

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'F' NEW DELHI)

BEFORE SHRI A.D. JAIN, JUDICIAL MEMBER
AND
SHRI T.S. KAPOOR, ACCOUNTANT MEMBER

I.T.A. No.522/Del/2011
Assessment year : 2007-08

ITO,
Ward-124 (3),
New Delhi.

M/s Planet Herbs Life Science
Pvt. Ltd. E-30, Basement,
V. Anand Niketan, New Delhi.

(Appellant)

(Respondent)

PAN /GIR/No.AADCP-7214-R

Appellant by : Shri K.K. Mishra, Sr. DR.

Respondent by : Shri Jeetan Nagpal, FCA.

ORDER

PER TS KAPOOR, AM:

This is an appeal filed by the revenue against the order of Ld CIT(A)-XVII, New Delhi dated 30.11.2010 for assessment year 2007-08. The grounds raised by the revenue are as under:-

1. That on the facts and circumstances of the case and in law the Ld CIT(A) erred in deleting the disallowance of ₹.28,38,957/- made by the Assessing Officer u/s 40a(ia) on account of unverified maintenance expenses.
2. That on the facts and circumstances of the case and in law the decision of the Ld CIT(A) does not seem to be reasonable in view of the observations and findings of the Hon'ble Apex Court in the

case of Transmission Corporation of A.P. v. CIT AP 239 ITR 587 (SC).

3. That the appellant craves to be allowed to add any fresh grounds of appeal and/or delete or amend any of the grounds of appeal.

2. The brief facts of the case are that the appellant is a private limited company and is engaged in the business of trading of herbal and nutraceuticals. The return of income for the assessment year 2007-08 was filed declaring loss of ₹.27,23,595/-. The case was selected for scrutiny. During the course of assessment proceedings, the Assessing Officer noticed that the assessee has paid an amount of ₹.28,38,957/- to M/s Whyte Mideast on account of manpower and maintenance expenses. The Assessing Officer confronted the assessee for non deduction of TDS on the above payment. The assessee stated in his reply that these payments are in the nature of reimbursement of expenses incurred by the party on its behalf and further submitted that section 40a(i) of the Act deals with the expenses incurred in the nature of interest, royalty fees for technical services or any other sum chargeable under this Act. Since the payment to this party is not related to these payments, the same is not subject to TDS and therefore should not be disallowed u/s 40a(i) of the Act. However, the submission of the assessee did not find favour with Assessing Officer and the Assessing Officer added this amount of ₹.28,38,957/-. Aggrieved, the assessee filed appeal before Ld CIT(A).

3. Before the Ld CIT(A), the assessee argued that payee M/s Whyte Mideast is a non resident company and the expenses incurred was in the nature of reimbursement of expenses incurred by payee outside India on behalf of the appellant and the reimbursement was in

accordance with the terms of supply agreement entered into between the appellant and the payee.

4. The Ld AR further argued before CIT(A) on the following grounds:-

1. That the expenses incurred by Whyte Mideast were on purely for and on behalf of the appellant;
2. That the appellant was under an obligation to reimburse to M/s Whyte Mideast for the expenses incurred by it in relation to business development and marketing of appellant's products.
3. That no part of the payment made by the appellant represented income of M/s Whyte Mideast.
4. That the nature and spirit of arrangement between the assessee party was to compensate the non resident company for the business promotion and other expenses incurred by it for and on behalf of the appellant.
5. That the amount paid or payable to non resident should first be chargeable to tax in the hands of payee as the payment or deduction of pre and post assessment taxes contemplates the existence of tax liability. Since the amount paid to the non resident is not chargeable to tax in India, the payer in India is not under any obligation to deduct tax at source.

5. Reliance was placed upon in the case of DCIT v. Lazard & Co. Services Ltd. (2010) 6 Taxman.com wherein Bombay ITAT held that the amount paid by the assessee outside India were reimbursement of expenses and are not subject to deduction of tax. The Ld AR also cited the case of Mahendra & Mahendra Ltd. v. DCIT (2009) 30 SOT 374 (Mum.) wherein the Bombay ITAT Bench had held that the under lying

principle behind the deduction of tax at source is the presumption that there will be some liability of the payee towards tax on the sum paid to him. If there is such liability then the entire exerciser of getting the amount of tax collected/deducted at source and then refundable to the payee will be futile.

6. The Ld AR also placed reliance on the decision of Hon'ble Supreme Court in the case of G.E. Technology Centre Pvt. Ltd. v. CIT (2010) 7 Taxman.com 80 (SC).

7. After hearing the pleadings, the Ld CIT(A) decided the case in favour of the assessee and deleted the addition made by the Assessing Officer. The relevant portion of CIT(A)'s order is reproduced below:-

"I have carefully considered the submission made by the appellant and perused the assessment order passed by the Assessing Officer. The appellant has given the details of the expenses of ₹.28,38,957/- as per page 1 of the paper book filed on the record. It is seen that these expenses include business promotion expenses, exhibition expenses, printing and stationery, telephone & telefax, traveling expenses and manpower, administrative and communication expenses in respect of Dubai office. The appellant has submitted that these were expenses incurred on behalf of the appellant and the appellant has only reimbursed them. The Assessing Officer has not brought any positive evidence on record to establish that it was not the reimbursement of the expenses. The Apex Court in the case of GE India Technology Centre (P) Ltd. v. CIT (2010) 7 Taxman.com. 80(SC) has held that section 195(2) is not merely a provision to provide information to the ITO(TDS), it is a provision

requiring tax to be deducted at source to be paid to the revenue by the payer who makes payment to a non resident, therefore, Section 195 has to be read in conformity with the charging provisions i.e. section 4,5 and 9. The Apex Court further held that the fact that the revenue has not obtained any information per se cannot be a ground to construe section 195 widely so as to require deduction of tax at source even in a case where an amount paid is not chargeable to tax in India at all. In the case under consideration the nature of payment made by the appellant to Whyte Mideast were reimbursements of expenses which are not chargeable to tax under provisions of section 4,5 & 9 of the Act. In view of the facts and circumstances of the case and judicial pronouncements on the issue, I am of the considered opinion that the payment made by the appellant were reimbursement of expenses and therefore, no disallowance is required u/s 40a(ia) of the Act. In view of the above discussion, the addition made by the Assessing Officer is deleted."

7. Aggrieved, the revenue has filed appeal before this Tribunal.

8. We have heard the rival parties and have gone through the material placed on record. The Ld DR relied upon the order of the Assessing Officer and argued that since the assessee has not deducted tax on payments made which were contractual in nature, the addition has rightly been made u/s 40a(ia) of the Act and therefore the order the order of CIT(A) be reversed and order of Assessing Officer be restored. The Ld AR pleaded that provisions of tax deduction at source are not applicable in respect of payments made to a non resident as the income in the hands of such non resident is not taxable in India. From the facts of the case, it is apparent that the payment of

₹.28,38,957/- was made as reimbursement of expenses which was per the terms & conditions of agreement entered into between the payer and payee and further the payment was made to a non resident company which is situated outside India. The CIT(A) has rightly observed that these were expenses incurred on behalf of appellant and the appellant has only reimbursed them and further the Assessing Officer had not brought any positive evidence on record to establish that it was not reimbursement of expenses. The CIT(A) has further rightly considered the fact in the case of G.E. India Technology Centre Pvt. Ltd. V. CIT (2010) 7 Taxman.com 80 (SC) wherein the Apex Court has held that where an amount paid is not chargeable to tax In India at all, there is no requirement of tax deduction. Section 195 of the Act clearly states that any person responsible for paying to a non resident any interest or any other sum **chargeable under the provisions of this Act** shall at the time of credit of such income will income tax thereon at the rate inforce at the time of payment or credit. Therefore, the first test to be applied for deduction of TDS is to see whether income in the hands of payee is taxable in India or not. In the present case, the payments were reimbursement of expenses and was in no way income chargeable to tax in India in the hands of the payee and hence did not require any tax deduction at source and therefore addition made u/s 40a(ia) of the Act was not warranted. The facts of the case in Transmission Corporation of AP Ltd. v. CIT 239 ITR 587 (SC) do not match with the facts of present case because in the case of Transmission Corporation (supra), the assessee had made certain payments to non resident against the work executed by non resident in India and therefore in that case income had arisen to non resident in India whereas in the present case no such income has arisen to non resident in India. In view of the above, we do not see any reason to interfere in the order of Ld CIT(A).

9. In the result, the appeal filed by the revenue is dismissed.
10. Order pronounced in the open court on the 25th day of May, 2012.

Sd/-
(A.D. JAIN)
JUDICIAL MEMBER

Sd/-
(T.S. KAPOOR)
ACCOUNTANT MEMBER

Dt. 25.5.2012.
HMS

Copy forwarded to:-

1. The appellant
 2. The respondent
 3. The CIT
 4. The CIT (A)-, New Delhi.
 5. The DR, ITAT, Loknaya Bhawan, Khan Market, New Delhi.
- True copy.

By Order

(ITAT, New Delhi).

Date of hearing

Date of Dictation

Date of Typing

Date of order signed by both the Members & pronouncement. 25.5.2012

Date of order uploaded on net & sent to the Bench concerned.

