IN THE INCOME TAX APPELLATE TRIBUNAL
"B'' BENCH : BANGALORE

BEFORE SHRI N.V VASUDEVAN, VICE PRESIDNET AND
SHRI B.R BASKARAN, ACCOUNTANT MEMBER

ITA No.1210 to 1212/Bang/2017
Assessment year : 2010-11 – 2012-13

M/s Deccan Creations Pvt. Ltd., No.42, 5th Mile, Tumkur Road, Yeshwanthpur, Bengaluru-560 022. PAN – AAACD 5156 F	Vs.	The Dy. Commissioner of Income-tax , Circle-11(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Smt. Jinitan Chaterjee, Advocate
Revenue by	:	Shri Priyadarshi Mishra, Addl. CIT (DR)

Date of hearing	:	02.11.2021
Date of Pronouncement	:	07.12.2021

O R D E R

Per B.R Baskaran, Accountant Member

All the three appeals have been filed by the assessee challenging the orders passed by Ld CIT(A)-2, Bengaluru and they relate to the assessment years 2010-11 to 2012-13. All these appeals were heard together and are being disposed of by this common order, for the sake of convenience.

2. In all the three years, the assessee is challenging the disallowance of sales commission paid to foreign agents u/s 40(a)(i) of the Act for non-deduction of tax at source. In AY 2010-11, the assessee is also challenging the disallowance of software purchase expenses.

3. The assessee is engaged in the business of manufacture and export of leather garments.

4. The first issue contested by the assessee in all the three years relates to the disallowance made u/s 40(a)(i) of the Act. It is pertinent to note that the appeal pertaining to AY 2010-11 is second round of appeal. In the first round, the Tribunal has restored this matter to the file of Ld CIT(A), since the Ld CIT(A) had decided this issue in favour of the assessee without considering certain observations made by the AO. In the second round as well as in AY 2011-12 and 2012-13, the Ld CIT(A) decided this issue against the assessee. The facts as available in AY 2010-11 are narrated hereunder.

4.1 The AO noticed that the assessee has paid sales commission to overseas agents located in Austria and Italy. However, it has not deducted tax at source from the commission so paid. When enquired about the same, the assessee submitted that the foreign agents do not have Permanent Establishment (PE) in India and hence the income is chargeable in their respective Country only as per the provisions of DTAA. Accordingly, it was submitted tax need not be deducted at source from commission payments. However, the AO took the view that the assessee should have approached the AO u/s 195(2) of the Act for determining the taxability or otherwise of the commission income given to the foreign agents. The AO also referred to the reply given by the assessee, more particularly, following portion of the reply:-

> "Agents are needed because of their knowledge in the respective country's leather garments market, the competitive

rates, the need and latest fashion trends, the design and quality of the products to be sold."

Accordingly, the AO took the view that the services rendered by the foreign agents fall under the category of "technical services" and these services also have a component of 'advertising and marketing services'. Accordingly, the AO took the view that the assessee was liable to deduct tax at source from the commission payments made to foreign agents. The Ld CIT(A) upheld the view of the AO in the second round in AY 2010-11 and also in other two years under consideration. The assessee is aggrieved.

4.2 The Ld A.R submitted that the assessee, being exporter of leather garments, does not have direct contacts with its customers. It is the agent, who procures the order from the customers and hence commission is paid to them. The garments are manufactured according to the requirements of the customers. The foreign agents are placed in their respective countries and hence well aware of the trends and requirements of the market. They, being in direct contact with the customers, pass on the requirements of the customers to the assessee, including on the matters of design, price etc. These services are normal services provided by any selling agent. Hence these types of services are not "technical services" as observed by the tax authorities. The Ld A.R placed his reliance on the decision rendered by the co-ordinate bench in the case of DCIT vs. M/s Cheslind Textiles Ltd (ITA No.1639/Bang/2016 dated 07-06-2019) and submitted that Tribunal has held that there was no obligation to deduct tax at source from the commission paid to foreign agents. Accordingly,

the Ld A.R prayed that the disallowance made u/s 40(a)(i) of the Act in all the three years be deleted.

4.3 The Ld D.R, on the contrary, submitted that the assessee itself has admitted before the tax authorities that the foreign agents are providing services on the basis of their specialised marketing and managerial skills.

4.4 In the rejoinder, the Ld A.R submitted that the assessee has obtained certificates from the agents, wherein they have certified that they have received the commission only for getting orders, i.e., no other service has been rendered by them.

4.5 We heard rival contentions and perused the record. We notice that the tax authorities have come to the conclusion that the foreign agents are rendering managerial services on the basis of explanations given by the assessee to the AO to the effect that the foreign agents are well aware of the local needs. We notice that the assessee has stated so only to reiterate the necessity of appointing foreign selling agents. The foreign agents, being local persons in their respective countries, are well aware of the local needs in terms of design, price etc. Accordingly, they could understand the requirements of foreign buyers and hence they can convey the customer's requirements to the assessee. The leather garments industry is prone to changes in fashion and further the quality and selling price, inter alia, also constitutes an important elements for securing foreign orders. It is quite natural for the assessee to seek those details from the agents, which the agents could furnish in view of their local presence. Thus, we notice that the foreign agents have provided the details of market trends and requirements of foreign buyers, which are usually provided by any agent. Hence the

same, in our view, cannot constitute managerial services. There is no dispute that the sales commission has been paid on the value of sales effected through them. Hence, in effect, the agents have acted as the link between the assessee and its customers and have received commission on sales effected through them.

4.6 We notice that the Hon'ble Madras High Court has held in the case of CIT vs. Wheels India Ltd (Tax Case Appeal No.448 of 2012 dated 06/08/2021) has held that the sourcing commission paid does not fall under the category of technical services. The order passed by Hon'ble Madras High Court is extracted below:-

> 4. The short issue which falls for consideration is whether the Tribunal was right in affirming the order passed by the Commissioner of Income Tax [Appeals][CIT(A)], LTU, Chennai deleting the disallowance under Section 40(a)(i) of the Act in respect of the payments effected by the assessee to non-resident without deducting tax at source. Thus the core issue involves as to for what purpose the payments were effected by the assessee to the non-resident and whether the assessee was required to deduct the tax at source. This is a factual matter which needs to be considered taking note of what was available in the hands of the Assessing Officer. The Assessing Officer is of the view that the payments were in the nature of fees for technical service and therefore, tax was to be deducted at source. The Assessing Officer was of such a view by interpreting the nature of the services rendered by the non-resident as a managerial service which was received by the assessee and therefore, referred to Indo South Korean DTAA, in particular, Article 13 and held that the payments made for managing the sales affairs of the assessee Company outside India without deducting tax at source under Section 195 of the Act has to be disallowed under Section 40(a)(i) of the Act.
>
> 5. The correctness of the said contention was decided by the CIT(A). As pointed out earlier, the nature of service which was rendered to the respondent/assessee has to be decided based on the available facts. This exercise was done by the CIT(A) not only in the assessment year under consideration but also for the assessment year 2005-2006 and in both the cases, the CIT(A) has

held in favour of the assesee. Thought for the assessment year 2005-2006, the revenue had filed an appeal before the Tribunal, on account of low tax effect that appeal could not be pursued by the Tribunal. However, what we are required to see is whether in the instant case, the CIT(A) has recorded a finding as to the nature of services availed by the assessee from the non-resident. After hearing the submissions of the auhorized representative of the assessee, the CIT(A) perused the copies of the agreement and on facts, found that the amounts paid by the assessee were sales commission and marketing services to non resident agents outside India for their services rendered outside India by way of canvassing sales order and none of the entities to whom payments were made by the assessee have a Permanent Establishment [PE] in India. Further, taking note of the relevant Articles in the respective DTAA agreements entered into between India and the respective Country, it was held that the income earned is taxable in those Countries. In support of the conclusion, the CIT(A) relied on the decision of the Hon'ble Supreme Court in the case of ***G.E.Technology Centre (P) Ltd., vs. CIT [327 ITR 456]***. Thus, on facts, the nature of services rendered by the non-resident to the assessee was considered by the CIT(A) after perusing the copies of the agreement. This factual finding has attained finality as the appeal filed by the revenue before the Tribunal was dismissed by the impugned order.

6. Further, the assessee would place reliance on the decision of the Hon'ble Division Bench of this Court in the case of ***Commissioner of Income Tax vs. Farida Leather Company [(2016) 95 CCH 0146 ChenHC]*** wherein it was held that sourcing orders abroad, for which payments have been made directly to the non-residents abroad, does not involve any technical knowledge or assistance in technical operations. In the case of ***Commissioner of Income Tax vs. Faizan Shoes Pvt. Ltd., [(2014) 367 ITR 0155(Mad)]***, it was held that the commission paid for procuring order for leather business from overseas buyers – wholesalers or retailers cannot be treated as if for technical services. In the case of ***Evolv Clothing Company Pvt. Ltd., vs. Assistant Commissioner of Income Tax [(2018) 407 ITR 0072(Mad)]***, the Hon'ble Division Bench held that the Assessing Officer accepted that the assessee therein had paid commission charges for the overseas agents and the same cannot be regarded as if for technical services.

> 7. As pointed out, on facts the First Appellate Authority and the Tribunal have held that what was paid by the assessee to the non-resident was sales commission and cannot be regarded as if for technical services.
>
> 8. In the light of the said factual conclusion, we find no grounds to interfere with the order passed by the Tribunal, more particularly, when no question of law or substantial question of law arises for consideration. Accordingly, the tax case appeal is dismissed. No costs."

4.7 In the instant case, we have noticed earlier that the foreign agents have given certificates that they have received commission only for getting orders. We have also held that the assessee has mentioned about the necessity of appointing agents by stating as under:-

> "Agents are needed because of their knowledge in the respective country's leather garments market, the competitive rates, the need and latest fashion trends, the design and quality of the products to be sold."

Ultimately, the assessee has received sales orders through the agents and the impugned commission payments have been made to the foreign agents for getting sales orders. Hence, as held by Hon'ble Madras High Court in the above cited case, the sourcing commission paid cannot be considered as fee for technical services. Accordingly, we hold that the tax authorities are not correct in law in holding that the commission was paid to the agents for rendering technical services in the form of managerial services. Thus, it shall constitute business income in their respective hands. There is no dispute that these foreign agents do not have permanent establishment in India and hence under Article 7 of India and

Austria DTAA as well under Article 7 of India – Italy DTAA, no business profit is taxable in India. Since no income out of commission payment is chargeable to tax in India in the hands of foreign agents, there is no requirement of deducting tax at source u/s 195 of the Act. Accordingly, we are of the view that disallowance made u/s 40(a)(i) in all the three years is not justified. Accordingly, we set aside the order passed by Ld CIT(A) on this issue in all the three years and direct the AO to delete the disallowance made u/s 40(a)(i) of the Act in all the three years under consideration.

5. The assessee is also contesting the decision of Ld CIT(A) in confirming the disallowance of payments made for software purchase in AY 2010-11. The AO noticed that the assessee has claimed deduction of Rs.4,64,313/- towards software purchase expenses. The assessee submitted that it has given a contract to M/s Affordable Business Solutions P Ltd, Bangalore for development and maintenance of customised ERP and other production software as per the business needs of the assessee. It was further submitted that the supplier is delivering the software in phased manner and the payments are also made in phased manner. It was contended that, since the software is required to be corrected/altered frequently, the same is treated as revenue expenditure.

5.1 The AO did not accept the contentions of the assessee. He held that there was enduring benefit on purchase of computer software. Accordingly, he held it to be capital expenditure and

allowed depreciation thereon. In the first round, the Ld CIT(A) held it to be revenue expenditure. The Tribunal, however, restored this issue to the file of Ld CIT(A). In the second round, the Ld CIT(A) confirmed the disallowance by observing that the assessee has failed to furnish any details relating to the software purchase.

5.2 Before us, the Ld A.R placed his reliance on the decision rendered by Hon'ble Karnataka High Court in the case of CIT vs. IBM India Ltd (Income tax Appeal No.130/2007 dated 10th April 2013 and submitted that the Hon'ble High Court has held that the payment made for application software enhances the productivity or efficiency and hence to be treated as revenue expenditure.

5.3 The Ld D.R, however, submitted that the assessee has not furnished any details relating to software and has also not demonstrated functional aspects in support of its contentions.

5.4 We heard the parties on this issue and perused the record. We notice that the Ld A.R is placing reliance on a case law in order to contend that software purchase is allowable as revenue expenditure. However, as rightly pointed out by Ld D.R, the assessee has not furnished any details relating to the computer software purchased by it. The assessee has not furnished the copy of contract entered with the supplier, nature of software purchased etc. Accordingly, in the absence of factual details, it will not be possible to apply the ratio of decision rendered by Hon'ble jurisdictional High Court in the case of IBM India Ltd (supra). We notice that the AO has allowed applicable depreciation on the software purchases treated as capital expenditure. Accordingly, we

do not find any reason to interfere with the decision rendered by Ld CIT(A) on this issue.

6. In the result, the appeal filed by the assessee for AY 2010-11 is partly allowed. The appeals relating to AY 2011-12 and 2012-13 are allowed.

Order pronounced in the open court on 7th December **2021**

Sd/-	**Sd/-**
(N.V Vasudevan)	**(B.R Baskaran)**
Vice President	**Accountant Member**

Bangalore,
Dated, 7th December 2021

/ vms /

Copy to:
1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore

1. Date of Dictation ……

2. Date on which the typed draft is placed before the dictating Member …….
3. Date on which the approved draft comes to Sr.P.S ……
4. Date on which the fair order is placed before the dictating Member ……..
5. Date on which the fair order comes back to the Sr. P.S. ……..
6. Date of uploading the order on website……..
7. If not uploaded, furnish the reason for doing so ……..
8. Date on which the file goes to the Bench Clerk ……..
9. Date on which order goes for Xerox & endorsement……
10. Date on which the file goes to the Head Clerk …….
11. The date on which the file goes to the Assistant Registrar for signature on the order …….
12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order ……
13. Date of Despatch of Order. ……..