2023:DHC:5354-DB

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

Date of Decision: 28th July, 2023

\+ **ITA 22/2021**

PR. COMMISSIONER OF INCOME TAX - 16 NEW DELHI
..... Appellant

Through: Mr. Sanjay Kumar & Ms. Easha, Advocates.

versus

MAHARANI ENTERPRISES ..... Respondent

Through: Mr. Piyush Kaushik, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN

O R D E R

% 28.07.2023

VIBHU BAKHRU, J.

1. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereafter '**the Act**'), impugning an order dated 06.08.2019, passed by the Income Tax Appellate Tribunal (hereafter '**the Tribunal**'). The impugned order is a common order which disposed of two appeals filed by the Revenue impugning two separate orders dated 16.06.2017 passed by the Commissioner Income Tax (Appeals) relating to the assessment years 2013-2014 and 2014-2015 respectively.

2. The present appeal relates to the dismissal of the appeal relating

to the assessment year 2013- 2014.

3. The controversy involved in the present appeal relates to disallowance of ₹4,13,48,057/- under Section 40(a)(i) of the Act made by the Assessing Officer (AO) on account of non-deduction of TDS.

4. The respondent assessee had sought deduction of certain expenditure being the commission paid to agent overseas and had not deducted the tax at source. According to the AO, the non-deduction of TDS under Section 195 of the Act disentitled the assessee to avail of any deduction on that account.

5. It is the assessee's case that the commission paid to overseas agents was not chargeable to tax under the Act; therefore, it had no obligation to deduct TDS.

6. The learned Tribunal considered the aforesaid controversy and, following the decision in the earlier years – order dated 09.10.2018 (in ITA No.3575/Del./2015) relating to assessment year 2012 – 2013, dismissed the appeal of the Revenue.

7. The learned Tribunal found that the export commission was paid to agents overseas on account of services rendered overseas. The agents had procured orders abroad and were paid the commission for the same. In view of the said finding, the learned Tribunal held that the commission paid did not accrue in India on the purchase orders being serviced by the assessee.

8. It is the Revenue's contention that the question whether any income is chargeable to tax in the hands of a non-resident agent, is required to be considered in its assessment and notwithstanding the question regarding chargeability of such income, the payer is required

to deduct and deposit TDS on any payments made by it.

9. The said contention is unmerited. Section 195 of the Act provides for deduction of tax in respect of the income that is chargeable under the Act. There is no obligation on the part of an assessee to deduct or deposit tax if the payments made by it to non-residents is not chargeable to tax under the Act.

10. The Hon'ble Supreme Court in the case of ***Commissioner of Income – Tax, A.P v. Toshoku Ltd***.; **1980 125 ITR 525 (SC)**, had considered a case of payment of commission to a Japanese company, which was appointed as an exclusive sales agent for Tobacco exported to Japan. In the aforesaid context, the Hon'ble Supreme Court has observed as under:

> *"12. The second aspect of the same question is whether the commission amounts credited in the books of the statutory agent can be treated as incomes accrued, arisen, or deemed to have accrued or arisen in India to the non-resident assessees during the relevant year. This takes us to Section 9 of the Act. It is urged that the commission amounts should be treated as incomes deemed to have accrued or arisen in India as they, according to the Department, had either accrued or arisen through and from the business connection in India that existed between the non-resident assessees and the statutory agent. This contention overlooks the effect of clause (a) of the Explanation to clause (i) of sub-section (1) of Section 9 of the Act which provides that in the case of business of which all the operations are not carried out in India, the income of the business deemed under that clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. If all such operations are carried out in India, the entire income accruing therefrom shall be deemed to have accrued in India. If, however, all the operations are not carried out in the taxable territories, the profits and gains of business deemed to accrue in India through and from business connection in India shall be only such profits and gains as are reasonably*

> *attributable to that part of the operations carried out in the taxable territories. If no operations of business are carried out in the taxable territories, it follows that the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India.*
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> *13. In the instant case the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assesses in India as contemplated by clause (a) of the Explanation to Section 9(1)(i) of the Act. The commission amounts which were earned by the non-resident assessees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the Department."*

11. The Commissioner Income Tax (Appeals) had, following the aforesaid decision, allowed the assessee's appeal against the assessment order dated 05.02.2016.

12. It is trite law that a foreign resident who does not carry on any business operations in the taxable territories in India, and has no permanent establishment or business connection, is not liable to pay tax under the Act in respect of any amount remitted by resident assessee.

13. In the present case, there is no material on record to even remotely suggest that the non-resident, who had been paid the export commission had any permanent establishment in India; had carried on any business within the taxable territory in India; or had any business connection in India rendering them liable to pay tax under the Act. There is also no allegation that the payments made were not *bona fide*

expenses.

14. In the circumstances, we find that no substantial question of law arises in the present case.

15. The appeal is, accordingly, dismissed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JULY 28, 2023
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