

**आयकर अपीलीय अधिकरण 'बी' ायपीठ चे ई म**  
**IIIN THE INCOME TAX APPELLATE**  
**TRIBUNAL 'B' BENCH, CHENNAI**

**माननीय +ी महावीर िसंह, उपा42 एवं**  
**माननीय +ी मनोज कु मार अUवाल ,लेखा सद4 के**  
**सम2।**

**BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND**  
**HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकरअपीलसं./ITA No.421/Chny/2019  
(निधरणवष / Assessment Year: 2009-  
10)

DCIT Corporate Circle-1(1), Chennai.	<b>बनाम</b> / Vs.	M/s. Allsec Technologies Ltd. 7H Century Plaza, 560-562 Anna Salai, Teynampet, Chennai – 600 018.
थायीलेखासं./जीआइआरसं./ PAN/GIR No.		<b>AACCA-5106- G</b>
(अपीलाथ /Appellant)	:	( wथ / Respondent)

अपीलाथ कीओरसे/ Assesseeby	:	Shri R. Vijayaraghavan (Advocate)-Ld. AR
wथ कीओरसे/Revenue by	:	Shri D. Hema Bhupal (JCIT) –Ld. Sr. DR
सुनवाईकीतारीख/Date of Hearing	:	08-12-2022
घोषणाकीतारीख /Date of Pronouncement	:	08-12-2022

**आदेश / O R D E R**

**Manoj Kumar Aggarwal (Accountant Member)**

1. Aforesaid appeal by Revenue for Assessment Year (AY) 2009-10 arises out of the order of learned Commissioner of Income Tax (Appeals)-1, Chennai [CIT(A)] dated 30-11-2018 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s. 143(3) r.w.s. 92(CA) of the Act on 17-04-2013.The grounds read as under:

1. The order of the Ld. CIT(A) is contrary to law, facts and circumstances of the case.
2. The Ld.CIT(A) erred in giving relief to the assessee on selling commission paid to non-resident company, when it being in the nature of marketing and consultancy services is taxable in India @ 15% as per Article 12 Clause 2(a)(2) of India-USA

Double Taxation Avoidance Agreement (DTAA) and taxable @ 10% as per Article 12 Clause I(a)(ii)/I(b)(ii) of India-Australia DTAA.

3. The Ld.CIT(A) erred in giving relief to the assessee on selling commission when the same is within the ambit of section 195 of the Act in view of the DTAA clauses with USA & Australia.

4. The Ld.CIT(A) erred in giving relief to the assessee under section 14A despite the decision of the Hon'ble Supreme Court in Maxopp Investments Ltd v. CIT [(2018) 91 taxmann.com 154 (SC)] & no express qualifying provisos in the section against application of section 14A.

The registry has noted a delay of 04 days in the appeal which stand condoned. As is evident, two issues fall for our consideration - (i) disallowance u/s 40(a)(i); (ii) Disallowance u/s 14A. Having heard rival submissions and after perusal of case records, the appeal is disposed-off as under.

## **2. Disallowance u/s 40(a)(i)**

2.1 The assessee paid selling commission of Rs.288.57 Lacs for services rendered by the payees outside India but it did not deduct tax at source as required u/s 195 which led Ld. AO to invoke disallowance u/s 40(a)(i). Considering Explanation-2 to Sec.195(1) as inserted by Finance Act, 2012 w.r.e.f. 01.04.1962, Ld. AO disallowed the payment u/s 40(a)(i).

2.2 During appellate proceedings, it transpired that the payments were made to US and Australia based entities as commission towards procurement and solicitation of business. As per the terms of the contract, the assessee paid commission of 5% for business obtained by these two entities outside India. Both the payees did not have any permanent establishment (PE) in India and therefore, the payments were not liable to TDS as per the decision of Hon'ble Supreme Court in **CIT vs. Toshoku Ltd. 125 ITR 525** and the decision of Hon'ble Delhi High Court in **CIT vs. EON Technology P.**

**Ltd. 343 ITR 366.** The assessee also relied on CBDT circular no. 23 dated 23.07.1969 which was in force in this year since the same was withdrawn only on 22.10.2009.

2.3 Concurring with assessee's submissions Ld. CIT(A) held as under: -

13. The facts and circumstances of the case have been examined vis-à-vis the findings of the AO. The agreements entered into by the appellant with the non-residents have been examined. The prevailing judicial decisions pertaining to such cases have been noted. The services for procuring orders for the products sold by the assessee in India have been generally treated as instances which are not found to be technical service. Payments to agents for procuring export orders was an incident of export and in the nature of service was not technical and it was rendered abroad. The Hon'ble Madras High Court in the case of CIT vs. Farida Leather Company [2016] 66 Taxmann.com 321 (Madras) ruled that the Commission paid outside India was not chargeable to tax in India and it was not liable for TDS. The jurisdictional High Court in the case of Faizan Shoes [2014] ITR 155 (Madras) held that foreign agents had no permanent establishments in India, no part of their services have been rendered in India, and in such a situation, there was no obligation on the assessee to deduct tax at source u/s 195. The jurisdictional Tribunal in the case of India Shoes Exports Pvt. Ltd. [2015] 57 Taxmann.com 303 considered the decision of the Madras High Court in the case of ITO vs. Faizan Shoes (cited supra) and held that the commission paid to foreign agents for procuring orders could not be considered as fees for technical services. Taking into account the material, factual and legal aspects pertaining to the selling commissions, I find that there is considerable merit in the submissions of the appellant. This ground of appeal is allowed.

Aggrieved as aforesaid, the revenue is in further appeal before us.

2.4 From the fact, it emerges that the impugned payments made by the assessee are in the nature of selling commission for procurement of orders outside India for the assessee. Upon examination of contractual terms, these payments could not be termed as 'fees for technical services'. Further, none of the payee is shown to have any PE in India. Therefore, the findings of Ld. CIT(A), in that regard, could not be faulted with. The Ld. AO has invoked Explanation-2 to Sec.195(1) as inserted by Finance Act,

2012 w.r.e.f. 01.04.1962. However, the assessee could not be expected to deduct tax at source in this year by foreseeing such a future amendment to law. In the impugned year, there was no such obligation on the assessee to deduct TDS but such obligation has arisen out of subsequent amendment to law which assessee could never anticipate.

2.5 In this regard, the decision of Chennai Tribunal in **M/s Rane Engine Valves Ltd. V/s DCIT (ITA Nos.1175/Chny/2017 &ors. dated 09.03.2022)** would apply wherein the bench held as under: -

4. The Ld.AR for the assessee submitted that the issue involved in the appeal regarding payment made to non-residents without deduction of TDS u/s.195 of the Act and consequent disallowance of payment u/s.40(a)(i) of the Act, is covered in favour of the assessee by the decision of ITAT Chennai Benches in the case of M/s.TVS Electronics Ltd. v. ACIT in ITA No.949/Chny/2017 for the AY 2005-06 dated 24.09.2021, wherein, the Tribunal under identical facts held that the assessee cannot be fastened liability on the basis of subsequent amendment to the law with retrospective effect, because the assessee cannot be expected to do impossibility of performance and thus, for non-deduction of TDS u/s.195 of the Act, payment made to non-residents, cannot be disallowed u/s.40(a)(i) of the Act.

5. The Ld.DR, on the other hand, supporting the order of the Ld.CIT(A) submitted that, if at all, the assessee claims that it was not required to deduct TDS u/s.195 of the Act, then the proper course of action is to obtain a Certificate u/s.195(2) of the Act from the AO and unless, the assessee obtained a Certificate, it cannot be argued that payment made to non-residents are not liable to tax in India and consequently, no disallowances can be made u/s.40(a)(i) of the Act. Therefore, the Ld.DR further submitted that there is no error in the reasons given by the Ld.CIT(A) to sustain the additions made by the AO and his order should be upheld.

6. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. We find that an identical issue has been considered by the Tribunal in the case of M/s.TVS Electronics Ltd. v. ACIT in ITA No.949/Chny/2017 for the AY 2005-06 dated 24.09.2021, wherein, on identical circumstances held that liability towards TDS cannot be fastened on the assessee on the basis of subsequent amendment to law with retrospective effect, because which was impossible on the part of the assessee to do the impossible things and deduct TDS on payment made to non-residents, because, the assessee cannot foresee the amendment and deduct TDS on said payment and consequently, payment made to non-residents, cannot be disallowed u/s.40(a)(i) of the Act, for failure to deduct TDS u/s.195 of the Act. The relevant findings of the Tribunal are as under:

8. Be that as it may. The issue before us is not taxability of payment made by the assessee to non-resident entity for services rendered outside India as fees for technical services or not in terms of section 9(1)(vii) of the Act. The issue before us is disallowance of sum paid to non-resident without TDS u/s 40(a)(i) of the Act. Admittedly, the AO has brought amended explanation 9(2) with retrospective effect from 1-4-1976 by the Finance Act, 2010 and held payment made by the assessee as FTS u/s 9(1)(vii) of the Act and further, for non TDS disallowed the same u/s 40(a)(i) of the Act. Therefore, to decide the issue, one has to understand the judgment of Hon'ble Supreme Court in the case of *Ishikawajma-Harima Heavy Industries Ltd., vs. DIT*, (supra). The Hon'ble Supreme court while deciding the issue of FTS has considered preamended provisions of section 9(1)(vii) and held that if any payment in the nature of FTS to be taxed in India, as per provisions of section 9(1)(vii) of the Act, then, both services rendered and services received to be in India. If services are rendered outside India, even such services are received in India then same cannot be brought to tax under Indian Income-Tax laws as per the judgment of Hon'ble Supreme Court in the case of *Ishikawajma-Harima Heavy Industries Ltd., vs. DIT*. Although, definition of FTS was amended by the Finance Act, 2010 with retrospective effect from 01.06.1976 but, the law prevailing at the time of making payment by the assessee to the non-resident was on the basis of judgment of Hon'ble Supreme Court which clearly held that payment made to a non-resident for services rendered outside India cannot be brought to tax in India as fees for technical services in absence of place of business / permanent establishment in India. Since, there was clear law by the decision of Hon'ble Supreme Court, the assessee has made payment without deducting tax at source. Therefore, liability towards TDS cannot be fastened on the assessee on the basis of subsequent amendment to law with retrospective effect, because it was impossible on the part of assessee to deduct tax on income of nonresident because the assessee cannot foresee the amendment and deduct TDS on said payments. This view is supported by various decisions of Tribunal including decision of ITAT, Mumbai Bench in the case of *Channel Guide India Ltd., vs. ACIT* and the Ahmadabad Tribunal in the case of *Sterling Abrasive Ltd., vs. ACIT* and Agra Bench in the case of *Metro & Metro vs. Addl.CIT*, where the Tribunal by following the decision of Hon'ble Supreme Court in the case of *Ishikawajma-Harima Heavy Industries Ltd., vs. DIT*, held that at the relevant point of time, it was impossible on the part of the assessee to deduct tax at source on income of non-resident and thus, on that basis no disallowance can be made towards payment made to a nonresident u/s.40(a)(i) of the Act.

7. In this view of the matter and by respectfully following the decision of the coordinate Bench of ITAT, Chennai, in the case of *M/s.TVS Electronics Ltd. v. ACIT*, we are of the considered view that the assessee cannot be expected to deduct TDS on payment made to non-residents on the basis of subsequent amendment to the law with retrospective effect from earlier date, because the assessee cannot foresee the amendment and deduct TDS and hence, we are of the considered view that the AO was erred in disallowing the payment made

to non-residents u/s.40(a)(i) of the Act, for failure to deduct TDS u/s.195 of the Act. The Ld.CIT(A) without considering the relevant facts, simply sustained the additions made by the AO. Hence, we are reversed the findings of the Ld.CIT(A) and direct the AO to delete the additions made towards disallowance of payment made to non-residents u/s.40(a)(i) of the Act.

Thus, the bench held that the assessee could not be expected to deduct Tax at source on payment made to non-residents on the basis of subsequent amendment to the law with retrospective effect from earlier date because the assessee cannot foresee the amendment and deduct TDS. Therefore, the disallowance made u/s 40(a)(i) would be unwarranted. Similar is the situation before us. No contrary decision is on record. Therefore, following this decision, we confirm the stand of Ld. CIT(A). The corresponding grounds raised by the revenue stand dismissed.

### **3. Disallowance u/s 14A**

3.1 The assessee earned exempt dividend income for Rs.186.79 Lacs which led Ld. AO to make disallowance u/s 14A. The Ld. AO, applying Rule 8D(2)(iii), computed indirect expense disallowance of Rs.15.65 Lacs. The Ld. CIT(A) directed Ld. AO to consider those investments which actually yielded exempt income during the year. Aggrieved, the revenue is in further appeal before us.

3.2 We find that the directions of Ld. CIT(A) are in accordance with the decision of Special Bench of ITAT in **ACIT vs. Vireet Investment (P.) Ltd. 82 Taxmann.com 415**. Therefore, the impugned order could not be faulted with. We order so. The corresponding grounds raised by revenue stand dismissed.

4. In the result, the appeal of the revenue stand dismissed.

Order pronounced on 08<sup>th</sup> December, 2022.

**Sd/-**  
**(MAHAVIR SINGH)**  
**उपा42 /VICE PRESIDENT**

**Sd/-**  
**(MANOJ KUMAR AGGARWAL)**  
**लेखा सद4 /ACCOUNTANT**  
**MEMBER**

चे\*ई/ Chennai; िदनांक/ Dated : 08-12-2022  
EDN/-

**आदेशकीXितिलिपअUेिषत/Copy of the Order forwarded to :**

1. अपीलाथ /Appellant2. यथ त (अपील)/CIT(A)4.  
/Respondent 3. आयकरआयR  
आयकरआयुRत/CIT 5. वभागीय तितनध/DR6. गाडफाईल/GF