IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "B", LUCKNOW

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI. A. K. GARODIA, ACCOUNTANT MEMBER

ITA No.636/LKW/2013
Assessment Year:2010-11

ACIT-1 Kanpur	v.	M/s Northern Tannery 150 Ft. Road, Jajmau Kanpur
		TAN/PAN:AAAFN6778L
(Appellant)		(Respondent)

C.o. No.42/LKW/2013
[Arising out of ITA No.636/LKW/2013]
Assessment Year:2010-11

M/s Northern Tannery 150 Ft. Road, Jajmau Kanpur	v.	ACIT-1 Kanpur
TAN/PAN:AAAFN6778L		
(Applicant)		(Respondent)

Department by:	Shri. Amit Nigam, D.R.		
Assessee by	Shri. Ashish Jaiswal, Advocate		
Date of hearing:	19	03	2015
Date of pronouncement:	18	06	2015

O R D E R

PER SUNIL KUMAR YADAV:

This appeal is preferred by the Revenue against the order of the ld. CIT(A), inter alia, on the following grounds:-

1. That the Ld. Commissioner of Income tax (Appeals)-II, Kanpur has erred in law and on facts in deleting addition of Rs.24,84,645/- made by the assessing officer on account of non-deduction of TDS on payment of commission to Foreign Agent without appreciating,

the facts brought on record by the Assessing Officer during the course of assessment proceedings.

2. The Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in Law and on facts in deleting the above addition made by the assessing officer without considering the Board's circular No.7/2009 dated 22.10.2009.

3. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has not appreciated the settled principle in respect of interpretation of prospective or retrospective nature of amendment in the statute as laid down by the Hon'ble Supreme court in the case of CIT Vs Gold Coin Health Food Pvt. Ltd.(008) 304 ITR 308 (SC) and CIT Vs Moser Baer India Ltd. [2009] 315 1TR 460(SC).

4. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in not appreciating the fact that the services rendered by the non resident agent to procure orders from foreign buyers are purely technical as well as managerial in nature. Therefore, the provisions of section 9(1) (vii) are clearly applicable on the assessee.

5. That the Ld. Commissioner of Income Tax (Appeals)-ll, Kanpur has erred in law and on facts in not appreciating the fact that the payment by the resident assessee in connection with its business in India to a person outside country is nothing but a fee which has been paid by the resident assessee to the non□resident for the technical services rendered by him.

6. The Ld. Commissioner of Income Tax (Appeals)-I, Kanpur has erred in law and on facts in deleting the addition of Rs.1,00,000/- made by the assessing officer on account of .foreign travelling expenses without appreciating the facts brought on record by the Assessing Officer.

7. The Ld. Commissioner of Income Tax (Appeals)-I, Kanpur has erred in law and on facts in deleting the addition of Rs. 2,00,000/-

made by the assessing officer on account of repair & maintenance of machinery expenses without appreciating the facts brought on record by the Assessing Officer.

8. The Ld. Commissioner of Income Tax (Appeals)-I, Kanpur has erred in law and on facts in deleting the addition of Rs. 2,50,000/- made by the assessing officer on account of miscellaneous expenses without appreciating the facts brought on record by the Assessing Officer.

9. That the order of the Ld. CIT (A)-II, Kanpur dated 24.05.2013 needs to be quashed and the order passed by the Assessing Officer dated 27.02.2013 to be restored.

2. In support of the order of the ld. CIT(A), the assessee has filed cross objection. We, therefore, heard the appeal as well as the cross objection together.

3. The main issue involved in the Revenue's appeal is with regard to the deletion of addition of Rs.24,84,645/- made by the Assessing Officer on account of non-deduction of TDS on payment of commission to foreign agent.

4. The ld. counsel for the assessee has invited our attention to the order of the Tribunal in the assessee's own case for assessment year 2009-10 which is placed on record at pages 59 to 66 of the compilation of the assessee, in which identical issue was discussed and the Tribunal, having followed the judgment of the Hon'ble jurisdictional High Court in the case of CIT vs. M/s Model Exims, 358 ITR 2 (Alld), decided the issue in favour of the assessee and the view taken by the ld. CIT(A) was confirmed. The ld. counsel for the assessee has further contended that since the issue is squarely covered by the earlier order of the Tribunal in the assessee's own

case for the immediately preceding year, the order of the ld. CIT(A) deserves to be confirmed.

5. The ld. D.R., on the other hand, has submitted that the assessment year involved is 2010-11 and the Explanation added to section 9(1)(vii) of the Income-tax Act, 1961 (hereinafter called in short "the Act") by the Finance Act, 2010 w.e.f. 1.6.1976 was to be considered and since it was not considered by the lower authorities while adjudicating the issue, therefore, the matter is required to be set aside to the file of the Assessing Officer for re-adjudication of the issue in the light of Explanation added to section 9(1)(vii) of the Act by the Finance Act, 2010.

6. The ld. counsel for the assessee, in rebuttal, has contended that this argument was also considered by the Hon'ble High Court in the case of CIT vs. M/s Model Exims (supra), therefore, adjudication of the issue in the light of Explanation added to section 9(1)(vii) of the Act by the Finance Act, 2010 is not called for.

7. Besides, the ld. counsel for the assessee has also placed reliance upon the judgment of the jurisdictional High Court in the case of CIT vs. Model Exims reported in 42 taxmann.com 446 (Alld) and Director of Income-tax (International Taxation)-II vs. Panalfa Autoelektrik Ltd., 49 taxmann.com 412 (Delhi) and the order of the Tribunal in the case of ACIT-1, Kanpur vs. M/s S. K. International, Kanpur in I.T.A. No. 757/LKW/2014 in support of his contention that where there is no evidence that the non-resident has ever rendered technical services or consultancy services or managerial services, disallowance cannot be made on account of non-deduction of tax. Non-resident was clearly appointed as commission agent for sale of products within the territory specified and in accordance with the terms set out, which was accepted by the non-resident, therefore, no deduction of tax was required on payment of commission to non-resident.

8. Having carefully examined the orders of the lower authorities in the light of the rival submissions, we find that we have been taking a consistent view in series of cases that wherever the payments are made on account of commission for procuring orders for sale, tax was not required to be deducted at source. Reference was made to the provisions of section 9(1)(vii) of the Act and Explanation added to section 9(1)(vii) of the Act by the Finance Act, 2010, but this aspect has already been examined by the jurisdictional High Court in the case of CIT vs. M/s Model Exims (supra). Following the judgment of the Hon'ble jurisdictional High Court in the case of CIT vs. M/s Model Exims (supra), the Tribunal has concluded in the assessee's own case in the immediately preceding year that tax was not required to be deducted at source on commission payment to foreign agents who has rendered services outside India. The commission paid to foreign agents for procuring orders cannot be called either to rendering of technical services or managerial or consultancy services. These different types of services were examined by the Hon'ble Delhi High Court in the case of Director of Income-tax (International Taxation)-II vs. Panalfa Autoelektrik Ltd. (supra) and their Lordships have held that services rendered for procurement of export orders etc. cannot be treated as managerial services provided by the non-resident to the respondent assessee. Their Lordships further defined the consultancy services and technical services. For the sake of reference, we extract the relevant observation of the Hon'ble High Court of Delhi as under:-

> *"The expression 'managerial, technical and consultancy services' have not been defined either under the Act or under the General Clauses Act, 1897. The said terms have to be read together with the word 'services' to understand and appreciate their purport and meaning. One has to examine the general or common usage of these words or expressions, how they are interpreted and understood by the persons*

engaged in business and by the common man who is aware and understands the said terms. [Para 14]

The services rendered, the procurement of export orders, etc. cannot be treated as management services provided by the non-resident to the respondent-assessee. The non-resident was not acting as a manager or dealing with administration. It was not controlling the policies or scrutinizing the effectiveness of the policies. It did not perform as a primary executor, any supervisory function whatsoever. This is clear from the facts as recorded by the Commissioner (Appeals), which have been affirmed by the Tribunal. [Para 15]

The non-resident, it is clear was appointed as a commission agent for sale of products within the territories specified and subject to and in accordance with the terms set out, which the non-resident accepted. The non-resident, therefore, was acting as an agent for procuring orders and not rendering managerial advice or management services. Further, the respondent-assessee was legally bound with the non-residents' representations and acts, only when there was a written and signed authorization issued by the respondent-assessee in favour of the non-resident. Thus, the respondent- assessee dictated and directed the non-resident.

The Commissioner (Appeals) has also dealt with quantification of the commission and as per agreement, the commission payable was the difference between the price stipulated in the agreement and the consideration that the respondent-assessee received in items of the purchase contract or order, in addition to a predetermined guarantee consideration. Again, an indication contra to the contention that the non-resident was providing management service to the respondent-assessee. [Para 16]

The revenue has not placed copy of the agreement to contend that the aforesaid clauses do not represent the true nature of the transaction. The Assessing Officer in his order had not bothered to refer and to examine the relevant clauses, which certainly was not the right way to deal with the issue and question. [Para 17]

Further, would be incongruous to hold that the non-resident was providing technical services. The non-resident had not undertaken or performed 'technical services', where special skills or knowledge relating to a technical field were required. Technical field would mean applied sciences or craftsmanship involving special skills or knowledge but not fields such as arts or human sciences. [Para 19]

The moot question and issue is whether the non-resident was providing consultancy services. [Para 20]

The word 'consultant' refers to a person, who is consulted and who advises or from whom information is sought. In Black's Law Dictionary, Eighth Edition, the word 'consultation' has been defined as an act of asking the advice or opinion of someone (such as a lawyer). It may mean a meeting in which parties consult or confer. For consultation service under Explanation 2, there should be a provision of service by the non-resident, who undertakes to perform it, which the acquirer may use. The service must be rendered in the form of an advice or consultation given by the non-resident to the resident Indian payer. [Para 21]

In the present case commission paid for arranging of export sales and recovery of payments cannot be regarded as consultancy service rendered by the non-resident. The non-resident had not rendered any consultation or advice to the respondent-assessee. The non-resident no doubt had acquired skill and expertise in the field of marketing and sale of automobile products, but in the facts, as noticed by the Tribunal and the commissioner (Appeals), the non-resident did not act as a consultant, who advised or rendered any counselling services.

The skill, business acumen and knowledge acquired by the non-resident were for his own benefit and use. The non-resident procured orders on the basis of the said knowledge, information and expertise to secure 'their' commission. It is a case of self-use and benefit, and not giving advice or consultation to the assessee on any field, including how to procure export orders, how to market their

products, procure payments etc. The assessee upon receipt of export orders, manufactured the required articles/goods and then the goods produced were exported. There was no element of consultation or advice rendered by the non-resident to the respondent-assessee. [Para 22]

The technical services consists of services of technical nature, when special skills or knowledge relating to technical field are required for their provision, managerial services are rendered for performing management functions and consultancy services relate to provision of advice by someone having special qualification that allows him to do so. In the present case, the aforesaid requisites and required necessities are not satisfied. Indeed, technical, managerial and consultancy services may overlap and it would not be proper to view them in watertight compartments, but in the present case this issue or differentiation is again not relevant. [Para 25]"

9. The scope of Explanation 2 to section 9(1)(vii) of the Act by the Finance Act, 2010 was also examined by the jurisdictional High Court in the case of CIT vs. Model Exims (supra) which was followed by the Tribunal in the assessee's own case for the immediately preceding year. The relevant observations of the Tribunal are extracted hereunder for the sake of reference:-

"5. The ld. counsel for the assessee has contended that this issue is covered by the order of the jurisdictional High Court and various orders of the Tribunal, particularly in the case of ACIT vs. M/s Model Exims, Kanpur in I.T.A. No. 697/LKW/2013 in the light of CBDT circular and amendments. We find that the view taken by the Tribunal has been approved by the Hon'ble High Court of Allahabad in the case of CIT vs. M/s Model Exims, 358 ITR 2 (Alld). The relevant observations of the Hon'ble High Court are extracted hereunder:-

"We find that all the questions as framed by the department are covered by our judgment in CIT v. M/s Model Exims, Kanpur, Income Tax Appeal (Def.) No.164 of 2011, decided in favour of the assessee and against the revenue on 10.09.2013 and die judgment in CIT, Kanpur v. M/s Allied Exims, Income Tax Appeal No.313 of 2013 decided on 13.11.2013. In both these judgments we have held, that A.O. did not bring anything on record, which could demonstrate that non-resident agents were appointed as selling agents, designers or technical advisers. The payment of commission to foreign agents did not entitle such foreign agents to pay tax in India and thus the TDS was not liable to be deducted under Section 195 of the Act. The disallowance made by A.O. under Section 40 (a) (i) for non-deduction of tax at source under Section 195 were not justified.

Shri Bharat Ji Agrawal has tried to distinguish the judgments on the ground that in the present case there was sufficient material by way of written submissions of the assessee, who had stated in his reply on 20.12.2010 that the assessee is engaged in business of manufacture and export of finished leather, shoe upper and leather products. The assessee's main business being export business it has to take the service of foreign agents, who secure export orders and help in execution of such business. For the services rendered by the foreign agents, they are paid commission in foreign exchange by remitting the amount through bank.

We find that the CIT (A) has considered the alleged admission in the reply of the assessee and has also perused the agreement from which he found that there was nothing, which could demonstrate that these agents were appointed as selling agents, designers or technical advisers for invoking the provisions of Section 9 (1) (vii) of the Act. The findings recorded by the CIT (A), which have been confirmed by the ITAT is quoted as below:-

"5.3.2 The A. O. has also invoked the provisions of Section 9 (1) (vii) on the premise that such payments also full under FTS. In this regard she has observed that normally the exporter appoints the agents as his selling agent, designer & technical adviser for his products. He has further observed that being commission agent required managerial acumen & expertise and therefore, would be covered under Section 9 (1) (vii) of the Act as managerial services. On perusal of the assessment order and assessment folder, I find that the A.O. has not brought anything on record which could demonstrate that these agents had been appointed as selling agents, designers & technical advisers. Rather on me contrary I find that the agreement is of for procuring orders and nothing else. In absence of any such evidence, this observation of the A.O. is mere conjecture and therefore, no cognizance of the same can be taken. It is a trite law that suspicion, no matter how grave, cannot take place of evidence. In this case, there is even no case of suspicion, leave aside any evidence to the effect that the agents were not only selling agents but also designers and technical advisers. The confirmation from the respective foreign agents that the foreign agents did not have any branch or PE in India further supports the case of the appellant.

5.3.3 The A.O.'s observation that as a selling agent, the agent has to have managerial acumen and, therefore, hit by the provisions of Section 9 (1) (vii), is baseless. The provisions of Section 9 (1) (vii) deals with fees for technical services and it has to be read in that context. Par that matter, everything in life requires managerial skills, like running the household, being an Assessing Officer, running a shop etc. Will that tantamount to

providing managerial services in the context of Section 9 (1) (vii)? The answer is clear NO. Thus, the aforesaid payments do not fall within the meaning of "FTS' as described in Section 9 (1) (vii) of the Act.

5.3.4 The income of the non-resident was not chargeable to tax in India since the same was neither received in India nor had it accrued or deemed to accrue in India. Accordingly, the appellant was not required to deduct Tax at Source u/s 195 in respect of commission paid to the Foreign Agents. Disallowance u/s 40 (a) (i) is, therefore, deleted."

Shri Bharat Ji Agrawal submits that the CIT (A) and ITAT have not considered the explanation added to Section 9 (1) (vii) by the Finance Act, 2010 w.e.f. 1.6.1976 and which provides that for the purpose of second proviso the income of such non-resident shall be deemed to accrue or arise in India under Clause (v) or Clause (vi) or Clause (vii) [of sub-section (1)] and shall be included in total income of non-resident whether or not, non-resident has residence or place of business or business commission in India; or non-resident has rendered services in India.

We do not find that the fact situation contemplated or clarified in the explanation added by Finance Act, 2010 is applicable to the present case as in the present case the agents appointed by the assessee had their offices situate in a foreign country and that they did not provide any managerial services to the assessee. Section 9 (1) (vii) deals with technical services and has to be read in mat context. The agreement of procuring orders would not involve any managerial services. The agreement did not show the applicability or requirement of any technical expertise as functioning as selling agent, designer or any other technical services.

There are no distinguishing feature in this case, nor do we find that the ratio of the Constitution Bench decision in Commissioner of C. Ex., Bolpur v. Ratan Melting & Wire Industries, (2008) (231) E.L.T. 22 (SC) (para 6) is applicable in as much as in the present case there was no decision of the Supreme Court or High Court or any statutory provision, which was contrary to the circular, which was withdrawn on 22.10.2009.

The questions of law are covered by the judgments of this Court cited as above, and are decided in favour of the assessee and a against the department."

6. We, therefore, following the aforesaid judgment of the jurisdictional High Court, decide the issue in favour of the assessee and confirm the order of the ld. CIT(A) in this regard.

10. Similar view was also taken in other cases of the Tribunal. Nothing has been brought on record by the Revenue in order to demolish the stand taken by the assessee and to establish that non-resident has ever rendered any technical services or consultancy or managerial services. Therefore, we are of the view that since the assessee has simply procured export orders through commission agent for which commission was paid, the assessee was not required to deduct tax at source on the commission paid to the foreign agent. Accordingly we confirm the order of the ld. CIT(A).

11. The other issue raised vide grounds No.6 to 8 relates to disallowances made by the Assessing Officer on ad-hoc basis without pointing out any specific defect in the accounts of the assessee and the ld. CIT(A) has deleted the same for the reason that the Assessing Officer has made ad-hoc disallowances.

12. During the course of hearing before us, similar is the position, as the Revenue could not point out any specific defect in the maintenance of

accounts under different heads. No doubt the Assessing Officer can make disallowance if the assessee fails to produce the relevant evidence with respect to any particular expenditure, but the disallowance on ad-hoc basis is not permissible under the law. We, therefore, find no merit in these grounds of appeal. Accordingly, we confirm the order of the ld. CIT(A) on this issue.

13. Since the order of the ld. CIT(A) is confirmed, we find no merit in the cross objection.

14. In the result, the Revenue's appeal and cross objection of the assessee are dismissed.

Order was pronounced in the open court on the date mentioned on the captioned page.

Sd/-	Sd/-
[A. K. GARODIA]	[SUNIL KUMAR YADAV]
ACCOUNTANT MEMBER	JUDICIAL MEMBER

DATED: 18th June, 2015

JJ:1506

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

Assistant Registrar