
(2014) 09 RAJ CK 0002
In the Rajasthan High Court
Case No : ITA No. 341 of 2011

CIT

APPELLANT

Vs

Modern Insulators Ltd.

RESPONDENT

Date of Decision : 09-09-2014

Acts Referred:

Income Tax Act, 1961 — Section 195 260A 40(a)(i) 40(a)(ia) 5(2)

Citation : (2014) 09 RAJ CK 0002

Hon'ble Judges : Ajay Rastogi, J;J.K. Ranka, J

Bench : Division Bench

Advocate : Vikram Pagariua, Advocate for the Appellant;

Judgement

J.K. Ranka, J.

1. This appeal under section 260A of the Income Tax Act (for short, Income Tax Act) is directed against the order of the Tribunal and is relevant for the assessment year 2007-08.

2. Brief facts necessary for disposal of this appeal are that the respondent is engaged in the business of manufacturing of insulators and bushings and is a limited company incorporated under the Companies Act. The short controversy relates to payment of commission made by the respondent-company to (1) M/s. Alavabond Ltd., London, amounting to Rs. 3,17,93,218; (2) M/s. Jacob & Jacob S.A. De C.V., amounting to Rs. 32,75,683; (3) M/s. Trafalghar Trading FZC, Sharjah (UAE), amounting to Rs. 2,53,89,798 and liability to deduct TDS thereon. While the claim of the respondent-assessee is that it relates to payments of commission to non-resident agents and in view of the circular of the CBDT, bearing No. 786 dt. 7-2-2000 [(2000) 158 CTR (St) 61], it was not required to deduct tax at source on the said commission payments, however, the assessing officer was of the view that in view of the latest Circular No. 7, dt. 22-10-2009 [(2009) 226 CTR (St) 57 : (2009) 30 DTR (St) 1], which came to be issued by the CBDT before completion of the assessment, therefore, the said

circular is applicable and in the light of the said circular, the assessee was liable to deduct tax at source on payments made to the non-residents referred to above and since the assessee failed to deduct tax at source and to pay in the Government treasury account under section 195 of the Income Tax Act, therefore, the assessing officer was of the view that the entire amount is disallowable under the provisions of s. 40(a)(ia) of the Income Tax Act and accordingly, a show-cause notice was issued to this effect and dissatisfied with the reply of the assessee, the assessing officer disallowed the entire amount by invoking provisions of section 40(a)(ia). The assessing officer also disallowed the payments to M/s Alavabond Ltd., London and M/s. Trafalghar Trading FZC. As per assessing officer, the assessee was unable to justify the business expediency in payment of the said amount to the aforesaid companies and therefore, the assessing officer disallowed the amount paid to the said companies but since the disallowance was being made under section 40(a)(ia), no separate addition was made. Insofar as payment made of commission to M/s. Jacob & Jacob S.A. De C.V. is concerned, the assessing officer was satisfied and allowed the commission payment but since TDS was not deducted, disallowed the entire claim under section 40(a)(ia) of the Act.

3. Dissatisfied with the disallowance under section 40(a)(ia) and on account of business expediency, the matter was carried in appeal before the Commissioner (Appeals), who was satisfied with the explanation offered by the assessee and the Commissioner (Appeals) not only deleted disallowance of commission by holding that the assessee has been able to justify the payments on account of business expediency to the agents aforesaid but also held that in view of the Circular No. 786 dt. 7-2-2000, which was in force during the previous year relevant to the year under appeal, there was no liability of the assessee to deduct tax at source under section 195 of the Act and accordingly, he was of the view that provisions of section 40(a)(ia) cannot be invoked and are inapplicable and thus deleted the entire disallowance. The Commissioner (Appeals) "also discussed the grounds relating to business expediency and rejected the finding of the assessing officer.

4. Dissatisfied with the deletion of the disallowance under section 40(a)(ia), the Revenue carried the matter in appeal before the Tribunal. However, before the Tribunal, the ground raised by the Revenue pertained to challenging the order under section 40(a)(ia) only and insofar as the ground relating to business expediency of the payments, the Revenue was satisfied and no ground was raised before the Tribunal. The Tribunal also, after analyzing the material on record and the circular of the Board dt. 7th Feb., 2000 came to the conclusion that the said circular was in force and was not withdrawn and the Circular No. 7, dt. 22-10-2009 cannot be said to be retrospective in nature and thus, while relying upon the judgment of the Hon'ble Apex Court in the case of G.E. India Technology Centre Private Ltd. Vs. Commissioner of Income Tax and Another, , Authority for Advance Rulings in the case of In re Spahi Projects (P) Ltd., (2009) 315 ITR 374 (AAR) and Delhi High Court in the case of Asia Satellite

Telecommunications Co. Ltd. Vs. Director of Income Tax, and also after analyzing the two circulars, upheld the order passed by the Commissioner (Appeals) and thus dismissed the appeal of the Revenue which is assailed before us by the Revenue.

5. Learned officer, appearing on behalf of the Revenue, contended that the Circular No. 7 : , dt. 22-10-2009, which was brought in by the CBDT on 22-10-2009, was applicable in the facts of the present assessee because the assessment was made by the assessing officer on 31-12-2009 by which time the circular came into force and according to him it was applicable to all pending assessments as the said circular came into force immediately. He further contended that there was liability to deduct tax at source by the assessee of the commission payments to the foreign agents under section 195 and since tax was required to be deducted at source and was not deducted, the assessing officer was well within the provisions of law to disallow the entire amount under section 40(a)(ia) of the Income Tax Act. He also contended that the assessee was unable to prove business expediency of making huge payment of approximately about Rs. 6 crores. He thus contended that the provisions of s. 40(a)(ia) and interpretation of circulars is required to be seen and therefore, substantial question of law arises out of the order of the Tribunal.

6. We have considered the arguments advanced by learned officer appearing on behalf of the appellant-Revenue and have also perused the impugned order and other orders.

7. Section 40(a)(ia) of the Income Tax Act provides that the amount can be disallowed under the provisions of s. 40(a)(ia), if the assessee has not deducted tax at source under Chapter XVII-B of the Income Tax Act. However, we notice that under section 40(a)(ia), insofar as the payment is concerned, it is restricted to payment made to a resident and it nowhere specifies as to amount of commission having been paid to foreign agents/non-residents. The relevant provision for disallowance, if any, would have been s. 40(a)(i) and not section 40(a)(ia). Liability for deduction of TDS under section 195, arises for payment made to a non-resident, not being a company or to a foreign company any interest or royalty i.e., fees for technical services or any other sum chargeable under the provisions of the Act and it is a finding of fact by the lower authorities that all the three foreign agents are not assessed to tax in India and none of them has any office in India. Para No. 2 of the Circular No. 786 : , dt. 7-2-2000 provides as under :

"2. The deduction of tax at source under section 195 would arise if the payment of commission to the non-resident agent is chargeable to tax in India. In this regard attention to CBDT Circular No. 23, dt. 23rd July, 1969, is drawn, where the taxability of Foreign agents of Indian exporters was considered along with certain other specific situations. It had been clarified then that where the non-resident agent operates outside the country, no part of his income arises in India. Further, since the payment is usually remitted directly abroad it cannot be held

to have been received by or on behalf of the agent in India. Such payments were therefore held to be no taxable in India. The relevant sections, namely, s. 5(2) and section 9 of the Income Tax Act, 1961, not having undergone any change in this regard, the clarification in Circular No. 213 [1977 CTR (Jour) 101] still prevails. No tax is therefore deductible under section 195 and consequently, the expenditure on export commission and other related charges payable to a non-resident for services rendered outside India becomes allowable expenditure. On being appraised for this position, the Comptroller and Auditor-General have agreed to drop the objection referred to above."

8. From perusal of relevant para 2 of the aforesaid circular, it clearly specifies that the question of deduction of tax at source under section 195 would arise only if the payment of commission to a non-resident is chargeable to tax in India, the fact that the said payment was remitted directly abroad and it cannot be held to have been received on or on behalf of the agent in India. It is a finding by the two appellate authorities that the commission paid abroad is not chargeable to tax in India under the Income Tax Act. The Circular No. 7 dt. 22-10-2009, in our view, cannot be considered retrospectively to make it applicable for payments made before that date. The Tribunal has also held that the above non-residents/foreign agents have provided services for earning commission and the services have been rendered outside India, the commission so earned by non-resident is a business profit. As per DTAA between India and UK and DTAA between India and UAE, it is mentioned in Article 7 of both the DTAA's that the business profit can be taxed in other Contracting State in case the enterprise of a Contracting State is having a PE in other Contracting State and it has never been a case admittedly of the Revenue that the aforesaid non-resident companies/entities are having their PE in India. The Circular No. 786 : , dt. 7-2-2000 governs the case of the respondent-assessee as the year involved is the assessment year 2007-08 and in our view, the Circular No. 7, dt. 22-10-2009, which came into force from 22-10-2009, cannot be said to be applicable in the facts of the instant case nor can be said to be retrospective in nature or even clarificatory in nature.

9. Though the learned officer argued that huge payments to the tune of about Rs. 6 crores were made to the aforesaid agents and no business expediency was proved/established by the assessee, we notice that even the question of law is framed to the above effect but we are surprised that before Tribunal when the Revenue did not raise/challenge the said issue, then on what basis substantial question of law can be said to be raised. This shows the lackadaisical approach of the Revenue officers. Thus, the said question does not arise out of the order of Tribunal. Be that as it may, even otherwise, it is a finding of fact arrived at by the Commissioner (Appeals) after elaborate discussion that rate of commission was same for all the foreign agents and when assessing officer has been satisfied about other payments nothing was brought on record by the assessing officer to justify about disallowance of commission payment to these two foreign agents; merely because amount is more, that by itself does not justify disallowance and

assessing officer has to bring on record something more to disallow any payment. There is also a finding of fact appreciated by the Commissioner (Appeals) that the assessee had to establish in foreign markets which are highly competitive, therefore, services of these foreign agents/companies were taken by the assessee. Payment of such nature is to be judged from the angle of a businessman/assessee and Revenue officers should normally not interfere unless cogent/valid reasons are available to disallow. Thus, in our view, no substantial question can be said to emerge and we find no perversity or illegality in the order of Tribunal so as to call for interference of this Court.

10. Consequently, the appeal, being devoid of any merit, is hereby dismissed in limine.