IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA

Before Shri Pramod Kumar (Accountant Member),
and Shri Mahavir Singh (Judicial Member)

I.T.A. No.: 1686 and 1687/Kol/2011
Assessment year 2007-08 and 2008-09

Taj Leather Works ***……..Appellant***
30/1, Alimuddin Street,
Kolkata 700016 [PAN : AABFT7886N]

Vs.

Assistant Commissioner of Income Tax
Circle 32, Kolkata ***……Respondent***

Appearances
Indranil Banerjee *for the appellant*
A P Roy *for the respondent*

Date of concluding the hearing : March 26, 2012
Date of pronouncing the order : May 31 ,2012

O R D E R

Per Pramod Kumar:

1. These two appeals pertain to the same assessee, involve a common issue arising out of materially similar set of facts and were heard together. As a matter of convenience, therefore, both of these appeals are being disposed of by way of this consolidated order.

2. The short issue that we are required to adjudicate in both these appeals is whether or not the CIT(A) was justified in upholding the disallowance under section 40(a)(ia) of the Income Tax Act, 1961, on the ground that the payments made by the assessee to Indian agents of foreign airlines, namely Singapore International Airlines (Singapore), Emirates (UAE), British Airways (UK) and Lufthansa German Airlines (Germany), were not deducted to deduction of tax at source under section 194 C of the Act. Even though the assessee has several grounds of appeal, learned representatives fairly agree that it is our adjudication on the issue so identified above which will decide the fate of these appeals.

3. The assessment years involved are 2007-08 and 2008-09 and the CIT(A)'s impugned orders are dated 15th September 2011 and 14th October 2011 respectively.

4. The issue in appeal lies in a narrow compass of material facts. The assessee is a manufacturer and exporter of leather products and the assessee has incurred expenditure on air freight, in exporting its products abroad, paid to various airlines. These payments for airfreight are made to two entities, namely PDP International Limited (PDP, in short) and DHL Danzas Lemuir Ltd (DHL, in short), in their capacity as agents of these airlines. In the course of assessment proceedings, the Assessing Officer required the assessee to show cause as to why disallowance under section 40(a)(ia) not be made as the assessee has not deducted tax at source under section 194 C from these payments. The stand of the assessee was that these payments are made to non-resident airlines, and, therefore, following the rationale of circular no. 723 which lays down that no taxes are required to be deducted at source under section 194C from payments to agents of foreign shipping companies, no taxes under section 194 C are required to be deducted from the same. The Assessing Office, however, rejected this stand of the assessee on the grounds that (a) circular no. 723 specifically applicable only to foreign shipping companies and the benefit of the same cannot, therefore, extend to the foreign airlines; (b) PDP and DHL were resident companies, they may utilize services of any airlines for transportation but they were providing services to the assessee, and, therefore, the assessee was obliged to deduct tax at source under section 194 C; and (c) even if it is assumed that the payments were made to the agents of the foreign companies, the assessee was under an obligation to move an application under section 195(2) requiring the Assessing Officer to determine whether tax was deductible from such foreign remittance. The Assessing Officer thus held that the assessee was obliged to deduct tax at source from these payments, and since he has failed to do so, these payments

cannot be allowed as deduction in computation of business income. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) discussed and elaborated upon the stand of the Assessing Officer and upheld the same. The assessee is not satisfied and is in further appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

6. It is an admitted position that so far as the airfreight is concerned, it is paid to the agents on the actuals basis and that the bills and airfreight documents have been directly issued to the foreign airlines. PDP and DHL, while accepting payments for airfreight components, have acted merely as agents of the respective airlines and have not received the airfreight payments in their own right. In copies of airway bills, which have been filed before us in the paperbook, the name of thes e agents is shown as “Issuing carrier’s agent and the city” as also the agent’s code is given as “Agent’s IATA code”. There is thus enough material to demonstrate that the persons having received money for the airfreight have received the same in their capacity as “issuing carrier’s agent” i.e. agent of the airline concerned. The airfreight payment is thus made to the foreign airlines, namely SIA, Emirates, British Airways and Lufthansa – though through the agent, i.e. PDP and DHL etc.

7. In view of the above discussions, in our considered bview, the payments cannot be said to have been made to a resident company, and, accordingly, the provisions of Section 194 C , which apply only on the resident recipients, donot come into play.

8. As for the stand that the assessee should have moved the application under section 195(2) in case of payments to non residents

and assessee's failure to do so is to be visited with consequences for non deduction at source, the law is now settled by Hon'ble Supreme Court in the case of GE India Technology Centre Pvt Ltd Vs CIT (327 ITR 456) wherein Their Lordships have categorically held that, "**where a person responsible for deduction is fairly certain, then he can make his own determination as to whether the tax was deductible at source and, if so, what should be the amount thereof**". The plea of the revenue authorities to the effect that where the assessee does not move an application under section 195(2) and makes the remittance without deduction of tax at source, the assessee should be visited with consequences for non deduction of tax at source, which was accepted by Hon'ble Karnataka High Court in the case of CIT Vs Samsung Electronic Co Ltd (320 ITR 209), was categorically rejected by Their Lordships, and Their Lordships observed as follows:

> ***In our view, section 195(2) is based on the "principle of proportionality". The said sub-section gets attracted only in cases where the payment made is a composite payment in which a certain proportion of payment has an element of "income" chargeable to tax in India. It is in this context that the Supreme Court stated, "If no such application is filed, income-tax on such sum is to be deducted and it is the statutory obligation of the person responsible for paying such 'sum' to deduct tax thereon before making payment. He has to discharge the obligation to TDS". If one reads the observation of the Supreme Court, the words "such sum" clearly indicate that the observation refers to a case of composite payment where the payer has a doubt regarding the inclusion of an amount in such payment which is exigible to tax in India. In our view, the above observations of this Court in Transmission Corpn. of A.P. Ltd.'s case (supra) which is put in italics has been completely, with respect, misunderstood by the Karnataka High Court to mean that it is not open for the payer to contend that if the amount paid by him to the non-resident is not at all "chargeable to tax in India", then no TAS is required to be deducted from such payment. This interpretation of the High Court completely loses sight of the plain words of section 195(1) which in clear terms lays down that tax at source is deductible only from "sums chargeable" under the provisions of the Income-tax Act, i.e., chargeable under sections 4, 5 and 9 of the Income-tax Act.***

9. We have also noted that it is not even the revenue's case that the amounts paid to foreign airlines, on account of airfreight payments, are taxable in India, and quite rightly so, because, as the provisions of all the respective tax treaties clearly provide, the profits from operations of ships and aircrafts in the international traffic are taxable only in the state in which the respective enterprise are fiscally domiciled and not in the source state. This rule, howsoever devoid of paradigm justification as it may appear to many of us, is one of the fundamental rules followed in almost all the tax treaties and our tax treaties with UK, UAE, Singapore and Germany are no exception to this general rule. It is only elementary that a tax deduction at source under section 195 is only a vicarious liability inasmuch as when recipients of income, i.e. the airlines concerned, have no primary liability to pay tax, there cannot be any vicarious liability to deduct tax from payments in which such income is embedded.

10. In view of the above discussions as also bearing in mind entirety of the case, we are of the considered view that the assessee did not have any obligations to deduct tax at source – whether under section 194 C or under section 195 – from payments made to the foreign airlines for airfreight. In this view of the matter, the impugned disallowances under section 40(a)(ia) are devoid of any merits, nor can these disallowances be made under section 40(a)(i) either – as alternatively suggested by the authorities below. We, accordingly, direct the Assessing Officer to delete the impugned disallowances. The assessee gets the relief accordingly.

11. In the result, the appeals are allowed in the terms indicated above. Pronounced in the open court today on 31st day of May 2012.

Sd/xx
Mahavir Singh
(Judicial Member)

Sd/xx
Pramod Kumar
(Accountant Member

Kolkata, the 31st day of May, 2012

Copies to : (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *The Departmental Representative*
(6) *Guard File*

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Kolkata benches, Kolkata