The Principal Commissioner Of Income ... vs Ferromatic Milacron India Pvt Ltd on 30 July, 2019

Author: J.B.Pardiwala

Bench: J.B.Pardiwala, A.C. Rao

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 281 of 2019

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THE PRINCIPAL COMMISSIONER OF INCOME TAX 2

Versus

FERROMATIC MILACRON INDIA PVT LTD

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Appearance:
MRS MAUNA M BHATT(174) for the Appellant(s) No. 1
for the Opponent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA
and
HONOURABLE MR.JUSTICE A.C. RAO

Date : 30/07/2019

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. This Tax Appeal under Section 260-A of the Income Tax Act, 1961 (for short "the Act, 1961") is at the instance of the Revenue and is directed against the order passed by the Income Tax Appellate Tribunal, "D" Bench, Ahmedabad, dated 26.10.2018 in the ITA No.841/Ahd/2017 for the Assessment Year 2013-14.

2. The Revenue has proposed the following substantial questions of law for the consideration of this Court :

> "[A] Whether the Appellate Tribunal has erred in law and on facts in upholding the order of the CIT(A) deleting the addition of Rs.1,68,48,562/- made on C/TAXAP/281/2019 ORDER account of disallowance of depreciation on non-

compete fees ?

[B] Whether the Appellate Tribunal has erred in law and on facts in upholding the order of the CIT(A) deleting the addition made on account of disallowance u/s.40(a)(ia) of the Act for non deduction of tax on commission payable to foreign agents of Rs.1,38,19,875/- ?"

3. The two questions as proposed by the Revenue referred to above, are no longer res integra in view of the decision of this Court in the case of Principal Commissioner of Income-tax v. Ferromatic Milacron India (P.) Ltd. reported in [2018] 99 taxmann.com 154 (Gujarat). We take notice of the fact that in the case of the very same assessee this Court decided both the questions proposed against the Revenue.

3.1 As regards the first question proposed by the Revenue referred to above, this Court observed as under :

"8. We may recall the Assessing Officer does not dispute that the expenditure was capital in nature since by making such expenditure, the assessee had acquired certain enduring benefits. He was, however, of the opinion that to claim depreciation, the assessee must satisfy the requirement of section 32(1)(ii) of the Act, in C/TAXAP/281/2019 ORDER which, Explanation 3 provides that for the purpose of the said sub-section the expression "assets" would mean [as per clause (b)] intangible assets, being know- how, patents, copyrights, trade marks, licenses, franchises or any other business or commercial rights of similar nature. In the opinion of the Assessing Officer, the non-compete fee would not satisfy this discrimination. Going by his opinion, no matter what the rights acquired by the assessee through such non-compete agreement, the same would never qualify for depreciation in section 32(1)(ii) of the Act as being depreciable intangible asset. This view was plainly opposed to the well settled principles. In case of Techno Shares and stocks Ltd (supra) the Supreme Court held that payment for acquiring membership card of Bombay Stock Exchange was intangible asset on which the depreciation can be claimed. It was observed that the right of such membership included right of nomination as a license which was one of the items which would fall under section 32(1)(ii). The right to participate in the market had an economic and money value. The expenses incurred by the assessee which satisfied the test of being a license or any other business or commercial right of similar nature.

9. In case of Areva T & D India Ltd (supra) Division Bench of Delhi High Court had an occasion to interpret the meaning of intangible assets in context of section 32(1)(ii) of the Act. It was observed that on perusal of the meaning of the categories of specific intangible assets referred to in section 32(1)(ii) of the Act preceding the term "business or commercial rights of similar nature" it is seen that intangible assets are not C/TAXAP/281/2019 ORDER of the same kind and are clearly distinct from one another. The legislature thus did not intend to provide for depreciation only in

respect of the specified intangible assets but also to other categories of intangible assets which may not be possible to exhaustively enumerate. It was concluded that the assessee who had acquired commercial rights to sell products under the trade name and through the network created by the seller for sale in India were entitled to depreciation.

10. In the present case, Mr Patel was erstwhile partner of the assessee. The assessee had made payments to him to ward off competence and to protect its existing business. Mr. Patel, in turn, had agreed not to solicit contract or seek business from or to a person whose business relationship is with the assessee. Mr. Patel would not solicit directly or indirectly any employee of the assessee. He would not disclose any confidential information which would include the past and current plan, operation of the existing business, trade secretes customer lists etc.

11. It can thus be seen that the rights acquired by the assessee under the said agreement not only give enduring benefit, protected the assessee's business against competence, that too from a person who had closely worked with the assessee in the same business. The expression "or any other business or commercial rights of similar nature" used in Explanation 3 to sub- section 32(1)(ii) is wide enough to include the present situation."

C/TAXAP/281/2019 ORDER 3.2 As regards the second question proposed by the Revenue referred to above, this Court observed as under :

"2. Question A pertains to disallowance made by the Assessing Officer under section 40(a)(ia) of the Income Tax Act, 1961 ['the Act' for short] for the failure of the assessee to deduct tax at source on exemption paid to foreign agents. This issue has been considered in Tax Appeal No. 1232 of 2018 in following manner:

"1. The issue arises in relation to assessment year 2011-12. During the course of assessment proceedings, the Assessing Officer noticed that the assessee had paid payment of Rs. 1.20 crore (rounded off) to non-resident out of the total commission of Rs. 1.49 crores (rounded off) paid during the year. On such commission paid to non- residents, the assessee had not deducted any tax at source. The Assessing Officer therefore, inquired with the assessee, who responded by suggesting that all services were rendered by the non-residents outside India and therefore, no part of the income had accrued or arose in India. Such income was therefore, not taxable in India. The assessee relied on the decision of Supreme Court in case of GE India Technology Center P. Ltd vs. Commissioner of Income Tax and anr reported in 327 ITR 456 and contended that, in such a case, there was no liability to deduct tax at source.

2. The Assessing Officer did not accept such C/TAXAP/281/2019 ORDER explanation and made the addition of entire amount in terms of section 40(a)(ia) of

the Act. The assessee carried the matter in appeal. CIT(A) gave substantial relief to the assessee. All additions, barring commission payment of Rs. 18.80 lacs (rounded off) were deleted. With respect to the said sum of Rs. 18.80 lacs, Commissioner was of the opinion that this related to the machines which were sold in India. He did not accept the assessee's contention that the non- resident commission agents did not have any permanent establishment in India and the services were also rendered by them outside India. He was of the opinion that the activity of the sale had taken place in India and that therefore the case would fall within section 9(1)(I) of the Act.

3. The assessee carried the matter in appeal before the Tribunal. The Tribunal allowed the appeal on the ground that no part of the income had arisen or accrued in India. The payee was not liable to pay tax at such income. Requirement of TDS therefore would not arise.

4. As is well known, section 195 of the Act imposes requirement of deduction of tax at source on any person responsible for paying to a non- resident any sum chargeable under the provisions of the Act. The prime requirement therefore for applicability of the section is that the payment to the non-resident should be a sum chargeable under the provisions of the Act. In other words, the payment is not an income which is chargeable C/TAXAP/281/2019 ORDER to tax in India. Requirement of deducting tax at source under section 195 of the Act would not arise. This aspect was elaborated by the Supreme Court in case of GE India Technology Center P. Ltd (supra) holding that on mere remittances of an amount to non-resident, duty to deduct tax at source would not arise unless such remittances contains wholly or partly taxable income.

5. Section 9 of the Act carries the heading "income deemed to accrue or arise in India. Sub- section (1) of section 9 provides that in following incomes, contained in various clauses therein, shall be deemed to accrue or arise in India. Clause (I) of sub section (1) provides that all income accruing or arising, whether directly or indirectly, through or from any business connection in India or through or from any property in India or through or from any asset or source of Income in India or through the transfer of a capital asset situate in India shall be deemed to accrue or arise in India.

6. In the present case, as noted, admitted facts are that the non-resident agents appointed by the assessee for procuring export orders do not have permanent establishment in India. Their agents are situated outside India. Their activities as commission agents are being carried out outside India. The Tribunal therefore correctly held that there was no liability on the assessee to deduct tax at source. Merely because a portion of the sale to the overseas purchasers took place in India, C/TAXAP/281/2019 ORDER would not change situation vis a vis the commission agents.

7. In the result, Tax Appeal is dismissed."

4. In view of the aforesaid, this Tax Appeal fails and is hereby dismissed.

(J. B. PARDIWALA, J) (A. C. RAO, J) Dolly