Id. CIT(A). However, the Id. CIT(A) has upheld the disallowance made by the A.O. on the ground that as per the newly inserted explanation to Section 194 of the Act, the assessee was required to deduct tax at source while making payment to foreign or non-resident person on account of commission, foreign booth, sponsorship fee and foreign exhibition participation fee.

4. Before us, the Id AR of the assessee has submitted that commission of Rs. 9,90,672/- was paid to M/s Mo'ab for fertilizer and chemical LLC, Jordan without deducting TDS. This commission was paid for the sale to Indo-Jordan Chemicals Limited, Jordon. Since the commission agent was operating outside India and has no PE in India, therefore, the payment made to non-resident outside India is not chargeable to tax in India. He has further contended that no TDS is deductible U/s 194H of the Act as the said Section is applicable for resident Indians only. Therefore, the provisions of Section 194H or Section 195 of the Act are not applicable in the case of the assessee as the payment are made to non-resident overseas agent for the services rendered outside India. In support of his contention, he has relied upon the following decisions:

- (i) JLC Electromet Pvt. Ltd. Vs. ACIT, ITA No. 1494/JP/2018 & 23/JP/2019.

(ii) G.E. India Technology Centre P Ltd. Vs. CIT 327 ITR 456 (SC).

5. The Id AR has submitted that when the income in the hand of resident is not chargeable to tax in India then no TDS is required to be deducted on such payment. The explanation to Section 195 of the Act would not override the main Section 195 itself which requires that an income chargeable to tax in India under the provisions of this Act is required TDS. The Id AR has further submitted that the provisions of Section 194H of the Act are applicable in respect of the commission payment by a person to a resident. Since the payment in question is made to non-resident, therefore, Section 194H of the Act is not applicable in the case of assessee.

6. As regards the payment made towards foreign booth, sponsorship fee, foreign exhibition participation fee and advertisement expenses, since the recipients have no PE in India, therefore, the said payment was not taxable and chargeable to tax in India in the hand of the recipient and consequently no TDS was required to be deducted. Thus, the Id AR has submitted that the Id. CIT(A) has wrongly applied explanation to Section 195 of the Act ignoring the fact that the payments made to non-resident are not chargeable to tax in India.

7. On the other hand, the Id DR has submitted that the A.O. has given a finding that the payment made by the assessee are in the nature of fee for technical services and therefore, as per the provisions of Section 9(1)(vii) of the Act, the said payment is chargeable to tax in India and consequently the assessee was under obligation to deduct tax at source failing which the said payment is not allowable as deduction as per the provisions of Section 40(a)(i) of the Act. Thus, the Id DR has submitted that once the payment in question is held to be fee for technical services, then the same is liable for TDS. He has relied upon the orders of the authorities below.

8. We have considered the rival submissions as well as the relevant material on record. The A.O. noted that the assessee has made various payments to non-resident foreign entity/persons towards commission, advertisement fee, registration charges etc. Details of these payments are given by the A.O. in para 5.1 as under:

- (a) Sale Commission of Rs. 9,90,672/- paid to Mo'ab for fertilizer and chemical LLC, Jordan.
- (b) Advertisement fees of Rs. 5,64,740/- paid to Argus Media Limited, Argus House, 175, St. John Street, London, UK.
- (c) Advertisement fee of Rs. 1,12,036/- paid to Arab Fertilizers Association (AFA), General Secretariat-Cairo Egypt, 9 Ramo Building-Omar Ibn EI Khattab St. Al Nasr Road.

- (d) Registration charges of Rs.2,27,032/- (1,23,032+50,654+53,268) which was debited under the head of Advertisement expenses and which was paid in Egypt and Morocco. The TDS liability to deduction tax on these payment to outside India is also on the assessee as per the provisions of Section 195 of the IT Act, 1961.

Thus, the A.O. asked the assessee to explain why the amount shall not be disallowed U/s 40(a)(ia)/40(a)(i) of the Act. The assessee files its reply and contended that the payments are not liable to TDS as the same are not chargeable to tax in India in the hands of recipient as these payments do not fall in the ambit of income deemed to accrue or arise in India. The A.O. did not accept this contention of the assessee and treated these payments as fee for technical services and consequently made the disallowance U/s 40(a)(i) of the Act in para 5.10 to 5.12 as under:

"5.10 Here, it would proper to examine the provisions of Section 9(1)(vii) of the Income Tax Act, 1961, which are cited as under:-

"Income deemed to accrue or arise in India.

9.(1) The following incomes shall be deemed to accrue or arise in India :—

(vii) income by way of fees for technical services payable by—

(a) the Government; or

(b) a person who is a resident, 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; or

- (c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

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".]

As noted above, Section 9(1)(vii) would classify and cover all incomes as accruing and arising in India which partake the character of payment on account of 'fee for technical services', which in turn, has been defined to include any payment for rendering of any managerial or consultancy services rendered by the non-resident agent. In the instant case, since the assessee was not able to sell his goods on his own offshore, he has to engage the managerial acumen and expertise of the non-resident in lieu of a consideration, termed as 'Commission'. This is to say that the payment by the resident assessee in connection with his business in India to a person outside India making use of his expertise in sale of similar goods in a particular country is nothing but a fee which has been paid by the resident assessee to the non-resident for the technical services rendered by him.

- 5.11 This being the stated position and the factum of the case, the payment made by the assessee to a non-resident is squarely covered by the provisions of Section 195 of the Income Tax Act, 1961 which

call for deduction of tax at appropriate rate at the time of payment to a non-resident. In view of these provisions which find place in the statute, the provisions of Section 40(a)(ia) are also attracted wherever TDS on payment of commission, advertisement fees and Registration Charges to a non-resident has not been made at appropriate rates. These provisions bar deduction of any payment on account of commission [fee for technical services] made to a non-resident, without TDS.

- 5.12 In these circumstances, there is absolutely no basis to conclude that income (which is commission in our case) is not taxable under Income Tax Act, 1961. The assessee in these circumstances is liable to deduct tax at the time of credit of such income to the account of payee or at the time of payment whichever is earlier. Alternatively, the assessee has to obtain certificate for no deduction or lower deduction of tax on the payments as required u/s 195(2) of the Act. The foreign agents can also obtain certificates for non-deduction or lower deduction of tax on amount receivable/received as prescribed u/s 195(3) of Act. Since, these conditions have not been certified payments have been made to non-residents without deduction of tax as required u/s 195 of the Act. Consequently, the expenditure on export commission and other related charges payable to a non-resident for services rendered outside India is not allowable expenditure and they deserve to be disallowed u/s 40(a)(ia) of the Act. Therefore, an amount of Rs. 18,94,480/- (9,90,672 + 5,64,740 + 1,12,036 + 2,27,032) is disallowed and added to the total income of the assessee."

Thus, the A.O. after holding the payments as fee for technical services has invoked provisions of Section 40(a)(i) of the Act, though, the A.O. has

made a reference to provisions of Section 40(a)(ia). On appeal, the Id. CIT(A) has confirmed the disallowance made by the A.O. in para 4.3. as under:

“5.3 *I have gone through the assessment order, statement of facts, grounds of appeal and written submission carefully. It is seen that the AO after discussing the provisions of Section 195, including the Explanation 2, has concluded that the appellant was required to deduct the tax at source while making the payment of above referred expenses even, to the non-resident persons, whether or not the non-resident person had a residence or place of business or business connection in India or any other presence in any manner whatsoever in India. **The Explanation 2** has been inserted by the Finance Act of 2012 **with retrospective effect from 01.04.1962**. I am of the considered view that the argument of the appellant that since the nonresident persons whom the payments were made did not have place of business or business connection in India, therefore, the appellant was not required to deduct tax at source on the above referred payments, is not correct. Regarding the second argument of the appellant that the income of the recipients of the above referred expenses was not "sum chargeable under the provisions of Income Tax Act, 1961 therefore the provisions of section 195(1) are not applicable to these payments", the A/R of the appellant was specifically requested to clarify whether any ruling was obtained from the Authority for Advance Ruling u/s 245R(2), regarding non taxability of the income of the recipient in India under the Income Tax Act. The A/R submitted that no such ruling was obtained from AAR by the recipients of the above referred expenses. There is no other evidence on record to show that the sum received by the non-residents in the form of foreign export commission, foreign booth & sponsorship fee and foreign exhibition*

*participation fee (Rs. 18,94,480) was not chargeable to tax under the Income Tax Act. There is no order or finding by any Income Tax Authority that the above referred sum of Rs. 18,94,480/- was not chargeable to tax under I.T. Act, 1961. Therefore, I am of the considered view that the appellant was required to deduct tax at source while making payment of foreign export commission, foreign booth & sponsorship fee and foreign exhibition participation fee (Rs. 18,94,480) to non-resident, **whether or not the non-residents had a residence or place of business or business connection in India.** The decision relied upon by the appellant are applicable only when there is evidence on record to show that the sum paid by the assessee was not chargeable to tax under the Income Tax Act. Therefore, disallowance of Rs. 18,94,480/- made by the AO is hereby confirmed.”*

The Id. CIT(A) has upheld the disallowance by relying on the explanation to Section 195 of the Act without going into the issue whether the payment in question is chargeable to tax in India in the hands of the recipient particularly when the recipients have no PE in India. We note that though the assessee has contended before the A.O. that the recipients have no PE in India, however, no reliance was placed by the assessee on “DTAA”, if any, between the India and Jordan or the countries of the recipients. Even before us, the assessee has vehemently contended that in absence of PE of the recipient, the payment is not chargeable to tax in India and consequently no TDS was required to be deducted on such payment.

9. At the outset we note that the assessee and Mo'ab for fertilizer and chemical LLC had entered into an agreement dated 13/08/2013 whereby the assessee appointed Mo'ab as its sole marketing agent in Jordan. The said agreement contains the terms and conditions as well as respective obligations and duties of the parties to be performed in respect of sale of produce of the assessee in the Jordan as well as neighboring country. Neither the A.O. nor the Id. CIT(A) has examined the actual nature of services rendered by the agent so as to bring them to the ambit of the fee for technical services. We further note that the assessee has made payment of commission in respect of sale to one party namely Indo-Jordan Chemical Limited, Jordan. This fact is relevant to consider the nature of services rendered by the foreign agent when the assessee has made sales only to one party. Even it is not clear from the record produced before us whether the sale made to the Indo-Jordan Chemical Limited, Jordan was an international transaction being sold to associated enterprises (AE) or not. Since the A.O. has not taken up this issue and even held that the agent has rendered the services which is in the nature of managerial acumen and expertise and consequently payment is in the nature of fee for technical services, therefore, we do not go into the said issue whether any services were rendered by the agent or not. However, it is a relevant aspect of the matter that the assessee claimed the

payment as sales commission, therefore, once the claim of the assessee as sales commission is to be considered then the actual nature of payment is required to be examined. The assessee has even not claimed the benefit under any DTAA if any between the India and the country of the recipient of these payments. As regards the advertisement payment, the assessee has made payment to two different media entities namely Argus Media Limited, London, U.K. and Arab Fertilizers Association, Cairo Egypt, therefore, the issue of existence of PE of the recipient can be considered only when there is a DTAA between the India and the countries of the recipient non-resident entities. The registration fee and foreign exhibition participation fee was paid to Arab Fertilizers Association, Egypt, therefore, in order to consider benefit of DTAA and existence or non-existence of PE, the provisions of the respect DTAA are required to be considered. Since neither the A.O. nor the Id. CIT(A) have examined this issue by considering the relevant facts as well as the respective DTAAs if any between the India and the country of the recipient/non-resident, therefore, in our considered opinion, this issue requires a proper verification and examination. Accordingly, we set aside this issue to the record of the Id. CIT(A) for adjudication of the same afresh. Needless to say that if the payment made by the assessee is not chargeable to tax in the hands of the recipient then the same is not liable

for TDS merely because of the explanation to Section 195 of the Act as it is a prerequisite contention for invoking provisions of Section 195 of the Act that the payment is chargeable to tax in India in the hands of the recipient. Further the assessee be given an opportunity of hearing before deciding the issue.

10. In the result, appeal of the assessee is allowed for statistical purposes only.

Order pronounced in the open court on 30th January, 2020.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 30th January, 2020

*Ranjan

आदेश की प्रतिलिपि अग्रेषित@Copy of the order forwarded to:

1. अपीलार्थी@The Appellant- Mrs. Deepa Mathur, Jaipur.
2. प्रत्यर्थी@ The Respondent- The D.C.I.T., Circle-4, Jaipur.
3. आयकर आयुक्त@ CIT
4. आयकर आयुक्त(अपील)@The CIT(A)
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6. गार्ड फाईल@ Guard File (ITA No. 94/JP/2019)

आदेशानुसार@ By order,

सहायक पंजीकार@Asst. Registrar