IN THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai
Before Shri D. Karunakara Rao (AM) & Shri Sandeep Gosain (JM)

I.T.A. No. 1608/Mum/2009
(Assessment Year 2005-06)

ITO 2(3)(1) Room No. 581A Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. RST India Ltd. 07, Rahimatoola House Homji Street Fort Mumbai-400 001.
(Appellant)	..	(Respondent)

PAN No. AAACR1838C

Assessee by :	Shri J.D. Mistry
Department by :	Shri Sujit Bangar
Date of Hearing :	5.01.2016
Date of Pronouncement :	3.2.2016

O R D E R

Per Sandeep Gosain, JM :-

This appeal by the Revenue is directed against the order of learned CIT(A) –XXX, Mumbai dated 19.12.2008 for A.Y. 2005-06 on following grounds:

On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in allowing relief to the assessee to the extent impugned in the grounds enumerated below:

1. *"The Ld. CIT(A) has erred in deleting the addition of Rs2.25 crores made by the AC u/s 28(ii)(c) relying on the decision of Apex Court in the case of M/s Oberoi Hotels.*

2. *The Ld. CIT(A) failed to appreciate that the termination of contract, didn't affect the assessee's profit making structure and it did not involve the loss of an enduring trading asset, but it merely deprived the assessee of a trading activity making him free to carry rest of his business. The compensation received thus attracts the provisions u/s 28(ii)(c) and is to be treated as revenue receipt.*

3. *The Ld. CIT(A) failed to appreciate that the case of Blue Star Ltd. Vs. CIT (1995) 217 ITR 514 the compensation received by the assessee for termination of the agency agreement was held to be a revenue receipt because the trading structure of the*

assessee was not impaired and the termination could be treated as a normal incident of the business.

4. *The Ld. CIT(A) has erred in deleting the disallowance Rs.13,00,442/- on account of non deduction of TDS on payment of commission made by the AC u/s 40(a)(ia).*

5. *For these and other grounds that may be urged at the time of hearing, the decision of the CIT(A) may be set aside and that of the Assessing Officer restored*

2. Since ground No. 1 to 3 are interconnected and inter related and they are heard together therefore we thought it fit to decide the same collectively.

3. We have heard the counsels of both the parties on above ground No. 1&2 and perused the material placed on record. The basic dispute before us is as to whether additions made by the Assessing Officer and deleted by learned CIT(A) u/s. 28((ii)(c) of the Act are correct or not. It is an undisputed fact that the provisions of section 28(ii)(c) is applicable where there is relationship of agent and principal between the parties and for the sake of convenience provisions of section 28(ii)(c) are reproduced herein :

Section 28(ii)(c) in The Income- Tax Act, 1995
(c) any person, by whatever name called, holding an agency in India for any part of the activities relating to the business of any other person, at or in connection with the termination of the agency or the modification of the terms and conditions relating thereto;

Keeping in view the aforementioned proposition, we have to analyze as to whether the case of the assessee falls within the definition of section 28(ii)(c) of the Act or not. Learned CIT(A) while accepting the appeal of the assessee has decided the said grounds in detail. Relevant para of learned CIT(A) in dealing with the aforementioned ground are as under :-

6. I have perused the order of the Assessing Officer and the detailed submissions made by the Appellant and have also gone through the various case laws cited by the Assessing Officer in the assessment order and those cited by the Appellant in the appellate proceedings, and having given thoughtful consideration thereto, in my opinion, the addition made by the Assessing Officer on both the grounds that compensation received is a revenue receipt and that amount is taxable u/s 28 (ii) (c) is incorrect. Applying the decision of the

Supreme Court in case of Best & Co. (supra) relied upon by the Assessing Officer himself is in favour of the appellant in view of the facts of the case. The Appellant has not received the said compensation due to an ordinary incident in the course of the business. Hence, it cannot be concluded as "Revenue Receipt." Further, applying the decision of the Hon'ble Supreme Court in case of Oberoi Hotels (Supra) to the facts of the case, it is observed that due to cancellation of the agreement, the Appellant has lost the source of income and hence payment made to compensate such loss of source of income should be held to be "Capital Receipt." Even the decision of the Supreme Court in case of Kettlewell Bullen (Supra) supports the appellant's case since by the cancellation of the agreement, trading structure of the appellant is impaired. Further, such cancellation results in loss of source of income. Hence, on the basis of facts of the case and in view of these Supreme Court decisions, it is held that the compensation of Rs. 2.25 crores on termination of the agreement is a "Capital Receipt' and not a revenue receipt chargeable to tax

6.1 Further as it is observed in earlier paras, the relationship between the Appellant and the Sealand was on principal to principal basis. The Section 28 (ii) (c) is applicable when the compensation is received by the person who is the agent It means relationship between the two parties should be that of the agent and principal Hence, in my opinion section 28 (ii)(c) has no applicability to the Appellant's case and as such the aforesaid compensation is held to be capital receipt which is not taxable as income under section 28 (ii) (C) of the Act Reliance may further be made on the decision of Honble ITAT Mumbai Bench in the case of IGE (India) Ltd v. JCIT (ITA No. 1586) Mumbai 2003 dated 30.9.2008 wherein it is held that the compensation received on account of termination of the agency and distributorship Agreement is a capital receipt, not taxable as income of the business or profession. In the result, this ground is allowed and the addition made on this account is deleted.

4. Aforementioned findings of learned CIT(A) has been challenged by the Revenue on the ground that learned CIT(A) has erred in deleting the additions of Rs. 2.25 crores made by the Assessing Officer u/s. 28(ii)(c) of the Act and in this respect learned DR appearing on behalf of the Revenue has drawn our attention to certain clauses of the Service Agreement dated September 1,1981 and also drawn our attention to the detail order passed by the Assessing Officer. However, from co-joint reading of the findings of the Assessing Officer, learned CIT(A) as well as clauses of service agreement dated September 1,1981, we are unable to find that any of those clauses mentioned in service agreement between Sealand Service, Inc. and Ranadip shipping & Transport Company Pvt. Ltd. are meeting with the criteria laid down in section 182 to 238 of the Indian Contract Act where relationship of Principal and agent has been fully described. In this context Hon'ble High Court of Bombay in the case titled Daruvala Bros. (P) Ltd. (80 ITR 213) has categorically mentioned that the matter of legal relationship which arises upon a contract of agency made

between a principal and an agent has not remained ambiguous and has been crystallized in India by the provisions in sections 182 to 238 of the Indian contract Act. Section 182 provides that an agent is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, and who is so represented is called the 'principal'. Under sections 191 and 192, an agent is authorised to appoint a sub-agent; but where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent and is bound by and responsible for his acts, as if he was an agent originally appointed by the principal. Sections 211 to 221 deal with the agent's duty to the principal and, on the contrary, sections 222 to 225 deal with the principal's duty towards the agent. Under section 213, an agent is bound to render proper accounts to his principal on demand. Section 213 and 215 have the effect of providing that in no case where under an agreement between the two parties one of them is entitled to act on his own behalf and for himself in respect of the goods entrusted to him, the relationship of principal and agent can arise. In other words, where such relationship exists, the acts of the agent under the agreement, originally, cannot be for himself and he should in the matter of the agreement only act as an agent and carry out his obligations as representing and for and on behalf of his principal. The scheme of section 226 to 236 clearly indicates that the contacts made by an agent are enforceable in the same manner and have the same legal consequence as if the contracts had been made by the principal. Under section 230, an agent cannot, personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. This provision, however, is subject to the exceptions contained in the second part of the section.

5. However, basic test for determining relationship of agent and the principal is that whether a third person can sue the Principal for acts committed by the agent on behalf of the principal and from the entire reading of the Service Agreement which has been placed on record, we are unable to find even a single clause from which we could gather that a third person can sue M/s. Sealand for the acts committed by Ranadip Shipping and Transport Co. P. Ltd. i.e. assessee in the present case, and when once that element is missing, therefore relationship between the Sealand and Ranadip Shipping and Transport Co. P. Ltd. cannot be termed as “relationship” between the “agent” and “principal”. We find support from the judgment in the case of Daruvala Bros. (P) Ltd. The assessee company has also relied upon the

decision rendered by the ITAT, "Pune Bench" in the case of Kirloskar Oil Engines Ltd. (ITA No. 546/PN/04 dated 22.6.2012).

6. Learned Departmental Representative also relied upon the Judgment passed by Hon'ble Bombay High Court in the case of Blue Star Ltd. (217 ITR 514) and order passed by the Assessing Officer.

7. Learned AR relied upon the Judgment of Hon'ble Jurisdictional High Court in the case of Seimens Aktiongesellschaft (310 ITR 320), wherein it was held as under :-

> *"Section 90, read with section 9, of the Income-tax Act, 1961 and articles I, H, HI, X and XII of the Double Taxation Avoidance Agreement between India and Germany - Double Taxation Relief- Where agreement exists - Assessment year 1979-80 - Whether where provisions of DTAA entered into between India and other country are more beneficial to a non-resident assessee than provisions of Income-tax Act, provisions of DTAA would prevail - Held, yes - Whether correct interpretation of DTAA between India and Germany would be to include royalties from patents, copyrights or trademarks, and like within expression 'industrial' or 'commercial' profits - Held, yes - Assessee, a non-resident company incorporated in Germany, had entered into different agreements with three Indian companies prior to 1-61976 - Under said agreements, assessee had agreed to provide to Indian companies relevant patents, patent applications, written material, experience, information, etc., regarding certain products - In consideration, Indian companies were to pay assessee certain percentage of selling price of contract products - Assessing Officer assessed said amounts in hands of assessee as being liable to tax in India - However, on second appeal, Tribunal held that amounts received by assessee from Indian companies were in nature of 'royalty' within meaning of section 9(1)(vi), but under DTAA between India and Germany, said amounts had to be considered as 'commercial profit' and as assessee had no PE in India, they could not be brought to tax in India - Whether on facts, Tribunal's order was in accordance with law and, therefore, deserved to be upheld - Held, yes"*

8. We have gone through the aforementioned judgement relied upon by learned Departmental Representative but the para material contained in this Judgement is all together different and do not support the present case. In that case it was held that "*income – capital or revenue receipt – compensation for termination of agency agreement- assessee free to do its normal business after such termination – agency agreement was an agreement in the normal course of business – compensation received is revenue receipt."* The controversy

in question hinges upon the point that where there is relationship of agent or principal between Sealand and Ranadip Shipping and Transport Co. P. Ltd. i.e. the assessee but the Revenue has failed to bring out any evidence in support of his contention and also failed to point out any illegality or impropriety committed by learned CIT(A) while accepting the appeal filed by the assessee by following the decision rendered by the higher courts. Therefore we find the order passed by learned CIT(A) on this ground is judicious and do not call for any interference. Therefore ground No. 1 to 3 raised by the Revenue are dismissed.

Ground No. 4

9. learned Departmental Representative submitted that the Assessing Officer has rightly disallowed Rs. 13,00,442/- u/s. 40(a)(ia) as the said amount was paid towards commission to C&F agent and liable for deduction of TDS u/s. 194H of the Act. On the other hand learned AR submitted that the payments are reimbursement of expenses incurred by Mr. More and not on account of commission which is liable for deduction of TDS u/s. 194H of the Act and relied upon the decision of Delhi Tribunal in the case of ITO Vs. Dr. Willmar Schwable India (P) Ltd. (3 SOT 71), wherein the ITAT after considering the circular No. 715 dated 8.8.1995 issued by CBDT, held that where separate invoices are raised for professional/technical services rendered and "reimbursement of expenses" and such reimbursement of expenses does not include any element of profits, then no tax is deductible on making payments towards such reimbursement of expenses.

10. We have heard both the parties and perused the order passed by learned CIT(A) and operative para of the same is as under :-

> *"I have gone through the above submissions as well as the reasoning given by the Assessing Officer. From the above submissions it is clear that the amount paid to Mr. More was only on account of reimbursement of the expenses incurred on behalf of the appellant. Hence, no TDS was liable to be deducted in view of the aforesaid decision of Delhi Tribunal*

and hence addition made u/s 40(a)(ia) is deleted. In the result, this ground of appeal is allowed.

11. Learned Departmental Representative has failed to bring out any evidence in support of his contention and also failed to point out any illegality or impropriety committed by learned CIT(A) while accepting the appeal filed by the assessee. Therefore we find the order passed by learned CIT(A) on this ground is judicious and do not call for any interference. Therefore ground No. 4 raised by the Revenue is dismissed.

12. Ground No. 5 is general in nature.

13. In the result, appeal filed by the Revenue stands dismissed.

Order has been pronounced in the Open Court on 3.2.2016.

Sd/-	Sd/-
(D.KARUNAKARA RAO)	(SANDEEP GOSAIN)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai; Dated : 3/2/2016

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai

PS