IN THE ITAT BANGALORE BENCH 'B'

Exotic Fruits (P.) Ltd.

v.

Income-tax Officer (International Taxation) Ward -1(1), Bangalore*

N. BARTHVAJASANKAR, VICE-PRESIDENT
AND GEORGE GEORGE K, JUDICIAL MEMBER
IT APPEAL NOS. 1008 TO 1013 (BANG.) OF 2012
[ASSESSMENT YEARS 2008-09 TO 2010-11]
OCTOBER 4, 2013

ORDER

Per Bench : These six appeals, instituted at the instance of the assessee company, are directed against the consolidated order of the CIT (A)-IV, Bangalore, dated 29.6.2012 for the assessment years 2008-09, 2009-10 and 2010-11 [u/s 201(1) & u/s. 201(1A) of the Act].

ITA Nos.1008, 1009 & 1010/12 - Ays.2008-09, 2009-10 & 2010-11:

Orders u/s 201(1) of the Act:

2. The assessee company has, in its grounds of Memorandum for all the three assessment years under consideration, raised almost four identical grounds. However, all the grounds are confined to a solitary issue, namely, that the CIT (A) had erred in concluding that the commission paid to M/s. Food Specialities Limited, Dubai amounting to Rs.1,14,34,166/-, Rs.1,58,65,626/- & 13,22,750/- for the AYs 2008-09 to 2010-11 respectively and Rs.1,53,99,061/- to Dohler Middle East, Dubai for the AY 2010-11 were in the nature of managerial services u/s 9(1)(vii) of the Act and consequently, liable for deduction of tax at source u/s 195 of the Act.

ITA Nos.1011, 1012 & 1013/12 - Ays.2008-09, 2009-10 & 2010-11:

Orders u/s 201(1A) of the Act:

3. The assessee company has also raised three similar grounds for all the AYs under dispute, the gist of which is: Whether the CIT (A) was justified in confirming the levy of interest u/s 201(1A) of the Act?

3.1 As the issues raised in these appeals being inter-connected and pertaining to the same assessee, they were heard, considered and disposed of, for the sake of convenience, in this consolidated order.

4. Briefly stated, the facts of the issues are as under:

The assessee is engaged in the business of processing of fruit products and exporting the same to the various non-resident customers in Saudi Arabia, Bahrain, Dubai, etc., through its non-resident agents. For the purpose of exports, the assessee had entered into an agency agreement

with the non-resident agents to whom the commission was being paid as per the terms and conditions. The commission, it appears, was being remitted to them in pursuance of the performance as per the said agreements. However, on verification of Form 15CA/CB furnished by the assessee, the AO had noticed that the assessee had not deducted tax at source on the payments made to the non-residents as provided u/s 195 of the Act. The AO had, further, noticed in 15CB report that the remittance was towards commission for export for services rendered outside India and that the same was in the nature of business income of the beneficiary who had got no permanent establishment in India and that his stay in India did not exceed 90 days during the year etc. Being queried by issuance of a Notice, the assessee had furnished a detailed submission on the issue. After due consideration of the assessee's lengthy contentions as recorded in the order under dispute, the AO had rejected the assessee's claim by extensively quoting the provisions of s. 9 (1) of the Act and concluded that :—

> "18. Therefore, in the light of the above discussion made in the preceding paragraphs, it is clear that the payments made to non-residents is deemed to accrue or arisen u/s 5 and 9 of the Income-tax Act, 1961 and would therefore, constitute an income chargeable under the Indian Income-tax Act, 1961. The fact that the non-resident would be rendering services outside India and also getting payment outside India, are wholly irrelevant considerations. Since, the source of income being situated in India, the non-residents are liable to income-tax in India under the Act.
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> 19. ....Accordingly, the total tax and interest payable for each year is computed as under:

F.Y	A.Y	Amount paid	Tax u/s 201(1)	Int. u/s 201(1A)	Total (in Rs.)
2007-08	2008-09	1,23,54,742	50,65,444	18,57,660	69,23,104
2008-09	2009-10	1,61,05,386	66,03,208	12,28,332	78,31,540
That the 2009-10	2010-11	1,71,79,678	70,32,925	10,34,458	80,67,383
				Total	2,28,22,028

> 20. Accordingly, I deem M/s. Exotic Fruits Pvt. Ltd. To be an assessee in default under section 201(1) for its failure to deduct/withhold the tax from the payments made to the non-residents as required under section 195 of the Income-tax Act 1961. The assessee is liable to pay a total sum of Rs.2,28,22,028/- u/s 201(1) & 201 (1A) for not complying with the provisions of s. 195 of the I. T. Act, 1961 for the above mentioned assessment years."

5. Aggrieved, the assessee took up the issues before the CIT (A). After due consideration of the contentions of the assessee as recorded in his order, quoting the judgment of the Hon'ble Supreme Court in the case of *CIT* v. *Toshoku Ltd.* [1980] 125 ITR 525 and also examining the agreements between the assessee and its non-resident customers, the CIT (A) had recorded his findings as under:

> "(On page 6 .... The above facts noticed from the agreements make it clear that in respect of remittance made to M/s Food Specialities Limited, UAE, the appellant failed to produce any evidence in respect of the payment made for the financial year 2007-08 to establish that the income was not chargeable to tax in India Further, from the agreement produced for subsequent period, it is evident the services are in the nature of managerial services and, therefore, comes under the purview of section 9(1)(vii) of the Income-tax Act. Similarly, the

fact revealed from the agreement discussed above in respect of remittances made to M/s Dohler Middle East Ltd., UAE, it is clear that the payment was made for the managerial services which comes under the purview of 'fees for technical services' u/s 9(1)(vii) of the Income-tax Act. Further, from the Explanation to section 9(2) of the I.T. Act, inserted with retrospective effect from 1.6.1976, it is clear that the fees for technical services shall be deemed to be accrued or arise in India and shall be includable in the total income of the non-residents even if the non-residents do not have residents or place of business or business connection in India and services have been rendered outside India. Thus, the remittances made to the above 2 non-residents are chargeable to tax in India u/s 9(1) (vii) of the Income-tax Act and, therefore, the appellant was required to deduct the tax u/s 195 of the I.T. Act. However, in the cases of Augusta Trading and Bureau Couecou, the payment is clearly in the nature of the commission for the services rendered outside India and, therefore, as held by the Hon'ble Supreme Court of India in the case of *CIT* v. *Toshoku Ltd.* [1980] 125 ITR 525, the commission paid to them will not be chargeable to tax in India and, therefore, the question of deducting tax at source on the payment made to them does not arise. Accordingly, the assessing officer is directed to re-compute the interest u/s 201 & 201(1A) of the Income-tax Act.".

6. Aggrieved, the assessee has come up before us with the present appeals. During the course of hearing, the learned AR reiterated more or less what has been presented before the first appellate authority. In furtherance, it was submitted that the initiation of proceedings u/s 201 of the Act shall come into fore only when there was a default on the part of the assessee to deduct tax at source as specified under the provisions of the Act. The AO had failed to foresee as to whether the assessee was liable to deduct TDS u/s 194H or u/s 195 of the Act with regard to the payment of commission to its foreign agents. It was, further, submitted that none of the assessee's agents stationed abroad have rendered any part of their services on Indian soil. As a matter of fact, it was claimed, the services rendered consist of getting orders from customers situated in Dubai and other countries and following up of the payments from customers and that none of the agents have their offices or business establishments in India while rendering their services to the assessee. It was urged that since no part of the services were rendered in India and no income arose on the payments of commissions to such agents, the assessee was not obliged to deduct tax at source u/s 195 of the Act as attributed by the Revenue. To strengthen his argument, learned AR had placed reliance on the following case laws:

(*a*) *Jt. CIT* v. *Wifi Networks (P). Ltd* [IT Appeal Nos.189 & 190 (Bang.) of 2012 dated 8-32013]

(*b*) *Sri Subbaraman Subramanian* v. *Asstt. CIT* [2013] 140 ITD 707

(*c*) *ITO* v. *Faizan Shoes (P.) Ltd.* [2013] 58 SOT 245

(*d*) *ITO* v. *Reliance International* - (2013) TaxCorp (INTL)5395 (Luck.); &

(*e*) *Linde AG* v. *ITO* [1997] 62 ITD 330 (Mum.)

6.1 On the other hand, the learned DR supported the stand of the authorities below on the issue. It was, further, submitted that as the issue has since been elaborately analyzed and came to a right conclusion by the CIT (A) in his findings under dispute, the same requires to be sustained.

7. We have carefully considered the rival submissions, duly perused the relevant materials on record and also the case laws on which the assessee's representative had placed strong reliance. The only issue which requires to be adjudicated is whether the assessing authority was right in invoking the provisions of section 201(1) and 201(1A) of the Act in the present case.

7.1 Briefly, the assessee is engaged in the business of processing of fruit products and exporting the same to its customers in various countries through its agents positioned in their respective countries. It was the case of the assessing officer that the source of income being situated in India, the non-residents are liable to income-tax in India under the Income-tax Act and since the assessee had failed to make deduction tax from the payments made to them as required u/s 195 of the Act, the assessee was treated as 'assessee in default' u/s 201(1) of the Act.

7.2 However, on a perusal of the materials placed before us, we have noticed that none of the assessee's agents based abroad have rendered any services in India. Admittedly, none of the assessee's agents have their offices or business establishments in India for rendering such services to the assessee. The commissions to such agents have been paid not in India but overseas. Since no part of the services were rendered by such agents in India, no income arose on the payment of commissions to such agents and, consequently, as rightly argued by the learned AR, the question of deduction of tax at source u/s 195 of the Act doesn't arise. The CIT (A) has merely stated that payments to non resident agents come with meaning of managerial service mentioned u/s 9(1)(vii). On perusal of agreement it is evident that the remittances to Non Residents are mere commission payment based on turnover of sales and there is no managerial service rendered by Non Resident to the assessee.

7.3 At this point of time, we would like to analyze the judicial view on a similar issue.

(*i*) The earlier Bench of this Tribunal had an occasion to deal with a similar situation in the case of *Wifi Networks (P.) Ltd.* (*supra*).

In that case, briefly, among others, the assessee was aggrieved by the disallowance of market survey fee paid to a resident of UAE u/s 40(a) (i) of the Act on the premise that the said payment was in the nature of 'fees' for technical services u/s 9(1) (vii) of the Act and the assessee had not deducted tax at source u/s 195 of the Act. The AO was of the view that since under the treaty with UAE there was no article which deals with taxability of fees for technical services, the payment will be fees for technical services u/s 9(1)(vii) of the Act. When the issue reached the Tribunal for adjudication, the Bench had, after taking into account the rival submissions as recorded therein, observed as under:

> "10.4.1. …….The learned counsel for the assessee placed on record the agreement dt 15.5.2006 pertaining to the relevant period under consideration. As per the agreement, the non-resident is to carry out extensive survey to assess the market potential at Uganda for value added services specifically for SMS, IVRS, Didin, CRBT, USSD etc., the short term and long term prospects for the assessee company, and to furnish the details of the Telecom Products currently being offered by existing UAS vendors. The assessee paid the market survey fees to the non-resident in consideration for rendering the above services.
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> 10.4.2. Since the Treaty between India-UAE does not contain an article in respect of 'fees' for technical services, the payment of market survey fees will have to be regarded as 'business profit' as per Article of the treaty. The non-resident was carrying on business in

UAE in the field of market survey and the assessee has availed his service for a consideration / fees. The agreement with the non-resident was in the course of business carried on and we find that the learned CIT (Appeals) was also of the same view. Thus, we are of the view that the payment of market fees to the non-resident in the present case on hand is to be dealt with as per Article 7 of the Treaty between India - UAE. The AAR in *Teknisil (Sendirian) Berhard In Re* (*supra*) held as under at Para 12 and 13 thereof:

12. The authority is of the opinion that neither of these contentions put forward by the Department can be accepted. It is true that the income derived by the TSB under the agreement can be described as fees for technical services though that specific expression does of fid a place in the contract. But, this makes no difference because that description is not sufficient to take it out of the purview of Article 7 which makes the income or profit of an enterprise of a State taxable only in that State unless the enterprise carries on business in other State through a permanent establishment situated therein. To say that TSB is not carrying on a business and that income by way of technical services has not been specifically provided for by the DTAA may indeed be fatal to the case of the Department because by virtue of Article 7, all the income or profits of an enterprise in a State are taxable only in that State save in two cases. The two exceptions are: (a) the profits of a business carried on through as permanent establishment in another State and attributable to such permanent establishment; and (b) income or profits which are dealt with separately in other articles of the agreement. That apart, there can be no doubt whatsoever that the supply of skilled labourers to other companies is in the nature of a business activity. In its application dated April 4, 1995, under section 197, the applicant has stated that it is engaged in the business of supplying skilled labour for execution of offshore projects for jacket and riser installations. The contract with HHI was entered into in the course of its business. No details of assessment year contracts of similar nature entered into by the appellant with other parties have been furnished. Still, the very nature of the contract is such that it spells out a business. The assessee is to engage skilled labour and supplies the labourers to other companies requiring such labour. It gets paid on the basis of certain rates per unit of labour employed and by effecting economics in the scale of wages it offers to its employees earns a margin of profit for itself. This is clearly in the nature of a business and Article 7 will be attracted.

13. The fact that the remuneration paid to the assessee may be in the nature of technical fee within the scope of section 9(1)(vii) does not make a difference. Fees of this nature can be earned in business or otherwise. If earned in the course of business, they constitute income from business. There is o incompatibility between recognizing the receipts as royalties or technical fees and also looking upon them as the profits of a business. Judicial decisions have recognized the principle in regard to other types of receipts such as dividends and interest. That being so, when technical fees are received in the course of business, one cannot deny them the treatment envisaged by Article 7, specially intended for application to business income……."

The ITAT, Mumbai, in the case of *Christiani & Neilsen Coperhogan* (*supra*) at Para 8 thereof has held as under:

'....The fees for 'technical services' in the normal business parlance is a part of the profits earned by an enterprise. It is earned through a systematic series of activities carried on by the assessee, i.e., in preparing the project by conducting preliminary studies, collection and

assimilation of data and finally preparing the feasibility report and, in this case, with regard to Trans-Harbour Communication Link between the Island city of Bombay and the Industrial and commercial profits and, therefore, it cannot be said that there is no specific provision for dealing with such kind of profit in AADT…..'

Recently, the Mumbai ITAT in the case of *Channel Guide India Ltd*. v *ACIT* has held that, if there is no clause dealing with 'fees for technical services' under the Treaty, the payment shall be dealt with Article 7 of the Treaty dealing with 'business profit'. It was held that Article 22 would not be applicable in such circumstances. Relevant observations of this decision are as under:

"23. At the time of hearing before us, the learned Departmental Representative has raised an altogether new contention that there being no clause in the Indo-Thailand Treaty dealing with fees for technical services, the amount in question paid by the assessee to SSA is covered by the residuary Article 22 of the Treaty and the same is chargeable to tax in India as other income. We find it difficult to accept this contention of Ld. DR M/s. SSA to whom the payment in question was made by the assessee is a licensee of certain satellite owned by Government of Thailand and it is in the business of providing TV Channels facility of broadcasting their programmes through the transponders located in the said satellite. For the said facility, M/s. SSA recovers service charges from TV Channels like the amount in question recovered from the assessee. keeping in view this nature of business of M/s. SSA, the amount paid by the assessee certainly constitutes business income of M/s. SSA and when the same is not in the nature of royalty or fees for technical services, it is covered by Article 7 of the Indo-Thailand treaty dealing with business income. There is thus no need to take a recourse to Article 22 of the treaty which covers only the items of income which are not covered expressly by any other article of the treaty."

In view of the decision above and the judicial decisions referred to, we are of the considered opinion that the payment of market survey fees to a resident of UAE in the present case will fall under Article 7, i.e., 'business profit', in the absence of an article in the India-UAE treaty dealing with 'fees for technical services'. It is a settled principle that business profit of a resident of a contracting state is not chargeable to tax in the other contracting State unless the non-resident carried out the business through a PE in India. In the case on hand, revenue has not established that the non-resident has a PE in India. Hence in the absence of the PE in India, the business profit of the non-resident is not taxable in India. Even if it is considered that the payments made to non-resident will fall under Article 22 of the Treaty viz. "Other Income", then also the payments are not taxable to tax in India since as per Article 22, income of a resident shall be taxable only in that contracting State i.e., UAE and not in India. In this view of the matter, the payment made to the non-resident was not chargeable to tax in India and, therefore, there was no liability to deduct tax at source in respect of the said payment under section 195 of the Act…..'

(*ii*) In the case of *Sri Subbaraman Subramanian* (*supra*), the earlier Bench of this Tribunal has, with regard to payments to non-residents, observed as under:

"12....the basic question to be considered by us is whether the payment made by the assessee to the agents outside India are in the nature of their business income or fees for technical services. Both the AO as well as the CIT (A) have held the services to be technical services as per provision of s. 9(1)(vii) of the Income-tax Act. For application of the said provision,

the nature of the services rendered by the non-residents in Maldives is to be examined. As far as Gemini International is concerned, we find that it supplies building materials to various tourist resorts at Maldives and to facilitate the delivery of goods to its customers, the assessee has engaged the services of M/s Misc. Maldives Pvt Ltd for weighing the goods, clearance from the Customs of Maldives and their delivery to the purchasers. In this whole exercise, we have to examine whether there is any technical, consultancy or managerial services rendered by the non-resident. For every activity of supervision, certain skill and knowledge of the equipment to be dealt with is required but can it be called as technical services. The agent only receives the material, gets the material cleared from the Customs and delivers it to the purchasers. In this whole exercise, there is no application of mind by the agent and no independent decision taken with regard to the goods to be delivered. In such circumstances, it cannot be said that technical services have been rendered by the agent at Maldives. Therefore, the income earned by the said agent outside India is to be considered as his business income and as held by the Hon'ble Delhi High Court in the case of CIT v. EON Technology (P) Ltd (2012) 343 ITR 366 (Del), the business profits of a non-residents cannot be brought to tax until and unless there is a PE in India…."

(*iii)* The Hon'ble ITAT, Chennai, in the case of *Faizan Shoes (P.) Ltd.* (*supra*) on a similar issue, has observed as under:

"6. On-going through the order of the Commissioner of Income-tax (Appeals), we find that the non-residents are only procuring orders for the assessee and following up payments, no other services are rendered other than procuring the orders and collecting the amounts. The non-residents are not providing any technical services to the assessee. The commission payment made to non-residents also does not fall under the category of royalty or fee of technical services, therefore, the Explanation to sub-section (2) of section 9 has no application to the facts of the assessee's case. We see that this case is squarely covered by the decision of the Supreme Court in the case of *GE India Technology Cen. P Ltd* v. *CIT* (327 ITR 456) wherein the Hon'ble Supreme Court held that the assessee is not liable to deduct TDS when non-residents provided service outside India. It was held that when the services are provided outside India, the commission payments made to non-residents cannot be treated as income deed to accrue or arise in India, therefore, the provisions of section 195 has no application. In order to invoke the provisions of section 195 of the Act, the income should be chargeable to tax in India. Here, the commission payments to non-residents are not chargeable to tax in India and, therefore, the provisions of section 1095 are not applicable. In the circumstances, we sustain the order of the Commissioner of Income-tax (Appeals) in deleting the disallowance made under s. 40(a)(i) of the Act."

(*iv*) Yet another finding, in the case of *Brakes India Ltd.* v. *Dy. CIT (LTU)* with regard to the payments of export sales commission and logistic services made to non-residents for non-deduction of tax at source, the Hon'ble Bench of Chennai Tribunal has observed as under:

"47. In our opinion, nature of services mentioned above will come not within the definition of 'fees for technical services' given under Explanation 2 to section 9(1) (vii) of the Act. By virtue of such services, the concerned recipients had not made available to the assessee any new technique or skill which assessee could use in its business. The services rendered by the said parties related to clearing, warehousing and freight charges outside India. The logistics service rendered was essentially warehousing facility. In our opinion, this cannot be equated

with managerial, technical or consultancy services. Even it is considered as technical service, the fee was payable only for services utilized by the assessee in the business or profession of the non-residents, earned them income outside India. Thus, it would fall within the exception given under sub-clause (b) of section 9(1) of the Act. In any case, under section 195 of the Act, assessee is liable to deduct tax only where the payment made to non-residents is chargeable to tax under the provisions of the Act. In the circumstances mentioned above, assessee was justified in having a bona fide belief that the payments did not warrant application of section 195 of the Act. In such circumstances, we are of the opinion that it could not have been saddled with the consequences mentioned under section 40(a)(i) of the Act….."

7.4 At this juncture, we would like to refer to the AO's observation in respect of the assessee's reliance on CBDT's **Circular No.23 date 23.7.1969** that

"5…. The **Circular No.23 dated 23.7.1969** has been withdrawn resulting in **Circular No.786 dated 7.2.2000** also becoming infructuous." In fact, an identical issue to that of the present one came up for consideration before the Hon'ble Mumbai Tribunal in the case of *Gujarat Reclaim & Rubber Products Ltd.* v. *Addl CIT* wherein the Hon'ble Bench had observed that "4.7. In view of the elaborate discussion made by the CIT (A) in AY 2008-09 with which we fully concur as it is correct both on facts and on law, we uphold the same and dismiss the Revenue ground on this issue in AY 2008-09 and allow assessee's grounds in AY 2007-08…."

7.5 For appreciation of facts, we extract the CIT (A)'s observations verbatim as reproduced by the Tribunal in its order (supra) as under:

"4.3. On page 7.....

The next question for consideration is the effect of withdrawal of Circular No.23 of 1969 and 786 of 2000 by the CBDT vide Circular No.7 of 2009.

I have considered the facts of the case. In the Circular No.23 of 1969 dtd 23.9.1969 some illustration instances of non-resident having business connection in India had been given as under:

- Maintaining a branch office in India for the purchase or sale of goods or transacting other business,
- Appointing an agent in India for the systematic and regular purchase of raw materials or other commodities, or for sale of the non-resident's goods, or for other business purposes
- Erecting factory in India where the raw produce purchased locally is worked out into a form suitable for export abroad.
- Forming a local subsidiary company to sell the products of the non-resident parent company
- Having financial association between a resident and a non-resident company

In the said Circular, CBDT have given clarification regarding the applicability of provisions of sec. 9 in the certain specific situations as under:

(1) Non-resident exporter selling goods from abroad to Indian importer

(2) Non-resident company selling goods from abroad to Indian subsidiary

(3) Sale of plant and machinery to an Indian importer on instalment basis

(4) Foreign agents of Indian exporters - a foreign agent of Indian exporter operates in his own country and no part of his income arises in India. His commission is usually remitted directly to him and is, therefore, not received by him or on his behalf in India. Such an agent is not liable to income-tax in India on the commission.

(5) Non-resident persons purchasing goods in India

(6) Sale by a non-resident to Indian customer either directly or through agents.

(7) Extent of the profit assessable u/s 9

In the above Circular relevant Para is No.4 dealing with the subject of foreign agents of Indian exporters.

The CBDT vide Circular No.7 of 2009 dtd. 22.10.2009 has withdrawn the Circular No.23/1969 with retrospective effect. In the Circular No.23 of 1969, CBDT clarified that the payment made to non-resident commission agents was not liable to income-tax in India. Such clarification of CBDT was based on the provisions of sections 5, 7, 9, 195 and other relevant provisions of the Act. The question for consideration is when there is no relevant change in sections 5, 7, 9, 195 then as to how the withdrawal of Circular No.23 of 1969 of CBDT will make the commission paid to such non-resident commission agents taxable in India. I am of the considered view that even after the withdrawal of Circular No.23 of 1969, the position will remain the same i.e., the commission paid to non-resident agents is not liable to tax under the provisions of I.T. Act when the services were rendered outside India, services were used outside India, payments were made outside India and there was no permanent establishment or business' connection in India. It cannot be accepted that by virtue of CBDT Circular No.23/1969, the commission paid to non-resident agents become not liable to income-tax in India and on such withdrawal of Circular by the CBDT, such commission paid to non-resident agents become liable to income-tax in India. Irrespective of Circular issued by CBDT, the question of taxability of such commission to income-tax has to be decided as per the provisions of section 9(1) of the Act. I am of considered view that the provisions of sec. 9(1) are not applicable to the commission paid to such non-resident agents. Such income (commission) in the hands of non-resident commission agents did not accrue or arise directly or indirectly, through or from any business connection in India. Such income to the non-resident commission agents did not accrue or arise in India through or from any property in India or through the transfer of capital asset situated in India. In the facts and circumstances the provisions of sec. 9(1) were not applicable to such payment of commission by appellant to non-resident agents.

The year under consideration is AY 2008-09 covering the previous year period 1.4.2007 to 31.3.2008. The CBDT issued Circular No.7 of 2009 in the year 2009. In the above mentioned case, the Bench of ITAT have held that withdrawal of such Circular is not having retrospective effect and will be applicable prospectively. In the facts and circumstances,

even if it is assumed that the withdrawal of Circular No.23 of 1969 by the CBDT's Circular No.7 of 2009 is having any effect on taxability of commission paid to non-resident agents, such withdrawal of Circular will not be applicable in the year under consideration. In the facts and circumstances, the Circular No.23 of 1969 will be clearly applicable in the year under consideration making such commission payment not liable to tax in India."

7.6 Further, we have also carefully perused the Comprehensive Agreement dated 18.11.1993 entered into by the Government of India with United Arab Emirates for avoidance of double taxation wherein Article 7 speaks thus -

"Article 7- Business profits - 1. The profits of an enterprise of a Contracting State shall be taxable only in that STATE unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment."

Further, Article 22 of the said agreement specifies that -

"Article 22 - Other income - 1. Subject to the provisions of paragraphs (2), items of income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in the foregoing articles of this agreement, shall be taxable only in that Contracting State."

7.7 To illustrate, the income of the non-resident(s) by way of commission in the present case cannot be considered as accrued or arisen or deemed to accrue or arise in India as the services of such agents, as asserted by the assessee, were rendered / utilised outside India and the commission was also paid outside India. Further, in the absence of permanent establishment(s) of such agents in India, the incomes of the said agents were NOT liable to be taxed in India and, as such, the assessee was not obliged to effect any deduction of tax on the commission payments made to the agents who were positioned overseas.

7.8 The learned A R had also produced a Photostat copy of the assessment order for the A.Y 2010-11 [u/s 143 (3) of the Act dt: 30.3.2012] in the assessee's own case. In the said order, the Assessing Officer has accepted the income returned after verifying various details including the details of TDS made etc. The assessment order was passed subsequent to the order passed u/s 201(1) & 201(1A). The relevant portion of the assessment order read as follows:

"..... During the course of assessment proceedings books of accounts were verified with reference to bills/vouchers. Further the details of sundry debtors/sundry creditors, details of loans and advances, details of direct & indirect expenses, details of processing charges, travelling expenses, professional fees, details of all statutory payments made, details of TDS made etc., were obtained and verified.

After examining the details filed and after discussion with the Accounts Manager of the company, the assessment is completed, determining the total income as under:

Total assessed income Rs.2,20,91,560/-." [As declared by the assessee in its ROI]

7.9 The facts and circumstances of the issue as deliberated upon and also in conformity with the judicial views (supra), we are of the considered view that authorities below were not justified in bringing the assessee's case under the purview of s. 201 (1) of the Act. In substance, the assessee

was not liable to deduct tax at source while making payments of commissions to non-resident agents. It is ordered accordingly.

8. We have since decided that the assessee's case doesn't fall within the ambit of s. 201 (1) of the Act for all the assessment years under consideration, the question of charging of interest u/s 201(1A) of the Act does not arise.

9. In the result, the assessee's appeals for all the assessment years, viz., assessment years 2008-09, 2009-10 and 2010-11 [u/s 201(1) & 201(1A) of the Act] are allowed.