

Failure of assessee to prove that NR-agent has no PE in India leads to disallowance of commission for TDS default

Summary – The Chennai ITAT in a recent case of Euro Leder Fashions Ltd., (the Assessee) held that In absence of any material on record as to whether non-resident agents appointed by assessee rendered services abroad and they had no business connection in India, question regarding assessee's obligation of deduction of tax at source on payment of sales commission to them was to be disposed afresh

Facts

- In the course of assessment, the Assessing Officer noticed that assessee had made payment of sales commission to non-resident agents. Since assessee did not deduct tax at source while making said payments, the Assessing Officer disallowed same by invoking provisions of section 40(a)(ia).
- The Commissioner (Appeals) deleted the disallowance made by Assessing Officer.
- On revenue's appeal:

Held

- Section 40(a)(i) makes it clear that the disallowance shall be made in case of any payment made which is chargeable under this Act and is payable outside India or in India to a non-resident not being a company or to a foreign company on which tax is deductible at source. Therefore, the first condition required to be fulfilled is the payment must be chargeable under the Act, thereafter the question of deduction of tax will arise.
- Section 195(1) also prescribes that tax has to be deducted while making payment to non-resident which is chargeable under the provisions of the Act. Therefore, the condition precedent for deduction of tax is that income must be chargeable under the provisions of the Act. In the facts of the present case, the assessee has not produced the agreement entered into by the assessee with foreign agents to show that they were appointed to act as commission agents outside India in their respective countries.
- As seen from the orders of the lower authorities, the assessee has not discharged the burden cast upon it to show the nature of services rendered by non-resident agent. If there are services rendered by non-residents, who have no permanent establishment in India or have any business connection in India, by virtue of which the payment of commission accrued or arose in India then, it is exempted, if the assessee is able to prove that the services were rendered by those non-residents abroad.

- In the present case, the assessee had not established that the non-resident had rendered services abroad and there was no business connection in India by producing relevant records, viz., either agreement entered into by the assessee with them or correspondence took between the parties. Without examining these details, one is not in a position to decide the nature of services rendered by the non-resident agent.
- Therefore, it is appropriate to remit the entire issue back to the file of the Assessing Officer with direction to the assessee to prove that it was sales commission towards procurement of orders from abroad.
- In the result, the appeal of the revenue is allowed for statistical purposes.