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

BEFORE HON'BLE SH. G. S. PANNU, V.P & HON'BLE SH. SANDEEP GOSAIN, JM

आयकरअपीलसं./ I.T.A. No. 4759/Mum/2015
(**निर्धारणवर्ष /** Assessment Year: 2009-10)

In the matter of:

ACIT CIR-1, IT Office, 1st floor, Mohan Plaza Wayale Nagar, Khadapada, Kalyan-421301.	**बनाम**/ Vs.	M/s Monarch Catalyst Pvt. Ltd. A-94 & F ½, MIDC Phase-1, Dombivali(E), Thane-421203
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAACM5013G		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri B. S. Bist, DR
प्रत्यर्थीकीओरसे/**Respondentby**	:	Shri Naresh Kumar, AR

सुनवाईकीतारीख/ **Date of Hearing**	:	22.02.2019
घोषणाकीतारीख / **Date of Pronouncement**	:	16.05.2019

आदेश / O R D E R

Sandeep Gosain, Judicial Member:

The present Appeal filed by the revenue is against the order of Ld. CIT (Appeal) – 2, Thane, dated 12.06.15 for AY 2009-10 on the grounds mentioned herein below:-

1. *Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has failed to appreciate the interpretation of provisions of section 5(2)(a) and section 195(1) of the Act.*

2. *Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has failed to appreciate that TDS in this case was regarding the payment of Legal Charges by the assessee to M/s. De Brauw Blackstone Westbroek, Netherlands for handling the case of assessee through M/s. J Sagar Associates, who is the legal advisor of the assessee for all legal matters. The relationship of both these parties is of Agent & Principal respectively. From the copies of the Invoices of M/s. De Brauw Blackstone Westbroek, Netherlands, on record, it is observed that M/s. J Sagar Associates has actually engaged the services of M/s. De Brauw Blackstone Westbroek, Netherlands and the assessee has made the payment to M/s. De Brauw Blackstone Westbroek, Netherlands directly, though M/s. De Brauw Blackstone Westbroek, Netherlands has raised bill in the name of M/s J. Sagar Associates. M/s. J Sagar Associates has raised separate bill for drafting the appeal and representation of the case etc. Therefore TDS was liable to be deducted on the*

payments made to M/s. De Brauw Blackstone Westbroek, Netherlands.

3. *Whether on the facts and in the circumstances of the case, the Ld. CIT(A) failed to appreciate that, from the records it is observed that the assessee has obtained NIL TDS certificates from the AO in respect of other payments made by it, but it has not obtained any such certificates regarding the payment of legal charges made to M/s. De Brauw Blackstone Westbroek, Netherlands and in respect of payment of Commission. Therefore the act of non deduction of TDS by the assessee is improper.*

4. *Whether on the facts and in the circumstances of the case, the Ld. CIT(A) failed to appreciate that, the CIT(A) has relied upon the order of the Apex Court in the case of GE India Tech vs. CIT, 327 ITR 456 (SC), where the Apex Court has restored the matter back to the file of the High Court. Therefore the issue has not attained its finality.*

5. *The order of the CIT(A) may be vacated and that of the Assessing Officer may be restored.*

6. *The appellant craves leave to add, amend, alter or delete any ground of appeal.*

2. The brief facts of the case are that assessee is a Private Limited Company & engaged in the business of manufacturing Nickel based Catalysts, Activated Alloy Catalysts, Precious Metal Catalysts & other allied items. During the year under consideration, the assessee had filed its Income Tax Return declaring a loss of Rs. (-) 10,58,46,164/-. The turnover of the company during the year was Rs.77.34 Crore. The said return of income filed was selected for scrutiny, and the order U/s. 143 (3) was passed after making disallowance of Rs. 2,11,06,922/- and confirming the loss of Rs. (-) 8,47,39,242/-. The Ld. AO has disallowed the Commission on exports - Rs. 80,15,981/- , Legal Charges - Rs. 1,04,64,941/-, Factory Wages - Rs. 25,00,000/- and Disallowance U/s 35D - Rs. 1,26,000/-.

Aggrieved by the order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the case of both the parties, *partly allowed* the appeal of the assessee.

Now before us, the revenue has preferred the present appeal by raising the above grounds.

Ground No. 1 to 4

3. These ground raised by the revenue are inter connected and inter related and relates to challenging the order of Ld. CIT(A) in deleting the addition made u/s 40(a)(i) of the Act by AO without appreciating the interpretation of provisions of section 5(2)(a) and section 195(1) of the Act, therefore we thought it fit to dispose of the same by this common order.

4. Ld. DR appearing on behalf of the revenue relied upon the orders passed by AO and submitted before us that the Ld. CIT(A) has failed to appreciate the interpretation of provisions of section 5(2)(a) and section 195(1) of the Act. It was submitted that Ld. CIT(A) has failed to appreciate that TDS in this case was regarding the payment of Legal Charges by the assessee to M/s. De Brauw Blackstone Westbroek, Netherlands for handling the case of assessee through M/s. J Sagar Associates, who is the legal advisor of the assessee for all legal matters. The relationship of both these parties is of Agent & Principal respectively. From the copies of the Invoices of M/s. De Brauw Blackstone Westbroek, Netherlands, on record, it is observed that M/s. J Sagar

Associates has actually engaged the services of M/s. De Brauw Blackstone Westbroek, Netherlands and the assessee has made the payment to M/s. De Brauw Blackstone Westbroek, Netherlands directly, though M/s. De Brauw Blackstone Westbroek, Netherlands has raised bill in the name of M/s J. Sagar Associates. M/s. J Sagar Associates has raised separate bill for drafting the appeal and representation of the case etc. Therefore TDS was liable to be deducted on the payments made to M/s. De Brauw Blackstone Westbroek, Netherlands.

4.1 Ld DR further submitted that Ld. CIT(A) failed to appreciate that, from the records it is observed that the assessee has obtained NIL TDS certificates from the AO in respect of other payments made by it, but it has not obtained any such certificates regarding the payment of legal charges made to M/s. De Brauw Blackstone Westbroek, Netherlands and in respect of payment of Commission. Therefore the act of non deduction of TDS by the assessee is improper.

4.2 It was further submitted by Ld DR that Ld. CIT(A) failed to appreciate that, the CIT(A) has relied upon the order of the Apex Court in the case of GE India Tech vs. CIT, 327 ITR 456 (SC), where the Apex Court has restored the matter back to the file of the High Court. Therefore the issue has not attained its finality.

5. On the other hand Ld. AR reiterated the same arguments as were raised by him before Ld. CIT(A) and submitted before us that the legal charges expenses claimed are in relation to the suit filed in International Court (Netherlands) by one of the assessee's supplier Greendown B. V. located at Netherlands and for pursuing the above said matter, Advocates and Solicitors were appointed at Netherlands - De Brauw Blackstone Westbroek and in India - M/s. J.Sagar Associates. It was submitted that AO had erred in disallowance of Legal Charges amounting to Rs. 1,04,64,941/- on the ground that assessee had not deducted TDS from the payment to Advocate and Solicitors U/s 40 (a)(i) of Income Tax Act.

5.1 Ld. AR further submitted that assessee paid the legal fees to De Brauw Blackstone Westbroek, Tripolis 300,Burgerweeshuispad, 301.P.O.Box 75084, 1070 AB Amsterdam, The Netherlands, as per attached annexure **(Annex. 1 - Point No. B).** The suit was filed by the supplier M/s Greendown B.V., Boezembocht 2B, 3034,KA Rotterdam, The Netherlands and the Advocate didn’t have permanent establishment in India, neither branches in India or business in India. It was pointed out that the said Advocate neither provided any services in India nor any payment had been made in India and therefore legal fees paid to said Advocate was not subject to Indian Income Tax and therefore TDS don't arise U/s 195, read with Sec.9 of Income Tax Act.

6. We have heard counsels for both the parties at length and we have also perused the material placed on record, judgment cited by the party as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 5 of its order and the same is reproduced below:-

> ***5.0 Ground Nos. l &*** *2 are directed against non deduction of TDS u/s. 40(a)(i) r.w.s. 195 of the I.Tax Act, 1961 under the head commission export sales of Rs.80,15,981/- and Legal charges of Rs.1,04,64,941/-.*
>
> *(i) I have carefully considered the submissions of the appellant, the observations of the AO in the assessment order; case laws relied upon by the appellant and facts of the case. Therefore, I proceed to decide the appeal of the appellant.*
>
> *(ii) The commission and legal payments are made to foreign parties for selling appellant's products outside India and these foreign parties are independent entities and do not have Permanent Establishment in India. Therefore, the commission received by the Non-resident i.e. foreign parties is not chargeable to tax in India.*
>
> ***(iii)*** *It was argued that the foreign agents did not render any part of the services jn India, did not have an establishment in India and therefore, commission*

cannot be deemed to have arisen in India as per section 5(2)(a).

(iv) *The Hon'ble Supreme Court in the case of GE India Technology v.CIT reported in 327 ITR 456(SC) has held that, the duty to deduct tax at source does not arise unless remittance contains wholly or partly taxable income. This decision has overruled by the decision of the Karnataka High Court in the case of CIT vs. Samsung Electronics Pvt. Ltd. reported in 320 ITR 209(2009).*

(v) Out of the disallowance of expenses of Rs.1,04,64,941/- u/s.40(i)(a) of the Act, the amount paid of Rs.26,86,242/- has been paid to local solicitor in India and tax has been deducted , therefore, the disallowance u/s.40(a)(i) is erroneous.

In view of the above stated facts, the addition made u/s.40(a)(i) of Rs.80,15,981/- + Rs.1,04,64,941/- is deleted and the appeal of the appellant is allowed.

6.1 After having gone through the facts of the present case and hearing the parties at length, we find from the records that the commission and legal profession payments were made to foreign parties for selling assessee’s product outside India and even those foreign parties did not render any part of the services in India and did not have an establishment in India and therefore, commission cannot be deemed to have arisen in India as per section 5(2)(a). Ld. CIT(A) had also considered the fact that assessee paid the legal fees to De Brauw Blackstone Westbroek as the suit was filed by the supplier M/s Greendown, The said advocate did not have permanent establishment in India, neither branches in India or business in India and thus relied upon the judgment of Hon'ble Supreme Court in the case of ***GE India Technology v.CIT reported in 327 ITR 456(SC)***, wherein it was *held that, the duty to deduct tax at source does not arise unless remittance contains wholly or partly taxable income.*

6.2 Keeping in view the entire facts and circumstances of the present case, we are also of the view that commission paid to foreign parties for selling assessee’s product outside India in the absence of P.E in India and not rendered any services in India and do not require deduction of TDS as the commission received by non-resident i.e. foreign parties is not chargeable to tax in India.

6.3 Since, the remittance do not contain wholly or partly taxable income, thus it has become all the more important to note that no duty arose upon the assessee to deduct tax at source.

6.4 Moreover, no new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld. CIT(A). Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld.CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, these grounds raised by the revenue stands **dismissed**.

Ground No. 5 & 6

7. These grounds raised by the revenue are general in nature, thus requires no specific adjudication.

8. In the net result, the appeal filed by the revenue stands **dismissed** with no order as to cost.

Order pronounced in the open court on 16.05. 2019.

Sd/-	*Sd/-*
(G. S. Pannu)	(Sandeep Gosain)
Vice President	Judicial Member

मुंबई Mumbai;दिनांकDated : 16.05.2019
Sr.PS. Dhananjay

<u>आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

.**उप/सहायकपंजीकार**
(Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ **ITAT, Mumbai**