IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA
[Before Shri Mahavir Singh, JM & Shri B. P. Jain, AM]

I.T.A No. 1592/Kol/2012
Assessment Year: 2009-10

Joint Commissioner of Income-tax, Range-2, Jalpaiguri	Vs.	M/s. Tirupati Plywood Industries (PAN: AABFT7055P)
(Appellant)		(Respondent)

&

C.O. No. 14/Kol/2013
In **I.T.A No. 1592/Kol/2012**
Assessment Year: 2009-10

M/s. Tirupati Plywood Industries	Vs.	Joint Commissioner of Income-tax, Range-2, Jalpaiguri
(Cross Objector)		(Respondent)

Date of hearing: 20.04.2015
Date of pronouncement: 30.04.2015

For the Revenue : Smt. Ranu Biswas, JCIT
For the Assessee/Cross Objector: Shri Subash Agarwal, Advocate

ORDER

Per Shri Mahavir Singh, JM:

Both the appeal and the Cross Objection filed by revenue and assessee respectively are arising out of order of CIT(A), Jalpaiguri in appeal No. 101/JAL/CIT(A)/JAL/11-12 dated 09.07.2012. Assessment was framed by JCIT, Range-2, Jalpaiguri u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as ñthe Actò) for Assessment Year 2009-10 vide his order dated 26.12.2011.

2. The appeal filed by revenue is barred by limitation by 11 days and revenue has filed Condonation petition stating reasons that the assessment records got misplaced and was traced at the fag end of limitation period. Ld. Counsel for the assessee has not objected for Condonation of delay. Hence, we condone the delay and admit the appeal.

3. The only issue in this appeal of revenue is against the order of CIT(A) deleting the disallowance made by AO by invoking the provisions of section

40(a)(ia) of the Act for non-deducting TDS u/s. 195 of the Act. For this, revenue has raised following effective ground no.2:

> *"2. That, on the facts and circumstances of the case, the Ld. CIT(A) without going in the merit of the addition disallowed the addition made by AO as per provisions u/s. 40(a)(i) of the I. T. Act, 1961. The assessee remitted a sum through Bank via letter of credit which means an amount have been deposited in India and thereby income deemed to be accrued and arose in India of which assessee is liable to deduct tax u/s. 195 of the I. T. Act, 1961.*
>
> *A. P. Ltd. Vs. CIT (1999) 105 Taxman 742/739 ITR 587 (SC)*
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> *The assessee did not deduct any Tax at source from the deductee Foreign Company. Hence, as per provisions of Section 40(a)(i) of the I. T. Act, 1961 the whole amount was added back to the total income."*

4. Briefly stated facts are that the assessee filed its return of income and the same was processed u/s. 143(1) of the Act. Subsequently, assesseeôs case was selected for scrutiny and notice u/s. 143(2) of the Act was issued as there was a survey u/s. 133A of the Act on assesseeôs business premises on 12.09.2008. The AO during the course of assessment proceedings noticed that the assessee has made payment of Rs.32,46,905/- for purchase of imported goods and made payment to importer without deducting TDS u/s. 195 of the Act. According to AO, the assessee is liable to deduct TDS for making payment to foreign parties u/s. 195 of the Act. As the assessee failed to deduct TDS the AO invoked the provisions of section 40(a)(ia) of the Act. The AO also relied on the decision of Honôble Supreme Court in the case of A. P. Ltd. Vs. CIT (1999) 739 ITR 587 (SC). Aggrieved against disallowance, assessee preferred appeal before CIT(A), who deleted the disallowance by relying on the decision of Honôble Supreme Court in the case of GE India Technology Centre P. Ltd. Vs. CIT (2010) 327 ITR 456 (SC) by observing as under:

> *"I have carefully considered the submission of the Ld. AR and also gone through the assessment order. The major issue involved in this case, whether the amount received by the exporter from the assessee was chargeable to tax in India. There is no material on record to show that the exporter had any PE in India or apart from remittance made against the import of timber, the assessee made any other payment to them. The AR explained that import was made on the basis of OGL and payment was made through bank. Thus, it is clear that the exporter was not liable to pay any tax in India. In the case of Transmission Corporation of AP Ltd (supra), it was held that the purpose of TDS provision in chapter XVII-B is to see that the sum which is chargeable u/s.4 of levy and collection of Income-tax, the payer should deduct tax thereon at the rates in force, if the amount is to be paid to a non-resident. The scope and ambit of Sec.195 has been explained by the Supreme Court*

in GE India Technology Centre P Ltd vs CIT (2010) 327 ITR 456 (SC). In the said case the expression "any other sum chargeable under the provisions of the Act" in Sec.195 of the Act was elucidated and explained. It was held that if payment is made in respect of the amount which is not chargeable to tax under the provisions of Act, TDS is not liable to be deducted. Decision of the Supreme Court in Transmission Corporation of AP Ltd. vs. CIT (1999) 239 ITR 587 (SC) operates and is applicable when the sum or payment is chargeable to tax under the provisions of the Act. In such cases, TDS has to be deducted on the gross amount of payment made and not merely on the taxable income included in the gross amount. The said decision would not apply in case payment is made but the said sum in entirety is not chargeable or exigible to tax under the provisions of the Act.

In view of the aforesaid legal position and facts explained, it is held that the remittance
made by the assessee cannot attract the provisions of Sec.195 of the I T Act, thus, disallowance made by the AO u/s. 40(a)(i) is deleted."

Aggrieved, revenue is in appeal before us.

5. We have heard rival submissions and gone through facts and circumstances of the case. The assessee is engaged in manufacturing of plywood where imported timber is being used. During the relevant previous year assessee has imported wood logs from outside India. Assessee has made payment of Rs.32,46,905/- to the exporter on its sale these woods to the assessee on F.O.R. basis. The assessee has made payment outside India on the basis of import licence and remittances were made through proper banking channel. There is no PE of the exporter in India rather there is no business connection with Indian importer except exporting of timber logs rather the Indian party as i.e. the assessee imported the goods. In term of the above and in the given facts of the case, this issue is squarely covered by the decision of Hon'ble Supreme Court in the case of GE India Technology Centre P. Ltd. Vs. CIT (2010) 327 ITR 456 (SC), wherein it is held as under:

"6. At this stage we may also quote hereinbelow Section 195 (6) as inserted by Finance Act, 2008 w.e.f. 1.4.2008. "195(6) The person referred to in sub-section (1) shall furnish the information relating to payment of any sum in such form and manner as may be prescribed by the Board." 7. Under Section 195(1), the tax has to be deducted at source from interest (other than interest on securities) or any other sum (not being salaries) chargeable under the I.T. Act in the case of non-residents only and not in the case of residents. Failure to deduct the tax under this Section may disentitle the payer to any allowance apart from prosecution under Section 276B. Thus, Section 195 imposes a statutory obligation on any person responsible for paying to a nonresident, any interest (not being interest on securities) or any other sum (not being dividend) chargeable under the 5 http://www.itatonline.org provisions of the I.T. Act, to deduct income tax at the rates in force unless he is

liable to pay income tax thereon as an agent. Payment to non-residents by way of royalty and payment for technical services rendered in India are common examples of sums chargeable under the provisions of the I.T. Act to which the aforestated requirement of tax deduction at source applies. The tax so collected and deducted is required to be paid to the credit of Central Government in terms of Section 200 of the I.T. Act read with Rule 30 of the I.T. Rules 1962. Failure to deduct tax or failure to pay tax would also render a person liable to penalty under Section 201 read with Section 221 of the I.T. Act. In addition, he would also be liable under Section 201(1A) to pay simple interest at 12 per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid. The most important expression in Section 195(1) consists of the words "chargeable under the provisions of the Act". A person paying interest or any other sum to a non-resident is not liable to deduct tax if such sum is not 6 http://www.itatonline.org chargeable to tax under the I.T. Act. For instance, where there is no obligation on the part of the payer and no right to receive the sum by the recipient and that the payment does not arise out of any contract or obligation between the payer and the recipient but is made voluntarily, such payments cannot be regarded as income under the I.T. Act. It may be noted that Section 195 contemplates not merely amounts, the whole of which are pure income payments, it also covers composite payments which has an element of income embedded or incorporated in them. Thus, where an amount is payable to a non-resident, the payer is under an obligation to deduct TAS in respect of such composite payments. The obligation to deduct TAS is, however, limited to the appropriate proportion of income chargeable under the Act forming part of the gross sum of money payable to the non-resident. This obligation being limited to the appropriate proportion of income flows from the words used in Section 195(1), namely, "chargeable under the provisions of the Act". It is for this reason that vide Circular No. 728 dated October 30, 1995 the CBDT has clarified that the tax 7 http://www.itatonline.org deductor can take into consideration the effect of DTAA in respect of payment of royalties and technical fees while deducting TAS. It may also be noted that Section 195(1) is in identical terms with Section 18(3B) of the 1922 Act. In CIT Vs. Cooper Engineering [68 ITR 457] it was pointed out that if the payment made by the resident to the nonresident was an amount which was not chargeable to tax in India, then no tax is deductible at source even though the assessee had not made an application under Section 18(3B) (now Section 195(2) of the I.T. Act). The application of Section 195(2) pre-supposes that the person responsible for making the payment to the non-resident is in no doubt that tax is payable in respect of some part of the amount to be remitted to a non-resident but is not sure as to what should be the portion so taxable or is not sure as to the amount of tax to be deducted. In such a situation, he is required to make an application to the ITO(TDS) for determining the amount. It is only when these conditions are satisfied and an application is made to the ITO(TDS) that the question of making an order under Section 195(2) will arise. In fact, at 8 http://www.itatonline.org one point of time, there was a provision in the I.T. Act to obtain a NOC from the Department that no tax was due. That certificate was required to be given to RBI for making remittance. It was held in the case of Czechoslovak Ocean Shipping International Joint Stock Company Vs. ITO [81 ITR 162(Calcutta)] that an application for NOC cannot be said to be an application under Section 195(2) of the Act. While deciding the scope of Section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of Section 195. Hence, apart from Section 9(1), Sections 4, 5, 9, 90, 91 as well as the provisions of DTAA are also relevant, while applying tax deduction at source provisions. Reference to ITO(TDS) under Section 195(2) or 195(3) either by the non-resident or by the resident payer is to avoid any future hassles for both resident as well as non-resident. In our view, Sections 195(2) and 195(3) are

safeguards. The said provisions are of practical importance. This reasoning of ours is based on the decision of this Court in Transmission Corporation 9 http://www.itatonline.org (supra) in which this Court has observed that the provision of Section 195(2) is a safeguard. From this it follows 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."

Further, Hon'ble Supreme Court answered the same as under:

"While interpreting a Section one has to give weightage to every word used in that section. While interpreting the provisions of the Income Tax Act one cannot read the charging Sections of that Act de hors the machinery Sections. The Act is to be read as an integrated 12 http://www.itatonline.org Code. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in the case of C.I.T. Vs. Eli Lilly & Co. (India) (P.) Ltd. [312 ITR 225] the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the I.T. Act form one single integral, inseparable Code and, therefore, the provisions relating to TDS applies only to those sums which are "chargeable to tax" under the I.T. Act. It is true that the judgment in Eli Lilly (supra) was confined to Section 192 of the I.T. Act. However, there is some similarity between the two. If one looks at Section 192 one finds that it imposes statutory obligation on the payer to deduct TAS when he pays any income "chargeable under the head salaries". Similarly, Section 195 imposes a statutory obligation on any person responsible for paying to a nonresident any sum "chargeable under the provisions of the Act", which expression, as stated above, do not find place in other Sections of Chapter XVII. It is in this sense that we hold that the I.T. Act constitutes one single integral inseparable Code. Hence, the provisions relating to TDS 13 http://www.itatonline.org applies only to those sums which are chargeable to tax under the I.T. Act. If the contention of the Department that any person making payment to a non-resident is necessarily required to deduct TAS then the consequence would be that the Department would be entitled to appropriate the moneys deposited by the payer even if the sum paid is not chargeable to tax because there is no provision in the I.T. Act by which a payer can obtain refund. Section 237 read with Section 199 implies that only the recipient of the sum, i.e., the payee could seek a refund. It must therefore follow, if the Department is right, that the law requires tax to be deducted on all payments. The payer, therefore, has to deduct and pay tax, even if the so-called deduction comes out of his own pocket and he has no remedy whatsoever, even where the sum paid by him is not a sum chargeable under the Act. The interpretation of the Department, therefore, not only requires the words "chargeable under the provisions of the Act" to be omitted, it also leads to an absurd consequence. The interpretation placed by the Department would result in a situation where even when 14 http://www.itatonline.org the income has no territorial nexus with India or is not chargeable in India, the Government would nonetheless collect tax. In our view, Section 195(2) provides a remedy by which a person may seek a determination of the "appropriate proportion of such sum so chargeable" where a proportion of the sum so chargeable is liable to tax. The entire basis of the Department's contention is based on administrative convenience in support of its interpretation. According to the Department huge seepage of revenue can take place if persons making payments to non-residents are free to deduct TAS or not to deduct TAS. It is the case of the Department that Section 195(2), as interpreted by the High Court, would plug the loophole as the said interpretation requires the payer to make a declaration before the ITO(TDS) of payments made to non-residents. In other words, according to the Department Section 195(2) is a provision by which payer is required to inform the Department of the remittances he makes to the nonresidents by which the Department is able to keep

track of the remittances being made to non-residents outside India. 15 http://www.itatonline.org We find no merit in these contentions. As stated hereinabove, Section 195(1) uses the expression "sum chargeable under the provisions of the Act." We need to give weightage to those words. Further, Section 195 uses the word 'payer' and not the word "assessee". The payer is not an assessee. The payer becomes an assessee-in-default only when he fails to fulfill the statutory obligation under Section 195(1). If the payment does not contain the element of income the payer cannot be made liable. He cannot be declared to be an assessee-in-default. The abovementioned contention of the Department is based on an apprehension which is ill founded. The payer is also an assessee under the ordinary provisions of the I.T. Act. When the payer remits an amount to a non-resident out of India he claims deduction or allowances under the Income Tax Act for the said sum as an "expenditure". Under Section 40(a)(i), inserted vide Finance Act, 1988 w.e.f. 1.4.89, payment in respect of royalty, fees for technical services or other sums chargeable under the Income Tax Act would not get the benefit of deduction if the assessee fails to deduct TAS in 16 http://www.itatonline.org respect of payments outside India which are chargeable under the I.T. Act. This provision ensures effective compliance of Section 195 of the I.T. Act relating to tax deduction at source in respect of payments outside India in respect of royalties, fees or other sums chargeable under the I.T. Act. In a given case where the payer is an assessee he will definitely claim deduction under the I.T. Act for such remittance and on inquiry if the AO finds that the sums remitted outside India comes within the definition of royalty or fees for technical service or other sums chargeable under the I.T. Act then it would be open to the AO to disallow such claim for deduction. Similarly, vide Finance Act, 2008, w.e.f. 1.4.2008 sub-Section (6) has been inserted in Section 195 which requires the payer to furnish information relating to payment of any sum in such form and manner as may be prescribed by the Board. This provision is brought into force only from 1.4.2008. It will not apply for the period with which we are concerned in these cases before us. Therefore, in our view, there are adequate safeguards in the Act which would prevent revenue leakage."

In view of the above decision, the issue is squarely covered in favour of assessee and against revenue. Hence, we confirm the order of CIT(A) on this issue and revenueôs appeal is accordingly dismissed.

6. Cross Objection of assessee is in support of order of CIT(A) hence, it is dismissed being infructuous.

7. In the result, both the appeals of revenue and the Cross Objection of assessee are dismissed.

8. Order is pronounced in the open court on 30.04.2015

Sd/-	**Sd/-**
(B. P. Jain)	(Mahavir Singh)
Accountant Member	Judicial Member

Dated : 30th April, 2015

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT ï JCIT, Range-2, Jalpaiguri.
2 Respondent ï M/s. Tirupati Plywood Industries, Vill. Narendrapur, PO. Jorepatki, Mathabhanga, Dist. Coochbehar.
3. The CIT(A), Jalpaiguri
4. CIT
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.