# CAN WITHDRAWAL OF CIRCULARS CHANGE LAW?

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Hitherto, the export commissions paid to foreign agents were never in question of taxation in India. This was fortified by Circular No.23 dated 23 July 1969 which stated that where a foreign agent of India exporters operates in his own country and his commission is usually remitted directly to him and is, therefore, not received by him or his behalf in India, such an agent is not liable to income tax in India on the commission

Later Circular No.786 dated 7 February 2000 emphasized the clarification in the above circular and laid down the law that where non-resident agent operates outside the country, no part of his income arises in India and since the payment is usually remitted directly abroad, it cannot be held to have been received by or on behalf of agent in India. Such payment were therefore, held to be not taxable in India.

In 2009, vide circular No 7, both the above circulars namely Circular No. 23 dated 23-07-1969 & Circular No. 786 dated 07-02-2000 were withdrawn, reasoning that interpretation of the Circular by some of the taxpayers to claim relief is not in accordance with the provisions of section 9 of the Income-tax Act, 1961 or the intention behind the issuance of the Circular

With no reason given for the withdrawal of the two circulars the CBDT also did not clarify on whether where non-resident agent operates outside India, whether his income will deemed to accrue or arise in India or not. This set the opening of the Pandora 's Box on the issue.

With the withdrawal of the circulars, it was left to the courts to decide the issue afresh. An issue, which was held to be not taxable in India since 1969. The moot point to consider here is whether an issue could be brought back to life with a withdrawal of a circular.

Notwithstanding the above, the courts had held that the same is not taxable with the strength of the circulars and also on the basic tenaments of law and the Income tax Act 1961

The Supreme Court in *CIT V. Toshuku (125 ITR 525)* laid the law that the commission amounts which were earned by non-resident for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India

In *CIT v EON Technology (P) Ltd 343 ITR 366)* the Delhi High Court went on to explain the term "business connections" to mean something more than mere business and is not equivalent to carrying on business, but a relationship between the business carried on by a non-resident, which yields profits and gains and some activities in India, which contributes directly or indirectly to the earning of those profits or gains. The court reiterated the Explanation1(a) to section 9(1)(i) and concluded that since only such part of the income as is reasonably attributable to the operations carried out in India is taxable in India. In case of export commission, no part of the same is attributable in India and hence not taxable in India.

In a decision of the AAR in *Wallace Pharmaceuticals Private Limited [2005] 278 ITR 97* it was concluded that the commission is in the nature of fees for technical services

In a very recent decision of the Delhi High Court in, *DIT v. Panalfa Autoelektrik (ITA No 292/2014) (Delhi High Court) (2014) 90 CCH 0109 Del HC,* this issue has be settled in favour of the assessee.

The facts of the case are as follows: .

The taxpayer paid commission during Financial Year 2009- 2010 to Agenta World Trading and Consulting Establishment (Agenta), a company registered in Liechtenstein for procuring export orders. An application was made under Section 195(2) of the Act for authorisation to remit Commission for arranging export sales and realizing payments to Agenta.

The AO held that the commission to a non-resident was taxable as Fees for Technical Services (FTS) under Section 9(1) (vii) (b) of the Act. The AO relied on the ruling of *Wallace Pharmaceuticals Private Limited* supra where it was held that when fees for technical services is payable by a person who is resident of India, it would be a deemed income arising in India within the meaning of Section 9(1), irrespective of whether the recipient of such income is a resident or a non-resident of India. The AO had directed the taxpayer to deduct tax at the rate of 10 per cent.

The CIT(A) and the Tribunal ruled against the tax department. The tax department appealed before the Delhi High Court. The High Court held that commission payment to a non-resident for procuring export orders are not FTS since the activities carried out by Agenta do not relate to carrying out managerial, technical and consultancy services. The non-resident was not controlling the policies or scrutinizing the effectiveness of the policies. Neither did it perform as a primary executor nor any supervisory function whatsoever. The High Court held that though Agenta had expertise and knowledge in the marketing domain, it was used for its own purposes, and therefore, there was no provision of consultancy/advisory/managerial services to the taxpayer.

Further, the High Court observed that there was no special skills or knowledge relating to a technical field required for carrying out export commissionaire arrangement, and therefore, not taxable as FTS. While rejecting the tax department's reliance on Wallace Pharmaceuticals, the Court held that it was clearly distinguishable from the Wallace Pharmaceuticals case in which the non-resident consultant had to perform several services in the nature of attending meetings on mutually agreeable dates and providing advice and counseling, which were in the nature of consultancy services as they entailed support from a product team, compliance with all legal and administrative formalities, including registration and marketing strategy, creation of entry into new markets, development and distribution channels, etc. The court thus and thus distinguished the facts of this case with that of *Wallace Pharmaceuticals.*

In the process, the High Court placed reliance on the decisions in the cases of *J.K. (Bombay) Limited v. CBDT and Another [1979] 118 ITR 312 (Del), CIT v. Bharti Cellular Limited and Others, [(2009] 319 ITR 139 (Del) and AAR ruling in Intertek Testing Services India Private Limited [2008] 307 ITR 418 (AAR). DIT v. Panalfa Autoelektrik (ITA No 292/2014) (Delhi High Court)* and concluded that there is no element of a 'technical service' provided by the non-resident to the Assessee in the present case and will therefore such commission paid will not be taxable under Section 9(1) (vii) (b) of the Act.

Thus, the issue seems to have settled now. The case of *DIT v. Panalfa Autoelektrik* supra and could be a well precedent to obtain the no tax certificates U/s.195.

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