

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD " A " BENCH, HYDERABAD**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA No. 1340/HYD/2010
Assessment Year : 2006-07

***ACIT, Cir-16(3),
Hyderabad.***

.... Appellant

vs.

***M/s. Priyadarshini Spinning Mills Ltd.,
Hyderabad.
PAN: AABCP 2284 K***

...Respondent

Appellant by : Shri K. Viswanatham
Respondent by : None

Date of hearing : 01-08-2012
Date of Pronouncement : 14-09-2012

ORDER

PER SAKTIJIT DEY, J.M.:

This appeal filed by the Revenue is directed against order dated 12-8-2010 of CIT (A)-V, Hyderabad passed in ITA No.0219/DCIT-16(3)/CIT(A)-V/2008-09 and it pertains to the assessment year 2006-07.

2. Despite notice, there was no appearance on behalf of the assessee- respondent during the course of hearing of this appeal. Hence, we proceed to dispose of this appeal ex parte on merits after hearing the learned DR.

3. Grounds raised by the Revenue read as under:-

- 1. The CIT (A) erred both in facts and law.**
- 2. The CIT (A) erred in deleting the addition of Rs.44,03,890/- towards commission on export sales.**
- 3. The CIT (A) ought to have appreciated the fact that the provisions of section 195 of IT Act are clearly applicable in the case of the assessee and as the assessee failed to deduct tax at source, the disallowance made u/s 40(a)(i) ought to have been upheld.**
- 4. The CIT(A) ought to have held that the provisions of section 5(2)(a) are applicable as the commission payments are deemed to have been received in India.**
- 5. Any other ground that may be urged at the time of hearing before the Tribunal."**

4. Ground Nos. 1 and 5 are general in nature and they do not require any adjudication.

5. The sole issue arising for consideration is whether commission paid to non resident agents is chargeable to tax under the Act thereby necessitating deduction of tax at source u/s 195(1) of the Act.

6. Brief facts are the assessee is engaged in manufacture and sale of cotton and synthetic yarn. In course of the assessment proceedings, the AO noticed that the assessee has debited commission on exports at Rs.57,54,660/- out of which Rs.44,03,890/- was paid to foreign agent. When the AO asked the assessee to show cause as to why commission paid shall not

be disallowed for non deduction of tax at source in view of the provisions contained in section 40(a)(1), the assessee submitted that the non resident agent did not carry on any business operations in the taxable territories of India. Commission amounts which were earned by non resident agent for services rendered outside India could not therefore be deemed to be incomes which are accrued or arisen in India. The assessee further relying upon a Circular No.786 dated 7-2-2001 of CBDT submitted that where non resident agent operates outside the country, no part of his income arises in India and since the payment is remitted directly abroad, it cannot be held to have been received on behalf of the agent in India. The AO however disallowed the payment of commission of Rs.44,03,890/- by holding that the commission payment paid to the non resident agent had deemed to have been received in India in view of Hon'ble Supreme Court's decision in the case of Standard Triumph Motor Co. Ltd. Vs.CIT and the decision of ITAT in the case of Cheminar Drugs Ltd. Vs. ITO (TDS) in ITA Nos. 10 and 11/Hyd/96 dated 22-12-1999. The AO held that the foreign agents are working of the assessee for several years and there are no new foreign company to whom the export sales were made. As the assessee is directly dealing with the old customers, there is no need for foreign agents or intermediates, there was no justification for payment of commission to the foreign agents in export sales. The AO held that by virtue of provision under section 5(2)(a), the commission payments to foreign agents are chargeable to tax in India and the assessee having failed to deduct tax u/s 195, the commission on export sales to foreign agents debited to P & L A/c is not an allowable deduction under the provisions of section 40(a)(i) of the Act. The assessee challenged the disallowance by filing an appeal before the CIT

(A). The CIT (A) allowed the appeal of the assessee since an identical issue for the assessment year 2005-06, payment of commission made to foreign agents was allowed.

6. We have considered the submissions of the learned DR. It is seen that identical issue of payment of commission made to the foreign agents came up before this Tribunal in ITA Nos. 1776/Hyd/2011 dated 6-7-2012 in the case of the same assessee. The ITAT, Hyderabad Bench following its order passed in case of Addl. CIT vs. Dr. Reddy's Laboratories (ITA Nos. 692 and 693/Hyd/2000 dated 24-8-2007 and ITA Nos. 84 and 85/Hyd/02 dated 30-5-2008 in the case of DCIT vs. Hyderabad Industries Ltd. Came to hold in the following manner:-

" The reasoning of the AO that since the DDs have been purchased from banks in India and have been sent through courier, the payment of commission deemed to have been paid in India is also not acceptable. It is worth noting that earlier while the ITAT has set aside the assessment to the file of the AO, a clear direction was given to find out whether the payment has been made in India at the request of the foreign agents. We find that the AO has failed to bring any material on record to show that the payments were made to the non resident agents in India at the request of the foreign agents. The ITAT, Hyderabad Bench in case of Dr. Reddy's Laboratories (supra), by relying upon Circular No.786 dated 7-2-2000 of CBDT, held in the following manner:-

" In the case of Transmission Corporation (supra), the facts were that the assessee had entered into certain agreements with certain foreign parties for supply of

equipments. Another set of contracts entered into were for assembling, erection, testing and commissioning of the equipment. Pursuant to these contracts, payments were made by the assessee to the foreign parties without deducting tax under s. 195 of the Act. The contention of the assessee was that s. 195 would be applicable only where the payment to the non resident is wholly income chargeable to tax as it provides that any person responsible for paying to a non resident 'any sum chargeable under the provisions of this Act', shall, at the time of payment, deduct income tax thereon at the rates in force. In other words, the contention was that when the payments made to the non resident were not entirely income, but a trading receipt, there is no question of deduction of income tax at the source as the section does not provide for it. To this contention, the Supreme Court answered that the assessee who made the payments to the non residents was under an obligation to deduct tax at source u/s 195 of the Act in respect of the sums paid to them under the contracts entered into. It further held that the obligation of the assessee to deduct tax u/s 195 is limited only to the appropriate proportion of income chargeable under the Act. Thus, it can be seen that the said judgment in fact helps the assessee. The second question answered by the Supreme Court can be understood to mean that the obligation of the assessee to deduct tax u/s 195 is not there when the payment made to the non resident does not contain any proportion of income therein. In our view, right from the beginning, not only on the basis of the circulars of the Board, but also on the basis of the decision of the Tribunal in its own case, the assessee

firmly believed that no part of the income paid to the foreign agent was taxable in India. Therefore, there was no question of deducting any tax at source on any proportion of the payment made to the non-residents. Thus, the judgment in the case of Transmission Corporation (supra) does not advance the case of the department in the present appeal. Finally, it may be pertinent to note that Circular No.786 dated 7-2-2000 i.e., the same has been issued after the judgment was rendered in the case of Transmission Corporation (supra) i.e., on 17-8-1999. The facts in the assessee's case remain governed by the Board Circular and hence, in the final analysis, respectfully following the earlier order of the Tribunal in the assessee's own case, we uphold the order of the CIT (A) deleting the disallowance."

In the case of DCIT vs. Hyderabad Industries (supra) also ITAT, Hyderabad Bench held the similar view. In the present case, the AO has failed to bring any material on record on the basis of which it could be concluded that commission paid to foreign agents is chargeable to tax in India. Unless the income is chargeable to tax in India, then tax is not required to be deducted u/s 195(1). From the facts and materials available on record, no definite conclusion can be made that the commission paid to foreign agents is chargeable to tax in India. Therefore, the disallowance made u/s 40(a)(i) is not sustainable. Hence, there is no reason to interfere with the finding of the CIT (A) on this issue. The grounds raised by the revenue are rejected."

7. We find the facts in the present appeal are identical with the facts of earlier assessment year and the learned DR has not advanced any arguments which could have enabled us to deviate from our aforesaid conclusion made in assessee's own case in ITA No.1776/Hyd/2011 dated 6-7-2012. In the aforesaid circumstances, following our earlier order (supra) we hold that the payment of commission to the foreign agents having been made outside India, there is no requirement for deduction of tax at source u/s 195(1) of the Act and the CIT (A) was justified in deleting the disallowance made u/s 40(a)(i) of the Act. Hence, grounds raised by the Revenue are dismissed.

8. In the result, the appeal of the Revenue stands dismissed.

Order pronounced in the court on 14-09-2012.

Sd/-

sd/-

**(CHANDRA POOJARI)
ACCOUNTANT MEMBER**

**(SAKTIJIT DEY)
JUDICIAL MEMBER**

Hyderabad,
Dated the 14th Sept. 2012.

Copy to:-

- 1) ACIT, Circle-16(3), Hyderabad.
- 2) M/s Priyadarshini Spinning Mills Ltd., Satyanarayana Enclave, ICON Block, 2nd Floor, Madinaguda, Hyderabad.
- 3) The CIT (A)-V, Hyderabad
- 4) The CIT Concerned, Hyderabad
- 5) The Departmental Representative, I.T.A.T., Hyderabad.

*Jmr**

