(2013) 12 AHC CK 0068

In the Allahabad High Court

Case No : I.T.A. No. 361 of 2013

Commissioner of Income Tax	APPELLANT
Vs	
Model Exims	RESPONDENT

Date of Decision : 17-12-2013

Acts Referred:

Citation : (2014) 363 ITR 66 : (2014) 222 TAXMAN 94

Hon'ble Judges : Surya Prakash Kesarwani, J;Sunil Ambwani, J

Bench : Division Bench

Judgement

1. We have heard Shri Bharat Ji Agrawal, senior counsel assisted by Shri Ashok Kumar, learned counsel for the income tax Department. Shri S.D. Singh, senior counsel assisted by Shri Krishna Deo Vyas, appears for the respondent-assessee. This income tax appeal u/s 260A of the income tax Act arises out of the order dated May 31, 2013, passed by the income tax Appellate Tribunal, Lucknow Bench "A", Lucknow, in I.T.A. No. 190/Lko./2012 relating to the assessment year 2008-09.

2. The Department has preferred the appeal on the following questions of law:

(1) Whether the Hon''ble Income tax Appellate Tribunal has erred in deleting the disallowance of Rs. 1,50,20,871 on account of non-deduction of income tax as per the provisions of section 195 of the income tax Act, 1961?

(2) Whether the hon''ble income tax Appellate Tribunal has erred in law in deleting the disallowance of Rs. 1,50,20,871 without appreciating the facts that the provisions of section 9(1)(vii), read along with the Explanation introduced by the Finance Act, 2010, with retrospective effect from June 1, 1976, of the income tax Act, 1961, are applicable for services rendered by the non-resident entities?

(3) Whether the Hon''ble income tax Appellate Tribunal has erred in law in deleting the disallowance without appreciating the facts that the Assessing Officer disallowed the payment u/s 40(a)(i) of the Act in respect of commission

paid to agents in violation of the provisions of section 195 read with section 9(1)(vii) of the income tax Act, 1961?

3. We find that all the questions as framed by the Department are covered by our judgment in Commissioner of Income Tax and Another Vs. Model Exims, and the judgment in CIT v. Allied Exims (Income Tax Appeal No. 313 of 2013 decided on November 13, 2013 since reported in [2014] 363 ITR 62 (All.)). In both these judgments we have held that the Assessing Officer did not bring anything on record, which could demonstrate that non-resident agents were appointed as selling agents, designers or technical advisers. The payment of commission to the foreign agents did not entitle such foreign agents to pay tax in India and, thus, the TDS was not liable to be deducted u/s 195 of the Act. The disallowance made by the Assessing Officer u/s 40(a)(i) for non-deduction of tax at source u/s 195 were not justified.

4. Shri Bharat Ji Agrawal has tried to distinguish the judgments on the ground that, in the present case, there was sufficient material by way of written submissions of the assessee, who had stated in his reply on December 20, 2010, that the assessee is engaged in business of manufacture and export of finished leather, shoe upper and leather products. The assessee''s main business being export business it has to take the service of the foreign agents, who secure export orders and help in execution of such business. For the services rendered by the foreign agents, they are paid commission in foreign exchange by remitting the amount through bank.

5. We find that the Commissioner of income tax (Appeals) has considered the alleged admission in the reply of the assessee and has also perused the agreement from which he found that there was nothing, which could demonstrate that these agents were appointed as selling agents, designers or technical advisers for invoking the provisions of section 9(1)(vii) of the Act. The findings recorded by the Commissioner of income tax (Appeals), which have been confirmed by the income tax Appellate Tribunal is quoted as below:

5.3.2 The Assessing Officer has also invoked the provisions of section 9(1)(vii) on the premise that such payments also fall under fees for technical services. In this regard she has observed that normally the exporter appoints the agents as his selling agent, designer and technical adviser for his products. He has further observed that being commission agent required managerial acumen and expertise and, therefore, would be covered u/s 9(1)(vii) of the Act as managerial services. On a perusal of the assessment order and assessment folder, I find that the Assessing Officer has not brought anything on record which could demonstrate that these agents had been appointed as selling agents, designers and technical advisers. Rather on the contrary, I find that the agreement is of for procuring orders and nothing else. In the absence of any such evidence, this observation of the Assessing Officer is mere conjecture and, therefore, no cognizance of the same can be taken. It is a trite law that suspicion, no matter how grave, cannot take place of evidence. In this case, there is even no case of suspicion, leave aside any evidence to the effect that the agents were not only selling agents but also designers and technical advisers. The confirmation from the respective foreign agents that the foreign agents did not have any branch or permanent establishment in India further supports the case of the appellant.

5.3.3 The Assessing Officer''s observation that as a selling agent, the agent has to have managerial acumen and, therefore, hit by the provisions of section 9(1)(vii), is baseless. The provisions of section 9(1)(vii) deals with fees for technical services and it has to be read in that context. For that matter, everything in life requires managerial skills, like running the household, being an Assessing Officer, running a shop, etc. Will that tantamount to providing managerial services in the context of section 9(1)(vii)? The answer is clear no. Thus, the aforesaid payments do not fall within the meaning of ''fees for technical services'' as described in section 9(1)(vii) of the Act.

5.3.4 The income of the non-resident was not chargeable to tax in India since the same was neither received in India nor had it accrued or deemed to accrue in India. Accordingly, the appellant was not required to deduct tax at source u/s 195 in respect of commission paid to the foreign agents. Disallowance u/s 40(a)(i) is, therefore, deleted.

6. Shri Bharat Ji Agrawal submits that the Commissioner of income tax (Appeals) and the income tax Appellate Tribunal have not considered the Explanation added to section 9(1)(vii) by the Finance Act, 2010, with effect from June 1, 1976, and which provides that for the purpose of the second proviso the income of such non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in total income of non-resident whether or not non-resident has residence or place of business or business commission in India; or non-resident has rendered services in India.

7. We do not find that the fact situation contemplated or clarified in the Explanation added by the Finance Act, 2010, is applicable to the present case as, in the present case, the agents appointed by the assessee had their offices situate in a foreign country and that they did not provide any managerial services to the assessee. Section 9(1)(vii) deals with technical services and has to be read in that context. The agreement of procuring orders would not involve any managerial services. The agreement did not show the applicability or requirement of any technical expertise as functioning as selling agent, designer or any other technical services.

8. There are no distinguishing feature in this case, nor do we find that the ratio of the Constitution Bench decision in Commissioner of Central Excise, Bolpur Vs. Ratan Melting and Wire Industries, is applicable inasmuch as in the present case there was no decision of the Supreme Court or the High Court or any statutory provision, which was contrary to the circular, which was withdrawn on October 22, 2009.

9. The questions of law are covered by the judgments of this court cited as

above, and are decided in favour of the assessee and against the Department. The income tax appeal is dismissed.

