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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **INCOME TAX APPEAL NOS. 280/2013 & 454/2013**

Date of decision: 23rd September, 2013

COMMISSIONER OF INCOME TAX-I

..... Appellant

Through Mr. Sanjeev Rajpal, Sr. Standing Counsel.

versus

ANGELIQUE INTERNATIONAL LTD

..... Respondent

Through Nemo.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J. (ORAL):

Revenue by this appeal under Section 260A of the Income Tax Act (Act, for short) claims that the assessee had defaulted and failed to deduct tax at source on commission/discount on sale of Rs.37,87,26,158/- paid to non-residents situated outside India and who do not have any office or permanent establishment in India. This amount of Rs.37,87,26,158/-, actually paid and incurred as expenditure by the respondent assessee, has been disallowed relying upon Section 40(a)(i) of the Act.

2. Factually, there is no dispute and it is accepted that the payments were made and are genuine payments. It is accepted that the parties to whom payments have been made do not have permanent establishment in India. These third parties were paid for having procured or obtained export orders, clearance of goods abroad, support in scheduling timely inspection of goods, insurance, clearance, follow up, arranging payments etc. The payments made to these foreign parties were within the limit prescribed by Reserve Bank of India and were made through proper banking channels.

3. The respondent assessee has relied upon Circular Nos. 23 dated 23rd July, 1969, 163 dated 29th May, 1975 and 786 dated 7th February, 2000. The latter two circulars were by way of clarification.

4. These circulars were subsequently withdrawn by Circular No. 7/2009 dated 22nd October, 2009. The assessment year in question is 2009-10 and relates to the financial year ending 31st March, 2011.

5. We accept the position that under the circulars, payments made in form of a commission or discount to the foreign party was not chargeable to tax in India under Section 9(1)(vii) of the Income Tax Act, 1961.

6. The aforesaid circulars were referred to in decision of this Court in ***Commissioner of Income Tax versus Eon Technology Private Limited,*** (2012) 343 ITR 366 (Delhi). Reference was made to

decision of the Supreme Court in ***CIT versus Toshoku Limited,*** (1980) 125 ITR 525 (SC). This case relates to Assessment Year 1962-63 and the Indian assessee had paid commission to foreign companies through whom they had procured export orders. Two questions arose; firstly what was the effect of entries in the books of accounts of the Indian assessee and payment to the foreign companies; and secondly whether procurement of export orders by foreign company for the Indian company had resulted in business connection. The contentions were rejected relying upon the aforesaid circulars. In the present case, the Assessing Officer has not invoked Section 9(1)(i) but relied on Section 9(1)(vii). However, Circular Nos. 23 dated 23rd July, 1969 and 786 dated 7th February, 2000 do not make any such distinction. The relevant portions of the said circulars were quoted in ***Eon Technology Private Limited*** (supra) and read as under:-

> "Circular No. 23, dated July 23, 1969
>
> 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.
>
> Circular No. 786, dated February 7, 2000
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> As clarified earlier in Circular No. 23,

> dated July 23, 1969, (see under section 5) where the non-resident agent operates outside the country, no part of his income arises in India, and 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 not taxable in India. This clarification still prevails. In view of the fact that the relevant sections (section 5(2) and section 9) have not undergone and change in this regard. No tax is, therefore, deductible under section 195 from export commission and other related charges payable to such a non-resident for services rendered outside India."

7. In ***Uco Bank, Calcutta versus Commissioner of Income Tax,W.B.***, (1999) 4 SCC 599, three Judges of the Supreme Court considered effect of a circular issued under Section 119(1) of the Act and reference was made to the earlier decisions, including ***Navnit Lal C. Javeri versus K.K. Sen***, (1965) 56 ITR 198 (SC) and majority judgment of the Supreme Court in ***State Bank of Travancore versus CIT***, (1986) 158 ITR 102 and it was observed as under:-

> "**15.** The said circulars under Section 119 of the Income Tax Act were not placed before the Court in the correct perspective because the latter circular continuing certain benefits to the assessees was overlooked and the withdrawn circular was looked upon as in conflict with law. Such circulars, however, are not meant for contradicting or nullifying any provision of the statute. They are meant for ensuring proper administration of the statute, they are designed to mitigate the rigours of the application of a particular provision of the statute in certain

situations by applying a beneficial interpretation to the provision in question so as to benefit the assessee and make the application of the fiscal provision, in the present case, in consonance with the concept of income and in particular, notional income as also the treatment of such notional income under accounting practice.

16. In the premises the majority decision in *State Bank of Travancore* v. *CIT* [(1986) 2 SCC 11 : 1986 SCC (Tax) 289 : (1986) 158 ITR 102] cannot be looked upon as laying down that a circular which is properly issued under Section 119 of the Income Tax Act for proper administration of the Act and for relieving the rigour of too literal a construction of the law for the benefit of the assessee in certain situations would not be binding on the departmental authorities. This would be contrary to the ratio laid down by the Bench of five Judges in *NavnitLal C. Javeri* v. *K.K. Sen* [AIR 1965 SC 1375 : (1965) 1 SCR 909 : (1965) 56 ITR 198] . In fact, *State Bank of Travancore* v. *CIT* [(1986) 2 SCC 11 : 1986 SCC (Tax) 289 : (1986) 158 ITR 102] has already been distinguished in the case of *KeshavjiRavji and Co.* v. *CIT* [(1990) 2 SCC 231 : 1990 SCC (Tax) 268 : (1990) 183 ITR 1] by a Bench of three Judges in a similar fashion. It is held only as laying down that a circular cannot alter the provisions of the Act. It being in the nature of a concession, could always be prospectively withdrawn. In the present case, the circulars which have been in force are meant to ensure that while assessing the income accrued by way of interest on a "sticky" loan, the notional interest which is transferred to a suspense account pertaining to doubtful loans would not be included in the income of the assessee, if for three years such interest is not actually received.....

> **17.** We do not see any inconsistency or contradiction between the circular so issued and Section 145 of the Income Tax Act. In fact, the circular clarifies the way in which these amounts are to be treated under the accounting practice followed by the lender. The circular, therefore, cannot be treated as contrary to Section 145 of the Income Tax Act or illegal in any form. It is meant for a uniform administration of law by all the Income Tax Authorities in a specific situation and, therefore, validly issued under Section 119 of the Income Tax Act. As such, the circular would be binding on the Department."

8. Referring to this decision, in ***Catholic Syrian Bank Limited versus Commissioner of Income Tax***, (2012) 3 SCC 784, it has been observed that the Central Board of Direct Taxes has statutory right to issue circulars under Section 119 of the Act to explain or tone down the rigours of law and to ensure fair enforcement of the provisions. Circulars issued have force of law and are binding of the Income Tax authorities though they cannot be enforced adversely against the assessee. Normally these circulars cannot be ignored. Thus a circular may not override or detract from the provisions of the Act but can seek to mitigate the rigour of a particular provision for the benefit of an assessee in specified circumstances.

9. First circular in question had been in force for a long time, from 1969. The Board may have withdrawn this circular and other circulars vide Circular No. 7 dated 22nd October, 2009 but the said withdrawal

cannot be retrospective. Circular No. 7 of 2009 cannot be classified as explaining or clarifying the earlier circulars issued in 1969 and 2000. This assertion in the assessment order is far-fetched and does not merit acceptance. Circular No. 7 does not clarify the earlier circulars but withdraws them. This is obvious and apparent. Circulars in force in the relevant assessment year have to be taken into consideration and should not be ignored.

10. So long as the circulars were in force, it aided in uniform and proper administration and application of the provisions of the Act. Read in this manner, we do not think the respondent-assessee was in default and had failed to deduct at source, though it was mandated and required. The respondent was entitled to rely upon the circulars. In light of the judgments of the Supreme Court in ***CIT versus Eli Lilly Company (India) Private Limited***, (2009) 312 ITR 225 (SC) and ***G.E India Technologies Centre Private Limited versus CIT***, (2010) 327 ITR 456 (SC), once the income was not exigible or chargeable to tax, TDS was not required to be deducted. Money paid to the third parties, who did not have any office or permanent establishment in India, was exempt and not chargeable to tax. Thus on the said payments or income, TDS was not required to be deducted. We also note that the payments in question were made prior to circular No. 7/2009. On this aspect, there is no dispute. We, therefore, do not find any reason to

interfere with the order passed by the tribunal deleting the addition made by the Assessing Officer under Section 40(a)(i) of the Act. The appeal, being devoid of merit, is dismissed.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

SEPTEMBER 23, 2013
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