

IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH 'L', MUMBAI
Before Shri N.V.Vasudevan, Judicial Member and
Shri Pramod Kumar, Accountant Member

I.T.A.No. 3208/Mum/2003

The Asst. Director of Income-tax (International Taxation)-2(2), Room No. 523, 5 th floor, Aayakar Bhavan, Mumbai 400 020.	Vs.	M/s. Wizcraft International Entertainment Pvt. Ltd., 4, Jyoti Wire House, 23-A, shah Indl. Estate, Off Veera Desai Road, Andheri (W), Mumbai 400 053 PAN: AAACW 1931 D
(Appellant)		(Respondent)

Appellant by : Shri.Keshave Saxena
Respondent by : Shri.K.Shivram & Ajay R.Singh

O R D E R

PER N.V. VASUDEVAN, JM:

This is an appeal by the revenue against the order dated 17th January, 2003 of the Commissioner of Income-tax (Appeals)-XXXI, Mumbai.

2. In this appeal the revenue has projected its grievance against the order of the learned Commissioner of Income-tax (Appeals) whereby the CIT(A) held that there was no obligation on the part of the assessee to deduct tax at source on certain payments made by the assessee to non-residents.

3. The grounds of appeal taken by the revenue reads as follows:

“On the facts and circumstances of the case and in law, the Ld.CIT(A) erred in holding that the payment to agent and reimbursement of expenses are not taxable without appreciating the fact that these are integral parts of payment to artists and the division is artificial.”

4.1 Wizcraft International Entertainment Pvt. Ltd. hereinafter referred to as ‘the appellant’ or “Wizcraft” is a Private Limited Company. It is engaged in the business of entertainment event

management and marketing. It is mainly engaged in organizing corporate events, product launches, dealer meets, mega theme parties, concerts, pub promotions, exhibitions, entertainment extravaganzas, etc. It has organized the events/performance of renowned foreign artists/groups in India.

4.2 For various events/performance of international artists in India, the Assessee entered into agreements with Colin Davie Artiste Services and Planet – 7, both were proprietary concerns of Mr. Colin Davie, having its registered office at P.O. Box 46, Skegness, Lincolnshire, U.K. PE24 5WA. Mr. Colin Davie is engaged in the business of acting as agent to and in coordination with several worldwide event management companies and provides artiste management services around the world. The appellant appointed Colin Davie as its agent –

- a) To act on its behalf with limited authority, subject to approval by Wizcraft
- b) To enter into a contract with the Artiste and
- c) For other ancillary acts required from outside India to ensure that the artiste is able to perform in India.

4.3 For the various services rendered by the artistes in India, the Appellant paid remuneration. It also paid remuneration to Mr. Colin Davie for acting as agents in procuring the presence and performance of renowned artistes in India. The appellant also paid reimbursement of expenses in connection with the visit and performance of the artistes in India.

4.4. For various events/performance of international artists in India, the appellant deducted tax and paid to the credit of the Central Government on the fees paid to them. In all the cases, on the performance fees paid to the artists, the taxes were withheld as prescribed under the Act and paid to the Government. As already stated the Appellant deducted tax at source on payments made to artistes for performance in India but did not deduct tax at source on commission paid to Colin Davie who acted as agent between the

appellant and the artiste who performed in India. According to the appellant in respect of the commission income of Colin Davie, the same is not taxable in India as Colin Davie had rendered services outside India for limited purpose of coordinating the engagement of the Artiste from outside India to perform the services on the dates of engagement. Similarly for reimbursement of expenses incurred in connection with the visit of the artiste for performance in India the Appellant made payments and in respect of such payments also the appellant did not deduct tax at source. According to the appellant as per the agreement with the artiste the Assessee agreed to reimburse the cost of travel of the artiste, out of pocket expenses while in India and expenses for transit of equipments used by Artiste and in respect of such reimbursement of expenses there is no element of income and therefore there is no obligation to deduct tax at source at the time of making payment.

4.5. The Assessing officer however treated commission payable and re-imburement of expenses in the following cases as liable to tax and raised demand for the same.

Amount in US \$

Name of the Artiste /Group and country	Performance fees	Commission	Reimbursement Of expenses	Total	No. of persons traveled. Against
Diana King USA	30,000	7,500	17,500	55,000	6
Diana King USA	55,000	20,000	-	75,000	6
UB 40-UK	35,000	25,000	90,000	150,000	27
Acrobazia-Canada	5000	3,000	7,000	15,000	2
Shaggy-USA	9000	-	6,000	15,000	1

4.6 As already stated, the appellant deducted tax at source on the performance fees paid to the artistes who performed in India and to

this extent there is no dispute between the appellant and the revenue. In respect of the commission paid to Mr. Colin Daive and reimbursement of expenses, the appellant did not deduct tax at source. We will deal with the argument with regard to non taxability in India of commission payment and reimbursement of expenses separately.

PAYMENT OF COMMISSION:

5. The stand of the appellant for not deducting tax at source on payment of commission to Mr. Colin Daive was that Mr. Colin Davie is resident of U.K. The government of the Republic of India (India) and the United Kingdom (U.K.) have entered into an Agreement for Avoidance of Double taxation and Prevention of Fiscal Evasion ('DTAA'). The Central Board of Direct taxes (CBDT) has issued a Circular No. 333 dated 02/04/1982, which reads as follows:

“Where a double taxation avoidance agreement provides for a particular mode of computation of income, the same should be followed irrespective of the provisions in the Income Tax Act, 1961. Where there is no specific provision in the agreement, it is the basic law i.e. the Income-tax Act, 1961, that will govern the taxation of income.”

Further, section 90(2) of the Income-tax Act, 1961 provides that provisions of DTAA shall prevail to the extent more beneficial to the assessee. Thus, the provisions of DTAA, to the extent beneficial to the assessee, shall override the general provisions of the Income-tax Act, 1961.

6. Since, Colin Davie is a resident of U.K. and India has entered into a DTAA with U.K., the provisions of DTAA between India and U.K. will override the general provisions of the Income-tax Act, 1961.

7. The Appellant pointed out that it has already deducted tax at source from amount paid to Artiste through his agent as the payments were covered under Article 18 of DTAA between India and U.K. The relevant Para 1 and Para 2 of Article 18 of DTAA between India and U.K. is reproduced below:

Article 18

1. Notwithstanding the provisions of Article 15 (independent personal services) and 16 (Dependent personal services) of this convention, income derived by entertainers (such as stage, motion picture, radio or television artistes and musicians) or athletes, from their personal activities as such may be taxed in the contracting State in which these activities are exercised.
2. Where income arising from personal activities are such as exercised in a Contracting State by an entertainer or athlete accrues not to that entertainer or athlete himself but to another person, that income may notwithstanding the provisions of Article 7 (Business profits), 15 (independent personal services) and 16 (Dependent personal services) of this convention, be taxed in that Contracting State.

8. For commission income of Colin Davie, it was submitted by the appellant that Colin Davie has rendered services outside India for limited purpose of coordinating the engagement of the Artiste from outside India to perform the services on the dates of engagement. Therefore, it was submitted that the provisions of Article 18 of the DTAA are not applicable in case of Colin Davie as the same are intended to cover payments to artist management companies for performance of artists. The appellant submitted that Article 18(2) of DTAA between India and U.K. corresponds to the Article 7(2) of the DTA model. The appellant relied on the commentary on model convention on Para 2 of Article 17 given at para 4 on page 850 of book by Klaus Vogel on Double Taxation Convention, which reads as follows:

The purpose of paragraph 2 is a counteract certain tax avoidance devices in cases where remuneration for the performance of an entertainer or athlete is not paid to the

entertainer or athlete himself but to another person, e.g. a so-called artiste-company, in such a way that the income is taxed in the State where the activity is performed neither as personal service income to the entertainer or athlete nor as profits of the enterprise in the absence of a permanent establishment. Paragraph 2 permits the State in which the performance is given to impose a tax on the profits diverted from the income of the entertainer or athlete to the enterprise where for instance the entertainer or athlete has control over or rights to the income thus diverted or has obtained or will obtain some benefit directly or indirectly from that income. It may be however, that the domestic laws of some States do not enable them to apply such a provision. Such States are free to agree to alternative solutions or to leave paragraph 2 out of their bilateral convention. The relevant Article applicable in case of agent is Article 7 dealing with Business Profits which is discussed in subsequent Para”.

9. The appellant pointed out that the payment of commission to Colin Davie is not covered by article 18 of DTAA between India and U.K. as Colin Davie himself has neither taken any part in events during the dates of engagement nor exercised any personal activities in India. Further, the income of Colin Davie by way of commission does not relate to the services of entertainer/artiste. The services are rendered outside India by Colin Davie and income arising from that Article 7 of DTAA between India and U.K. covers services rendered. The relevant Para 1 of Article 7 is reproduced below:

Article 7: Business profits

The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is directly or indirectly attributable to that permanent establishment.

The appellant pointed out that Colin Davie does not have any PE in India. The term PE is defined in Article 5 of DTAA between India and UK. In view of Para 1 of Article 7, it was submitted that the profits by way of commission payable to Colin Davie shall be taxable only in U.K. as he does not have a PE in India.

10. The appellant relied on the decision of the Hon'ble Supreme Court in the case of Carborandum Co. v. CIT (1977) 108 ITR 335, wherein it was held that "the carrying on of activities or operations in India is essential to make the non-resident have business connection in India in order that he may be liable to tax in respect of the income attributable to that business connection. In this contest, the appellant relied on the CBDT Circular No. 17(XXXVII) of 1953 dated 17th July, 1953 where it has been stated as follows:

"Foreign agents of Indian exporters – A foreign agent of an Indian exporter operates in his own country and no part of his income arises in India. Usually, his commission is remitted directly to him; and is, therefore, not received by or on his behalf in India. Such an agent is not liable to Indian Income-tax."

11. Further, reliance was placed on the CBDT circular No.786 dated 07/02/2000 regarding taxability of export commission payable to non-resident agents rendering services abroad. It is stated in the said circular that "No tax is therefore deductible under section 195 and consequently the expenditure on export commission and other related charges payable to a non-resident for services rendered outside India becomes allowable expenditure." The appellant submitted that although, the above circular is issued in the context of commission paid to foreign agent of Indian exporters, it applies with equal force to commission paid to agents for services rendered outside India.

12. In view of the above, the appellant requested that it be held that commission income of agent is not liable to tax in India and consequently there was no obligation on the part of the appellant to deduct tax at source at the time of making payment.

REIMBURSEMENT OF EXPENSES:

13. In addition to fees payable to artiste and commission payable to agent, as per the agreement, the appellant was also liable to reimburse all the expenses incurred by the artiste in respect of the said performance/shows. The nature of expenses and the amount to be reimbursed for each shows were as under:

Diana King USA (1st performance)
Airfare amount for 6 persons US \$ 17,500
Diana King USA (2nd performance)
NIL
UB-40 UK

Nature of expenses	Amount (in US \$)
Equipments 6 tons	9,500
Freight & Forwarding	24,000
Travel (27 people)	56,500
Total	90,000

Acrobazoa- Canada

Airfare, visas,etc. for 2 persons US \$ 7,000

Shaggy-USA

Airfare US \$ 6,000

14. The Assessee pointed out that the appellant mainly reimbursed travel, visa and other incidental cost of the artiste and their troupe. Only in the case of UB-40, which is a big music troupe, the appellant had to reimburse expenses on equipments, its freight and forwarding charges etc. over and above the travel cost. The A.O. has in his order accepted that the appellant has borne all the expenses relating to the performers in India like traveling, hospitality and all the related expenses. He has however observed that whatever payments have been made to the Artiste or their agent comprises the income in their hands until unless the expenses are claimed and substantiated in their hands. In this context, the appellant submitted that from the list

of expenses, which are to be borne by appellant, it was clear that it included traveling of performing artistes from their home country to India and such payments are purely reimbursements in which there can be no element of income. This is mainly because, the appellant has separately reimbursed the same to them. In addition to that whatever expenses are to be incurred in India, the appellant has undertaken to bear the same directly. The appellant submitted that while inviting any artiste for any show to be performed in India, it is very common rather it is mandatory practice that all the costs relating to the show will have to be borne by the organizer. Accordingly, the appellant had to bear all the expenses. The appellant pointed out that it paid all expenses incurred in India while the expenses to be incurred by the artistes in their home country were reimbursed to them by the appellant.

15. The appellant pointed out that there can be no doubt about the fact that the artiste/performer had traveled to India and as such the appellant had incurred air travel cost for the same. It was also pointed out that in case of Diana King for 1st performance there was reimbursement of expenses amounting to US \$ 17,500 but there was no expense for 2nd performance. This is mainly because the 1st series of performance were on 16 & 17 January 1999 and the 2nd series of performances were during 19 to 27 January 1999. Since for doing the 1st performance, she was there in India with her troupe there was no travel cost reimbursed to them for 2nd performances. The appellant submitted that this was a clear indication that wherever there is actual travel involved only then the appellant had reimbursed the expenses and not for fabricating the nature of payment to the artiste. The appellant also pointed out that the travel cost differed on the basis of country from where artiste/performer had traveled and the number of persons traveled.

16. The appellant pointed out that the artiste's were high profile celebrities and travel expense would be commensurate with their standing. It was also pointed out that the amount reimbursed to them

towards air travel per person was very reasonable. The Appellant gave a chart of cost of air travel to different destinations to demonstrate the reasonable of the costs shown by the appellant.

Country/Class	Amount to US \$		
	Economy	Business	First
USA-India	1,100	3,000	5,700
UK-India	700	2,200	3,500
Canada-India	1,100	3,000	5,700

The average expenses reimbursed by the appellant for various shows per persons was as follows:

Amount to US \$

Name of the artiste/group	Average air travel fare reimbursed per person
Diana King – USA	2,916
UB-40 –UK	2,093
Acrobazia-Canada	3,500
Shaggy-USA	6,000

17. The appellant thus submitted that the amount reimbursed by it to various artiste/performers was lower than the present air travel fare rates.

18. In respect of supporting vouchers/evidence in respect of above reimbursement of expenses, the Appellant pointed that it had all the copies of invoices available in respect of expenses incurred for all the shows. The copies of the invoices for UB-40 tour, where the reimbursement of expenses was higher were filed

Name of the party	Nature of expenses	Amount(in UK £)
Sealandair Travel Service	Travel	4,990
Sealandair Travel Service	Travel	7,320
Sealandair Travel Service	Travel	23,379
SSE Hire Ltd.	Hire and control	7,050

	charges of equipment	
Sound Moves (UK) Ltd.	Import handling charges	3,115
Sound Moves (UK) Ltd.	Carnet for world tour charges	1,803
Sound Moves (UK) Ltd.	Air freight for equipment	9,620
	Total	57,277

19. The total bills were for UK £ 57,277, which is equivalent to about US \$ 80,000. On account of such expenses, the appellant remitted US \$ 90,000 to them.

20. The appellant pointed out that in such type of transactions the agreements are signed in advance and the appellant has agreed to remit them expenses on the basis of estimate. As such, even if actual expenses incurred are more or less it was not possible to argue/debate with the artistes. Also even if actual expenses are more the appellant has to pay the artistes any extra amount.

21. In view of the above, the appellant requested that the remittance were towards reimbursement of expenses and the same should be allowed as expenses and the demand raised on the same should be deleted.

22. The AO after analyzing the various terms of the agreement between the Appellant and Agent was of the view that (a) Mr. Colin Davie while entering into agreement with the Appellant was acting as agent of the Artiste as well. (b) Mr. Colin Davie had given undertaking for performance on behalf of the Artiste. (c) The agreements refer to the gross payments which are later bifurcated into fees for artistes, agents commission and expenses. (d) The artiste did not sign any of the agreements. (e) Therefore all payments made by the Assessee are a single consideration payable to the artistes. The bifurcation of consideration has been done by the Appellant to avoid taxes in India

because the appellant had agreed to pay to the non residents consideration “net of taxes”. Since the appellant was to bear the taxes, the appellant had deliberately bifurcated the consideration into service charges, reimbursement and fees to paid to artistes. The final conclusion of the AO in this regard are contained in para-7 of his order which reads as follows:

“7. Taxability of payments: As discussed above, all the payments made by whatever nomenclature, to either artiste or their agents, are to be treated as consideration payable to artiste only. As per the provisions of DTAA, specifically article 18 of the treaty with UK and article 17 of the treaty with Germany, the income of the artiste is to be taxed in the state of exercising the activities. In all these cases, the artiste have performed in India, therefore, the income derived from the activities are taxable in India. The article deals with the taxation of “income” inbuilt in the payments or arising out of payments and not the gross payments itself. As discussed above, Wizcraft has paid the tax on amounts claimed to have been paid to the artiste. It has not deducted/paid the tax out of payments made to the agents/ for expenses. As per the provisions of sec. 195 of the I.T. Act and the decision of Hon’ble Supreme Court in the case of Transmission Corporation of AP Ltd. V/s. CIT (239 ITR 587), if the assessee has not made application u/s. 195 (2) of the I.T. Act, then, it is required to deduct and pay the taxes on the gross amounts. In the cases discussed above, the Wizcraft was to bear the tax liability and was to remit the amounts “Nett of tax”. As per the provisions of I.T. Act, Wizcraft should have paid the tax on full amounts, and should have filed the return of income as representative assessee of the non residents and could have submitted the computation of income, which arose to the non resident because of payments and could have claimed the refunds, for any excess taxes paid, but this has not been done by Wizcraft. It has neither paid the tax on whole amounts nor has filed the returns.

In the circumstances, in view of the decision of the Hon’ble Supreme Court referred above, Wizcraft is to be treated as an assessee deemed to be in default, as per provisions of sec. 201 of the Act, in respect of tax not paid. The assessee has not obtained any order u/s. 195 (2) in respect of payments in the cases of Diana King, UB-40 group Acrobazia and Shaggy, therefore, in these cases, Wizcraft is deemed to be in default in respect of tax of Rs. 32,31,815/-. This tax has been calculated, after grossing up the amounts as per sec. 195A of the I.T. Act, as the tax is borne by Wizcraft. It is also liable to interest as per sec. 201(1A) of the I.T. Act the same works out as Rs.12,88,588/”

23. On appeal by the Appellant, the CIT(A) held as follows:

“5.15 I have carefully considered the aforesaid submissions of the appellant as well as the stand of the AO. Considering the facts provided by the appellant in respect of reputation of each artiste group/troupe the need of agent is inevitable. Even in India, the reputed artistes generally enter into deal through agents only. There is no denial to the fact that Colin Davie has rendered service as agent of the appellant. In the absence of any cogent evidence the contention of the A.O cannot be accepted that Colin Davie has acted as an agent of the appellant as well as of artiste. On the other hand there is force in the contention of the appellant that Colin Davie is a resident of UK, while the different artiste group/troupe, which have performed in India have come from various countries and as such it does not seem to be possible that Colin Davie is acting as agent on behalf of all of them. I agree with the contention of the appellant that Colin Davie is their agent and not of the artistes. This is further fortified by the fact that Colin Davie is their agent and not of the artistes. This is further fortified by the fact that Colin Davie has acted as an agent of the appellant on a continuing basis and the commission has been paid on the success basis only. Further, the argument of the AO that the percentage of commission paid to Colin Davie differs, fortifies the contention of the appellant that Colin Davie is not an agent of the artiste. If that had been the case then probably the commission payable to Colin Davie would have been on the basis of percentage of the fees payable to artiste. However, that is not the case and that is the main reason why the commission paid to Colin Davie is ranging from 25% to 71.42% if calculated on the fees paid to the artiste. Even in the case of Lou Bega, where the appellant has obtained tax clearance certificate from the Department itself. The commission is 64.93% of the fees paid to Lou Bega. Further, the appellant has contended that in entertainment industry there is no universal yardstick for charging commission by the agents. It depends on the facts of the case and efforts/involvement of the agent. In view of the above, I hold that Colin Davie has acted as an agent of the appellant and has received commission for rendering such services.

5.16 The very fact that Colin Davie himself has not visited India for any of the shows, itself goes to prove that he has provided services outside India. The nature of services rendered by him as the agent to the appellant are listed above. The appellant has appointed Colin Davie as its agent to act on its behalf with limited authority to enter into a contract with the artiste and for other ancillary acts required from outside

India to ensure that the artiste is able to perform in India. Thus it is clear that Colin Davie was appointed to provide services outside India. Since the services are rendered outside India, as per the DTAA between India and UK the same is not liable to tax in India. The appellant has given detailed explanation about applicability of DTAA and non taxability of commission income. The said submission has been discussed above in the order. I agree with the contention of the appellant and accordingly hold that the commission paid by the appellant to Colin Davie is not liable to tax in India.”

6.7 I have gone through the submission made by the appellant and also the supporting in respect of expenses reimbursed. In respect of argument of the AO that expenses are remitted in advance, I agree with the contention of the appellant that unless it is remitted in advance no artiste of international repute shall agree to perform in India. No artiste shall incur expenses from his or her own pocket and then recover from the organizer. It is common practice that amount has to be remitted in advance to incur the expenses. Further, the appellant has submitted copy of invoices in respect of major expenses before me, which appears to be in order. Also, I agree with the argument of the appellant that there is no doubt that the artiste have performed in India and for that expenses have to be incurred and reimbursement of such expenses do not constitute income derived by these artistes from their personal activities so as to be taxable in terms of Article 18 of the Indo-UK DTAA. In view of the above I hold that the reimbursement of expenses is not liable to tax in India and this ground of appeal is decided in favour of the appellant.”

24. Aggrieved by the order of CIT(A), the revenue has preferred the present appeal before the Tribunal.

25. The learned D.R. relied on the order of the AO. He drew our attention to the various clauses of the agreement between the Assessee and Mr.Colin Davie and submitted that those terms of the agreement could not have been performed by Mr.Colin Davie without coming to India. According to him the services rendered by Mr.Colin Davie have therefore to be considered as having been rendered in India. The learned counsel for the Appellant reiterated the stand of the Appellant as was put forth before CIT(A) and the order of the CIT(A).

26. We have considered the rival submissions. We will examine the Agreements between the appellant and Mr. Colin Davie.

a) Agreement dated 4-1-1999:

Copy of this agreement is at pages 41-59 of Appellant's paper book. Mr. Colin Davie has agreed to act as agent for getting the performance of artiste Diana King in India on certain dates. The agreement recites that he has a power to act as appellants agent and entering into agreement with artiste. He has also held out that he has authority to enter into the agreement with the appellant on behalf of the artiste. Schedule-2 to the agreement clearly specifies that the Artiste will be paid \$ 15000 each for two concerts to be performed in Pune, India and that Colin Daive will be paid \$ 3750 each for the said two concerts as agents commission. Schedule-5 to this agreement refers to payment by the appellant airfare of \$ 17,500 for the artiste and her troupe consisting of 6 persons.

b) Agreement dated 7.1.1999:

Copy of this agreement is at pages-60 to 78 of Assessee's paper book. It is identical to the earlier agreement. It is in respect of engagement of the very same artiste Diana King. Schedule-2 to the agreement specifies that the artiste was to be paid \$ 11,000 each for the five concerts to be performed in India at Goa, Cochin, Madras, Bangalore and Hyderabad. Mr. Colin Daive was to be paid \$ 4,000 each for each of the said concert as agents commission.

In the case of both the aforesaid agreements the Artiste Diana King is a singer of International repute of USA. She has many hit song/music albums to her credit, which are very popular in the USA and European countries and also in India. She came to India for performance during Femina Miss India Contest organized on 16th and 17th January 1999 in Pune and subsequently from 19th to 27th January 1999 she gave 5 concert performances as a part of the India tour in 5 other cities namely Bangalore, Hyderabad, Chennai, Cochin

and Goa. She came to India with her troupe totaling 6 persons. It is not possible to get their performances in India without the help of Agents. There is no material on record to substantiate the conclusion of the AO that the entire consideration including the fee to be paid to Mr. Colin Davie is in fact the fees payable to the artiste for performance in India. This conclusion of the AO in our view is purely on surmises and was rightly held by the CIT(A) to be incorrect.

c) Agreement dated 29.1.1999:

Copy of this agreement is at pages 79-98 of Appellant's paper book. Mr. Colin Davie has agreed to act as agent for getting the performance of artiste UB 40 in India on certain dates. The agreement recites that he has a power to act as appellants agent and entering into agreement with artiste. He has also held out that he has authority to enter into the agreement with the appellant on behalf of the artiste. Schedule-2 to the agreement clearly specifies that the Artiste will be paid \$ 17500 each for two concerts to be performed in Mumbai, India and at Colin Davie will be paid \$ 12500 each for the said two concerts as agents commission. Schedule-2 Part-C of this agreement recites that the Appellant has to bear expenses of \$ 90,000 for transportation of equipments. The schedule also gives a break up of the expenses. The case of the AO as far as this artiste is concerned hinges on the fact that the commission is exorbitant. This by itself is not sufficient to conclude that the payment of commission was in fact payment made to artiste. The terms of the agreement cannot be ignored. The artiste UB 40 is a renowned group from the United Kingdom, which started its journey in the music world. Since the early '80 the group is from the West Midlands, they are a large mixed race group playing music of Jamaican origin. UB 40 formed their own, record company, DEP International. In September 1983 UB40 released the album titled "Labour of Love", including the astonishingly popular single "Red Wine", was in the British chart for two years. It gave UBs their first truly world-wide hit and, eventually, their first American No.1 UB40 have maintained their instantly recognizable and highly distinctive

style through nine more albums, as well as two hits compilations. The group of 27 persons came to India to perform during the Filmfare award ceremony on 21st February 1999 and for live concert on 22nd February 1999 in Mumbai. It is not possible to get their performances in India without the help of Agents. There is no material on record to substantiate the conclusion of the AO that the entire consideration including the fee to be paid to Mr. Colin Davie is in fact the fees payable to the artiste for performance in India. This conclusion of the AO in our view is purely on surmises and was rightly held by the CIT(A) to be incorrect.

d) Agreement dated 11-2-1999:

Copy of this agreement is at pages 99-117 of Appellant's paper book. Mr. Colin Davie has agreed to act as agent for getting the performance of artiste Acrobazia in India on certain dates. The agreement recites that he has a power to act as appellants agent and entering into agreement with artiste. He has also held out that he has authority to enter into the agreement with the appellant on behalf of the artiste. Schedule-2 to the agreement clearly specifies that the Artiste will be paid \$ 2500 each for two concerts to be performed in Mumbai, India and that Colin Davie will be paid \$ 1500 each for the said two concerts as agents commission. Part-C of Schedule-2 to the Agreement provides that the appellant has to pay airfare, visa of \$7000 for two artistes. Acrobazia is a group of 2 artistes of International repute of Canada. Both of them are balancing and circus artiste and have performed five regularly in Canada, US, UK etc. The group came to India to perform during the Filmfare Award Ceremony on 21st February 1999 and for live concert on 22nd February 1999 in Mumbai.

e) Agreement dated 10-1-2000:

Copy of this agreement is at pages 118-129 of Appellant's paper book. This agreement is between the appellant and Shaggy Troupe, the artiste who performed in India. Mr. Colin Davie has acted as agent of

Shaggy Troupe and signed this agreement. There is no payment of commission. The artiste was to be paid \$ 9000 as remuneration. A sum of \$ 6000 was to be paid for air travel expenses. Shaggy is a popular coloured Artiste from the United States of America. He came to India for performance on 15 January 2000 in Pune.

27. The above artist is internationally reputed and well known in the entertainment industry. Each of them is coming from a different country. They are renowned international performers and receive overwhelming responses for their performances in their respective countries as well as the rest of the world including India. However, scheduling their performances in India is not a smooth task. As a unique practice in vogue in the entertainment industry, those artists/performers are not easily approachable. Discussing with them about performing in India, time schedule, structure of the show/concert, venues, itinerary, fees etc. requires good business negotiation and persuasive skill apart from those accessibility. These artists/performers are quite unapproachable and emotional and are known for their varied and sometimes unpredictable behaviors. Here comes the role of agent who acts as a link acumen and skills to negotiate with such artists/performers. Further, they deal with such artists on a regular basis. For rendering such services, depending upon the nature of the deals and time and effort involved such agent claims commission from the organizers. We are of the view that the There is no material on record to substantiate the conclusion of the AO that the entire consideration including the fee to be paid to Mr.Colin Daive is in fact the fees payable to the artiste for performance in India. This conclusion of the AO in our view is purely on surmises and was rightly held by the CIT(A) to be incorrect.

28. The payment of commission to Colin Davie is not covered by article 18 of DTAA between India and U.K. as Colin Davie himself has neither taken any part in events during the dates of engagement nor exercised any personal activities in India. Further, the income of Colin

Davie by way of commission does not relate to the services of entertainer/artiste. In this regard, we reject the argument of the learned D.R. that without the presence in India Mr. Colin Davie could not have rendered the services which he agreed to do under the various agreements. This argument is purely on surmises and there is no evidence on record to show the presence of Mr. Colin Davie in India. The services are rendered outside India by Colin Davie and income arising from that Article 7 of DTAA between India and U.K. covers services rendered. The relevant Para 1 of Article 7 has already been referred to in the earlier part of this order. Mr. Colin Davie does not have any PE in India. In view of the above, the profits by way of commission payable to Colin Davie shall be taxable only in U.K. and is not taxable in India. Therefore there was no obligation on the part of the Assessee to deduct tax at source on payments to Mr. Colin Davie. The Hon'ble Supreme Court in the case of Carborandum Co. v. CIT (1977) 108 ITR 335, has held that "the carrying on of activities or operations in India is essential to make the non-resident have business connection in India in order that he may be liable to tax in respect of the income attributable to that business connection. The CBDT in Circular No. 17(XXXVII) of 1953 dated 17th July, 1953 has stated as follows:

"Foreign agents of Indian exporters – A foreign agent of an Indian exporter operates in his own country and no part of his income arises in India. Usually, his commission is remitted directly to him; and is, therefore, not received by or on his behalf in India. Such an agent is not liable to Indian Income-tax."

The CBDT circular No.786 dated 07/02/2000 regarding taxability of export commission payable to non-resident agents rendering services abroad has stated that "No tax is therefore deductible under section 195 and consequently the expenditure on export commission and other related charges payable to a non-resident for services rendered outside India becomes allowable expenditure." Though, the above circular is issued in the context of commission paid to foreign agent of

Indian exporters, it applies with equal force to commission paid to agents for services rendered outside India.

29. In view of the above, we hold that commission income of agent is not liable to tax in India and consequently there was no obligation on the part of the appellant to deduct tax at source at the time of making payment.

30. As far as reimbursement of expenses is concerned, the factual details have already been set out in para-13 to 21 of this order. It is clear from those details that the payments referred to therein were reimbursement of expenses. The law is well settled that any payment made towards reimbursement of expenses is not chargeable to tax. The Hon'ble Bombay High Court in the case of DIT (IT) Vs. Krupp UDHE GmbH (2010) 38 DTR (Bom) 251 following its own decision in CIT Vs. Siemens Aktiengesellschaft 220 CTR (Bom) 425 has laid down that reimbursement of expenses are not chargeable to tax and therefore there was no obligation to deduct tax at source.

31. For the reasons given above, we do not find any merits in this appeal by the revenue and the same is dismissed.

Order pronounced in the open court on this 19th day of November, 2010.

Sd/-
(Pramod Kumar)
Accountant Member

Sd/-
(N.V. Vasudevan)
Judicial Member

Mumbai dated the 19th November, 2010.
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Copy to:

1. The Assessee
 2. The Revenue
 3. The CIT-2, Mumbai
 4. The CIT(A)-4, Mumbai
 5. The DR 'C' Bench, Mumbai
- /True copy/

By order

Asst.Registrar,ITAT, Mumbai

Sr.No.	Details	Date	Initials	Designation
1	Draft dictated on	25.10.10		Sr.PS/PS
2	Draft Placed before author	26.10.10		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			