IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-2' : NEW DELHI)

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.5184/Del./2017
(ASSESSMENT YEAR : 2013-14)

M/s. Mitsubishi Corporation India Pvt. Ltd., Birla Tower, 5th Floor, 25, Barakhamba Road, New Delhi – 110 001.	vs.	DCIT, Circle 16 (2), New Delhi.

(PAN : AAACM4764G)

(APPELLANT) **(RESPONDENT)**

ASSESSEE BY : Shri Tarandeep Singh, Advocate
REVENUE BY : Shri H.K. Choudhary, CIT DR

Date of Hearing : 12.09.2017
Date of Order : 22.09.2017

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

The Appellant, M/s. Mitsubishi Corporation India Pvt. Ltd. (hereinafter referred to as 'the taxpayer') by filing the present appeal sought to set aside the impugned order dated 11.07.2017, passed by the AO in consonance with the orders passed by the ld. DRP/TPO under section 143 (3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') qua the assessment year 2013-14 on the grounds inter alia that :-

"1. That on facts and in law the AO [hereinafter referred to as the "AO"] erred in assessing the total income of the appellant at Rs.69,79,31,940/- as against a returned total income of Rs.27,96,96,718/-.

1.1 That on facts and in law the AO / Dispute Resolution Panel [hereinafter referred as the "DRP"] erred in ignoring / gloating the following binding precedents:

(a) Orders of Hon'ble ITAT in the appellant's own case for the A Ys 2006-07, 2007-08, 2008-09,2009-10,2010-11 and A Y 2012-13.

(b) Order passed by DRP in appellant's own case for AY 2011-12.

(c) Order passed by Hon'ble Delhi High Court in case of M/s Herbalife International India Limited reported in 384 ITR 276 (Del). I

2. That on facts and in law the AO/DRP erred in making a disallowance of Rs.41,82,35,222/- under section 40(a)(i) of the Act.

2.1 That on facts and in law the AO/DRP erred in holding/upholding that the benefit of non-discrimination as per Article 24(3) of the Double Taxation Avoidance Agreement ('DTAA') between India and Japan is not applicable and as such disallowance u/s 40(a)(i) is warranted.

3. Without prejudice, on facts and in law the AO/DRP erred in not considering and adjudicating upon the claim, that, provisions of section 40(a)(i) are in-applicable where the payments are made for purchase of goods from non-residents, as income therefrom is not chargeable to tax in India.

4. That on facts and in law the AO/DRP without any cogent, acceptable material on record erred in holding/upholding:

i. that the sale to the appellant by Mitsubishi Corporation, Japan (MCJ) is taxable in India when the MCJ's AO has clearly held that sale to appellant is not taxable in India in the assessment order for AY 2009-10 and 2010-11.

ii. that the Branch Office ('BO') could have helped in sales to appellant and not considering the factual finding of the TPO of MC] which have clearly held that BO is helping only EPC business of MCJ's machinery group and also ignoring the fact that the purchase of the appellant are not from the machinery group of MCJ.

iii. that the appellant has not filed any documentary that AO of MCJ has held that there is no PE in case of sale to the appellant whereas necessary evidences was duly filed with the AO.

iv. that the BO of MCJ is a PE for the purpose of making sale to the appellant.

v. that the appellant has not filed any documentary evidences relating to closure of LO (erroneously mentioned as 'BO' in page 49 of the assessment order), whereas necessary evidences relating to closure of LO were duly filed with the AO.

5. That on facts and in law the AO/DRP has erred in holding that other group companies i.e. Asia Modified Starch Co. Ltd, Thailand, MC Energy, Inc, Japan, Mitsubishi Corporation (Taiwan) Ltd, Taipei, Mitsubishi Shoji Chemicals Corporation, Japan, and SPDC Ltd, Japan have a PE in India.

6. Without prejudice and in alternative the disallowance made u/s 40(a)(i) is excessive and not in accordance with law.

7. That on facts and in law the orders passed by AO and DRP (to the extent prejudicial to the interest of appellant) are bad in law and void ab-initio."

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : the taxpayer is a part of Sogo Sosha group which play an important role in linking buyers and sellers for products ranging from bulk commodities to specialized equipments. Mitsubishi Corporation India Private Limited (MCIPL) is a wholly owned subsidiary of Mitsubishi Corporation (MC) and was incorporated in 1996. The company is a part of Sogo Shosha function performed by MC as a whole. Its equity share capital is held by MC and Mitsubishi Australia Limited. Accordingly, MC Group entitles constituted MCIPL's AEs by virtue of common control and capital. Major business groups that MCIPL deals in are Chemical, Energy, Metal Machinery Living Essentials and Industrial Finance, Logistics & Development Group. Within these groups, Mitsubishi India deals in various commodities. However, majority of operations of the company are from "Chemicals" group.

3. The taxpayer operates in two major segments. In the trading segment, the taxpayer undertakes "High Sea Sales" transactions or principal form of transactions and in service segment, the taxpayer is a front-end contact in India for customers to undertake potential supplier/customer identification and background research on the

prospective suppliers/customers apart from collating information such as market data and financial conditions of such entities for Associated Enterprises (AEs).

4. Assessing Officer noticed from the financials of the assessee that the assessee has made purchases from AEs without deducting tax at source in compliance to the provisions contained u/s 195 of the Act. Details of purchases made by the assessee from its AEs are as under :-

S. NO.	Name and Address of the AE	Description of transaction	Amount of purchases
1	Asia Modified Starch Co. Ltd., 130-132 Sindhorn Building, 2nd Floor, Tower 1, Wireless Road, Lumpini Pathumwan, Bangkok-10330, Thailand	Import of goods	1,70,77,479
2	Mitsubishi Corporation, Japan (including overseas branches) Head Office, 301, Marunouchi 2-Chome, Chiyoda-Ku, Tokyo 100-0005	Import of goods	27,34,31,66,430
3	MC Energy, Inc 4th Floor, Mitsubishi Corp. Building, 6-3, Marunouchi 2-Chome, Chiyoda-Ku, Tokyo 100-0005	Import of goods	17,21,207
4	Mitsubishi Shoji Chemical Corporation 6-1, Kyobashi, 1- Chome, Chuo-Ku, Tokyo 104-0031	Import of goods	2,51,01,437
5	Mitsubishi Corporation (Taiwan) Ltd. Empire Bldg., 14th Fl., 87 Sung Chiang Road, Tapei, Taiwan	Import of goods	17,21,207
6	SPDC Ltd., 2-3-10 Nagata-Cho, Chiyodaku Tokyo, 100-0014, Japan	Import of goods	2,10,89,32,071
	Total		30,41,71,07,047

5. Assessee filed comprehensive submissions. AO, being dis-satisfied with the submissions made by the assessee, proceeded to conclude that the assessee was required to deduct TDS on the business profit on the purchases made from its AEs as per provisions contained u/s 195 of the Act and determine the gross profit on the sales to the assessee at 2.75% and computed the income at Rs.83,64,70,444/- (Rs.30,41,71,07,047/- x 2.75%) 50% of the above profit is attributable to the business operations of the above companies and the assessee was found liable to deduct the TDS on an amount of Rs.41,82,35,222/- and accordingly passed draft assessment order dated 21.12.2016.

6. Assessee carried the matter before the ld. DRP by way of filing objections who has dismissed the objections and directed the AO to complete the assessment. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

7. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

8. Ld. AR for the assessee challenging the impugned order passed by the AO/DRP contended that the issue raised in the

present appeal vide grounds no.2, 2.1 & 3 is covered in assessee's own case in AY 2010-11 vide order dated 26.05.2015, available at pages 596 to 626 of the paper book. Ld. AR for the assessee further contended that in AYs 2010-11 and 2012-13, order passed by the Tribunal has been followed by the Revenue itself. Ld. AR also relied upon decision rendered by Hon'ble Delhi High Court cited as ***CIT vs. Herbalife International India (P.) Ltd. – 384 ITR 276 (Del.)*** wherein the assessee was an intervener and the identical issue has been decided in favour of the assessee. However, on the other hand, ld. DR for the Revenue relied upon the order passed by AO/DRP.

9. From the facts and circumstances of the case, grounds raised, orders passed by the lower authorities and arguments addressed by the authorized representatives of the parties to the present appeal, the solitary issue arises for determination in this case is :-

> ***"as to whether disallowance of Rs.30,41,71,07,047 made by the AO/DRP under section 40A(i) of the Act pertaining to the purchases made from its AEs without deducting tax at source u/s 195 of the Act is not sustainable, as this issue has already been decided in favour of the assessee company?"***

10. The ld. AR for the assessee challenging the impugned order contended that the disallowance made by the AO/DRP is not sustainable as the issue is covered in assessee's own case for AY

2010-11. This contention is not controverted by the ld. DR for the Revenue that the identical issue had come up before the Tribunal in assessee's own case in AY 2010-11.

11. The ld. AR challenged the impugned order on two grounds : one, that in respect of first category of purchases made by the assessee from its AEs, since the six foreign AEs from whom the assessee had made purchases are not having their PE in India and made offshore sales to the assessee and no income chargeable to tax has been generated / chargeable to tax, section 40A(i) of the Act is not attracted to that; and that in case of second category of purchases made from MCJ, the assessee is entitled to claim benefit of non-discrimination clause of DTAA and in that case also, proviso to section 40A(i) is not attracted.

12. Undisputedly, this issue has already been dealt with by the coordinate Bench of the Tribunal in assessee's own case in AY 2010-11 and has been determined in favour of the assessee. For ready perusal, operative part of the findings returned by the coordinate Bench of the Tribunal is reproduced as under :-

> "7. The next ground of the appeal is against the disallowance of Rs.70,37,18,502/- made under section 40(a)(i) of the Act.
>
> 8. The facts apropos this ground are that the assessee made purchases from its AEs as under : -

S.No.	Name and Address of the AE	Description of transaction	Amount of purchases (Rs.)
1	Asia Modified Starch Co. Ltd. 130-132 Sindhorn Building, 2nd Floor, Tower 1, Wireless Road, Lumpini Pathumwan, Bangkok-10330, Thailand	Import of goods	3,506,647
2	Mitsubishi Corporation Unimetals, (Japan) 8-1, Akashicho, Chuo-Ku, Tokyo-104-6591, Japan	Import of goods	29,926,820
3	Mitsubishi Corporation Unimetals, (Japan) Head Office, 3-1, Marunouchi 2 – Chome, Chiyoda-Ku, Tokyo, Japan	Import of goods	14,758,916,057
4	Mitsubishi Corporation, Singapore 1 Temasek Avenue, #19-00 Millenia Tower, Singapore 0391921	Import of goods	6,658,981,033
5	Mitsubishi International GmbH, Germany Hamburg Branch, Maattenwiete 5, Hamburg	Import of goods	17,610,327
6	Mitsubishi Shoji Chemical Corporation, 6-1, Kyobashi, 1-Chome, Chuo-Ku, Tokyo 104-0031	Import of goods	16,669,779
7	Petro Diamond Japan Corporation 4th Floor, Mitsubishi Corp. Building, 6-3, Marunouchi 2-Chome, Chiyoda-Ku, Tokyo 100-0005	Import of goods	2,566,470
8	Thai MC Company Limited	Import of goods	32,266,358

	Thailand 968, 24th Floor, U-Chuliang, Foundation Rama 4 Road Silon, Bangrak, Bangkok, Thailand		
9	Total		21,520,443,490

9. The Assessing Officer observed that the assessee paid/credited the accounts of its AE suppliers without deduction of tax at source in terms of section 195 of the Act. On being show-caused as to why disallowance be not made under section 40(a)(i) of the Act towards such purchases made from non-resident group companies, the assessee stated that the Tribunal has deleted such disallowance for the assessment year 2006-07 by observing that in some cases, the group entities did not have a permanent establishment in India, while in others, the assessee was entitled to the benefit of non-discrimination clause in the Double Taxation Avoidance Agreement between India and Japan (DTAA). The facts of the instant year were claimed to be similar to the said earlier year. Reliance was also placed on certain other tribunal decisions in support of the assessee's entitlement for making the payment of purchase price without deduction of tax at source. Not convinced, the Assessing Officer held that the assessee was required to deduct tax at source on the business profits of these companies as per the provisions of section 195 of the Act. In holding so, he followed the view taken by him for the immediately preceding year, that is, A.Y. 2009-10. He also relied on Instruction dated 26.02.2014 issued by the CBDT and thus computed the amount of disallowance under section 40(a)(i) at Rs.70,37,18,502/- by applying gross profit rate of 6.54% (as applied for the assessment year 2009-10) on total purchase transactions of Rs.2152.04 crore and attributing 50% of the same to the business operations of such companies in India. This resulted into an addition of Rs.70.37 crore, against which the assessee has come up in appeal before us.

10. We have heard the rival submissions and perused the relevant material on record. The AO has made disallowance u/s 40(a)(i) of the Act in respect of purchases made by the assessee from its seven AEs to whom payments were made without deduction of tax at source. First category consists of purchase transactions entered with its six related parties situated in Japan, Thailand and Germany. The case of the assessee is that these non-resident AEs did not have any permanent establishment during the year in India and, hence, income arising from sale of

goods to India could not be charged to tax under the Act in their hands. Second category comprises of items at serial nos. 3 and 4 of the above Table which are, in fact, purchases made by the assessee from MCJ including its branch office. The ld. AR contended that the AO wrongly recorded the Mitsubishi Corporation, Singapore, at serial no. 4 as a separate entity, which is only a branch of MCJ, indicated at serial no. 3. This contention was not controverted by the ld. DR with any material/evidence to the contrary. The ld. AR argued that no deduction of tax at source was warranted from the payments made to MCJ in view of non-discrimination clause in the DTAA. We will deal with these two categories of transactions, one by one.

11. First we espouse the category of purchases made from six foreign AEs, for which the ld. AR claimed that they did not have any PE in India and made off shore sales to the assessee, not leading to generation of any income chargeable to tax under the Act in their hands.

12. Section 40 of the Act begins with a non-obstante clause *qua* sections 30 to 38 of the Act and provides that no deduction shall be allowed in computing the income chargeable under the head 'Profits and gains of business or profession' in respect of the items set out in the provision. Clause (a)(i) of section 40 provides that no deduction shall be allowed in case of any assessee, *inter alia,* on '*other sum chargeable under this Act*' which is payable outside India or in India to a non-resident, not being a company or to a foreign company on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200. Thus, in order to invoke the provisions of section 40(a)(i), it is essential that the amount payable by the assessee to a foreign company etc. should be chargeable to tax under this Act in the hands of such foreign company etc. The AO has pressed into service the provisions of section 195 of the Act for treating the failure of the assessee in making deduction of tax at source from the payments made to the non-residents AEs. Sub-section (1) of section 195 states that any person responsible for paying to a non-resident, not being a company, or to a foreign company, any payments specified in the provision `*or any other sum chargeable under the provisions of this Act*' shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in

force. Thus deductibility of tax at source pre-supposes the chargeability of income under the Act and disallowance u/s 40(a)(i) follows from non-deduction/payment of tax at source by the person responsible on such payments. In other words, unless income from the transaction is chargeable to tax under the Act in the hands of non-resident etc., there can be no question of deduction of tax at source and the consequential disallowance u/s 40(a)(i) of the Act cannot follow.

13. It, therefore, becomes essential to first determine if the non-resident AE sellers were liable to tax in India for the goods sold by them to the assessee in India. As against a resident chargeable under the Act in respect of his world income, a non-resident as per section 5(2) of the Act is chargeable only in respect of income from whatever source derived, which is received or is deemed to be received in India or accrues or arises or is deemed to accrue or arise to him in India. Section 9(1) of the Act provides that all income accruing or arising, whether directly or indirectly, through or from any business connection in India, etc., shall be deemed to accrue or arise in India. Explanation 1(a) to this provision states that in the case of a business of which all the operations are not carried out in India, the income of the business deemed under clause (i) to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. The effect of this provision is that all income accruing or arising to a non-resident from any business connection etc. in India, to the extent of the operations of such business carried out in India, shall be deemed to accrue or arise in India and the provisions of section 5(2) shall be magnetized. Per contra, if the business operations are not carried out in India, but, still a non-resident earns income from any business connection in India, that income shall not be deemed to accrue or arise to him in India in terms of section 9(1)(i) of the Act and will get immunity from Indian taxation. The Hon'ble Supreme Court in *CIT vs. R.D. Aggarwal & Co. and Another (1965) 56 ITR 20 (SC)* considered a case in which the assessee obtained orders from dealers in Amritsar. Such orders were accepted by non-resident. Price was received and delivery was given outside India. No operations, such as, procuring of material or manufacture of finished goods, took place within India. It was held that no business connection was there and, in the absence of the non-resident having any place of business in India, the case was not covered within the provision analogous to section 9(1)(i) of the Act. Similar view has been reiterated by the Hon'ble Supreme Court in *CIT vs. T.I & M Sales Ltd. (1987) 166 ITR 93 (SC)* and more recently in *GVK Industries Ltd. And*

Another vs. ITO and Another (2015) 371 ITR 453 (SC). It, therefore, follows that when a non-resident makes offshore supply of goods to an Indian enterprise, without performing any activity in India, no income accrues or arises to him in India. If, however, some activity is done in India or some operations are performed in India, then, the income attributable to such operations is chargeable to tax under the Act. The absence of a Permanent Establishment of a non-resident in India ordinarily implies that no business operations were carried out by him in India. The existence of a PE in India may require examination as to whether such PE was involved in specific transactions between non-resident and an unrelated Indian enterprise. In case there is no PE of the foreign enterprise in India and the goods are directly sold offshore by such non-resident enterprise without performing any operations in India, then, no income can accrue or arise or deemed to accrue or arise to him in terms of section 9(1)(i) of the Act.

14. Reverting to the facts of the instant case, we find that out of the assessee's import transactions with six AEs, three are with Mitsubishi Shoji Light Metal, Japan, Thai MC Company Ltd., Thailand and Petro Diamond Corporation, Japan. The assessee made purchases from these three AEs in the immediately preceding assessment year and the Tribunal was pleased to hold that in the absence of any PE of these three enterprises in India, the provisions of section 40(a)(i) were not attracted. The AO, while finalising the assessment for the current year, has noticed on pages 52 and 54 of his order that the assessee made identical reply which was made during the course of assessment proceedings for the assessment year 2009-10. In rejecting the assessee's contention put forth for the instant year and making disallowance u/s 40(a)(i) of the Act, he relied on the view taken by him for the said assessment year 2009-10. Since the assessment order for the assessment year 2009-10 has been overturned by the Tribunal on this issue by holding that there was no evidence of such enterprises having any PE in India and as such no disallowance was called for, we are unable to countenance the contrary view canvassed by the ld. DR on this count. In so far as the purchase transactions with the other three AEs are concerned, namely, Mitsubishi Corporation, Unimetals, Japan, Asia Modified Strach, Thailand and Mitsubishi International, GmbH, Germany, we find that the AO has dealt with the purchase transactions with all the six AEs in a common manner without separately adjudicating upon these three parties which were not involved in the preceding year. This shows that the facts and circumstances in respect of these AEs are similar to

those of the three AEs from whom the assessee purchased goods in the preceding year as well. Apart from relying on his order for the AY 2009-10, the AO also noticed that the Tribunal order in the case of Metalone Corporation, in favour of the assessee, has not been accepted by the Department and appeal is pending against it before the High Court. The case of Metalone Corporation was originally taken cognizance of by him in an earlier year for holding that all the foreign AEs would be deemed to have PE in India because of some common activity carried out in India on behalf of all of them. This contention of the Revenue came to be turned down by the Tribunal in its order of Metalone Corporation by holding that the existence of PE cannot be inferred in such circumstances. In view of the fact that the AO has not drawn any line of distinction between the three new AEs from which the assessee made purchases in the current year alone *vis-a-vis* the remaining three from which imports were made in earlier years as well, and, further, on the failure of the ld. DR to point out any difference in the factual or legal position existing in respect of these three new entities, we are inclined to follow the same conclusion as given for the three parties coming from the earlier year for which the Tribunal has held that they did not have any PE in India. The crux of the matter is that since these six AEs did not have any PE in India, the off-shore sales made by them to the assessee in India would not generate any income chargeable under the Act to the AEs from such sale transactions.

15. Now we take up the second category of purchases made from MCJ, for which the ld. AR claimed the benefit of non-discrimination clause of the DTAA to bolster his submission of non-applicability of the provisions of section 40(a)(i) of the Act. The sum and substance of his arguments is that total purchases amounting to Rs.2141.78 crore were made by the assessee from MCJ including its overseas branch office and non-discrimination clause under Article 24 of the DTAA applies warranting non-deduction of tax at source. *Au contraire*, the ld. DR put forth that the case of the assessee is covered under Article 9 of the DTAA and for that reason, the application of Article 24 is ousted.

16. In order to appreciate the above rival contentions, it would be apposite to consider the mandate of Article 24, the relevant part of which, is as under:-

ARTICLE 24 - 1. Nationals of a Contracting State shall be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other Contracting State in the same

circumstances are or may be subjected. This provision shall, notwithstanding the provisions of article 1, also apply to persons who are not residents of one or both of the Contracting States.

2. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other Contracting State than the taxation levied on enterprises of that other Contracting State carrying on the same activities.

This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

3. *Except where the provisions of article 9,* paragraph 8 of article 11, or paragraph 7 of article 12 *apply*, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first mentioned Contracting State.....'.

17 It is equally important to consider the prescription of Article 9, the relevant part of which runs as under :-

`ARTICLE 9 - 1. Where :

(a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.....'.

18. The case of the ld. AR is that the assessee is entitled to the benefit of Article 24 in terms of para 3. A perusal of this para transpires that except where the provisions of Article 9 etc. apply, interest, royalties and other disbursements paid by an Indian enterprise to a Japanese enterprise, shall, be deductible in determining the taxable profits of the Indian enterprise under the same conditions as if they had been paid to an Indian resident. Simply stated, para 3 of Article 24 provides that any payment made by an Indian enterprise to a Japanese enterprise shall, for the purposes of determining the taxable profit of an Indian enterprise, be taken up under the same conditions as if the payment had been made to an Indian resident and not to a non-resident. In simple words, for the purpose of computing the taxable profit of an Indian enterprise, the provisions of the Act shall apply on a transaction with a Japanese enterprise as if it is a transaction with an Indian enterprise. If the transaction with a Japanese enterprise entails some adverse consequences in comparison with if such transaction had been made with an Indian enterprise, then such adverse consequences will be remedied under this clause by presuming, for computing the total income of an Indian enterprise, as if it was a transaction with an Indian enterprise and not a Japanese enterprise. Thus, Article 24 provides in unequivocal terms that for the purposes of determining the taxable profits of an Indian enterprise, any disbursements made to a Japanese enterprise shall be deductible in the same manner as if it had been made to an Indian resident. When we examine the TDS provisions, it is noticed that no provision under the Chapter XVII of the Act stipulates for deduction of tax at source from payment made for the purchases made from an Indian resident. This position when contrasted with purchases made from a non-resident, imposes liability on the purchaser for deducting tax at source under section 195, subject to the fulfilment of other conditions. When we compare an Indian enterprise purchasing goods from an Indian party *vis-a-vis* from a Japanese party, there is possibility of an obvious discrimination in terms of disallowance of purchase consideration under section 40(a)(i) in so far as the purchases from a Japanese enterprise are concerned. It is this discrimination which is sought to be remedied by para 3 of Article 24. The effect of this Article is that in determining the taxable profits of an Indian enterprise, the provisions of the Act, including disallowance u/s 40(a)(i), shall apply as if the purchases made from a Japanese enterprise are made from an Indian enterprise. Once purchases are construed to have been made by an Indian enterprise from another Indian enterprise, not requiring any deduction of tax at source from the

purchase consideration and consequently ousting the application of section 40(a)(i), the non-discrimination clause shall operate to stop the making of disallowance in case of purchases actually made from a Japanese enterprise, which would have otherwise attracted the disallowance. Thus, it is evident that para 3 of Article 24, without considering the effect of Article 9 and other Articles referred to in the beginning of this para, rules out the making of disallowance u/s 40(a)(i) of the Act.

19. Now let us examine Article 9 of the DTAA and its setting in Article 24(3), which in the opinion of the ld. DR, comes to the rescue of the Revenue in making inoperative the otherwise applicability of para 3 of Article 24. The opening part of para 3 provides that `*Except where the provisions of article 9 .... apply*'. Then it talks about the application of non-discrimination as discussed above. This shows that the provisions of Article 24(3) shall be restricted to the extent of applicability of Article 9. In other words, whatever has been provided in Article 9 shall remain intact and will have superseding effect over the mandate of Article 24(3). The contention of the ld. DR that once Article 9 applies, then the application of Article 24(3) is thrown out, is not wholly correct. The writ of Article 9 does not stop the application of Article 24(3) in entirety. The overriding effect of Article 9 over para 3 of Article 24 is limited to its content alone. In other words, the mandate of Article 24 applies save and except as provided in Article 9 etc. It does not render Article 24(3) redundant in totality. A conjoint reading of these two Articles brings out that if there is some discrimination in computing the taxable income as regards the substance of Article 9, then such discrimination will continue as such. But, in so far as rest of the discriminations covered under para 3 of Article 24 are concerned, those will be removed to the extent as provided.

20. Now let us decipher the instruction of the relevant part of Article 9 of the DTAA as extracted above. Para 1 of this Article can be viewed in two parts, viz., clause (a) or clause (b) as one part and the portion starting with `and' as the second part. Such first part sets out the basic condition for the applicability of the second part. The first part provides for the one enterprise directly or indirectly controlling or contributing to the capital of the other or the existence of common persons managing or contributing to the capital of both the enterprises. The existence of the conditions set out in the first part in the case of the assessee has not been disputed by the ld. AR. The second part of para 1 of Article 9 provides that when the stipulations of the first part of para 1 of Article 9 are satisfied AND the conditions between the two

enterprises in their commercial or financial relations differ from those which would have been between two independent enterprises, then, any profit which has not accrued to one of the enterprises due to such conditions, may be included in the profits of that enterprise and taxed accordingly. The effect of the second part is that the transactions between the two enterprises should be viewed at arm's length notwithstanding their commercial or financial relations. And if the profit accruing to an enterprise has been understated due to such commercial or financial relations, then, such understated profits should also be taxed. On circumspection of Article 9 read with Article 24, the position which emerges is that the enhancement of income made by virtue of Article 9 in treating the inhibited transactions between two enterprises as at arm's length price, cannot be neutralised by the application of Article 24. In other words, Article 24 applies on all discriminations as set out in it except those specifically excluded including Article 9. Reverting to the facts of the instant case, we find that the assessee is seeking the benefit of article 24 *qua* the disallowance u/s 40(a)(i) and not in respect of any transfer pricing adjustment made by bringing transactions between two AEs at arm's length price. Disallowance u/s 40(a)(i) is an independent component of the computation of total income which is distinct from any transfer pricing adjustment. Article 24 read with Article 9 albeit prohibits the deletion of enhancement of income due to the making of transactions at ALP, but permits the deletion of enhancement of income due to disallowance u/s 40(a)(i) of the Act. Be that as it may, we find that the TPO has not proposed any transfer pricing adjustment in respect of `Trading segment' of the assessee under which the purchases in question were made. The addition on account of TP adjustment is in respect of `Service fee received', which was earned by the assessee without making purchases of the goods from its AEs. As disallowance u/s 40(a)(i) is in respect of purchases made from the AEs, which is in no manner connected with the Commission segment, we hold that the assessee is entitled to the benefit provided by article 24 of the DTAA and cannot be visited with the disallowance u/s 40(a)(i) of the Act.

21. The foregoing discussion divulges that there existed no liability on the assessee to deduct tax at source from the payments made by it to the above listed seven foreign AEs, either because of non-chargeability of income under the Act from sale of such goods to the assessee or because of the application of non-discrimination clause. The natural corollary which follows is that the provision of section 195 cannot apply and, resultantly, there can be no disallowance u/s 40(a)(i) of the Act. We,

therefore, order for the deletion of this disallowance. This ground is allowed."

13. In view of what has been discussed above, we are of the considered view that since there is no change of facts and circumstances of this case nor there is a change in the business model of the taxpayer during the year under assessment, it is proved on record that the AEs viz situated in Japan, Thailand from whom the taxpayer has made purchases during the year under assessment are having no PE in India and as such, income arising from sale of goods to India cannot be charged to tax in their hands. It is also beyond doubt that in case of second category of the AEs from whom the assessee has made purchases are covered under non-discrimination clause of DTAA and this issue also has come up for determination before the Hon'ble Delhi High Court in case of ***CIT vs. Herbalife International India (P.) Ltd. - 384 ITR 276*** wherein the assessee was an intervener and has been decided in favour of the assessee.

14. In the case of ***CIT vs. Herbalife International India (P.) Ltd.***, Hon'ble High Court framed the question to be determined as under:-

> ***"(b) Whether the ITAT was correct in holding that Section 40(a)(i) of the Act is discriminatory and therefore not applicable in the present case as per provisions of Article 26 (3) of the Indo-US DTAA?***

15. The aforesaid question has been determined by the Hon'ble High Court in favour of the assessee by returning following findings :-

> ***"56. The argument of the Revenue also overlooks the fact that the condition under which deductibility is disallowed in respect of payments to non-residents, is plainly different from that when made to a resident. Under Section 40 (a) (i), as it then stood, the allowability of the deduction of the payment to a non-resident mandatorily required deduction of TDS at the time of payment. On the other hand, payments to residents were neither subject to the condition of deduction of TDS nor, naturally, to the further consequence of disallowance of the payment as deduction. The expression 'under the same conditions' in Article 26 (3) of the DTAA clarifies the nature of the receipt and conditions of its deductibility. It is relatable not merely to the compliance requirement of deduction of TDS. The lack of parity in the allowing of the payment as deduction is what brings about the discrimination. The tested party is another resident Indian who transacts with a resident making payment and does not deduct TDS and therefore in whose case there would be no disallowance of the payment as deduction because TDS was not deducted. Therefore, the consequence of non-deduction of TDS when the payment is to a non-resident has an adverse consequence to the payer. Since it is mandatory in terms of Section 40 (a) (i) for the payer to deduct TDS from the payment to the non-resident, the latter receives the payment net of TDS. The object of Article 26 (3) DTAA was to ensure non-discrimination in the condition of deductibility of the payment in the hands of the payer where the payee is either a resident or a non-resident. That object would get defeated as a result of the discrimination brought about qua non-resident by requiring the***

TDS to be deducted while making payment of FTS in terms of Section 40 (a) (i) of the Act.

57. A plain reading of Section 90 (2) of the Act, makes it clear that the provisions of the DTAA would prevail over the Act unless the Act is more beneficial to the Assessee. Therefore, except to the extent a provision of the Act is more beneficial to the Assessee, the DTAA will override the Act. This is irrespective of whether the Act contains a provision that corresponds to the treaty provision. In Union of India v. Azadi Bachao Andolan (supra) the Supreme Court took note of the Circular No. 333 dated 2nd April 1982 issued by the CBDT on the question as to what the assessing officers would have to do when they find that the provision of a DTAA treaty is not in conformity with the Act :

> ***"Thus, where a Double Taxation Avoidance Agreement provided for a particular mode of computation of income, the same should be followed, irrespective of the provision of the Income Tax Act. Where there is no specific provision in the Agreement, it is the basic law, i.e., Income Tax Act, that will govern the taxation of income."***

58. Further in Union of India v. Azadi Bachao Andolan (supra), after taking note of the decisions of various high courts on the purpose of Double Taxation Avoidance Conventions qua Section 90 of the Act, the Supreme court observed as under:

> ***"A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the Income***

Tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the Legislature to make a departure from the general principle of chargeability to tax under Section 4 and the general principle of ascertainment of total income under Section 5 of the Act, then there was no purpose in making those sections subject to the provisions of the Act. The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under Section 90 towards implementation of the terms of the DTAs which would automatically override the provisions of the Income tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of the DTAC."

59. Consequently, the Court negatives the plea of the Revenue that unless there are provisions similar to Section 40 (a) (i) of the Act in the DTAA, a comparison cannot be made as to which is more beneficial provision.

60. The reliance by the Revenue on the decision of this Court in Hyosung Corporation v. AAR (2016) 382 ITR 371 (Del) is misplaced. There the Court negatived a challenge to the constitutionality of Section 245R (2)(i) of the Act on the ground that it was violative of Article 14 of the Constitution as well as Article 25 of the DTAA between India and South Korea. Section 245R (2) of the Act barred a non-resident applicant from approaching the Authority for Advance Ruling (AAR) where the matter was pending before any income tax authority. The matter, therefore, only pertained to the procedure of filing a petition before the AAR and not as regards any substantive right. The decision of the Pune Bench of the ITAT in Automated Securities Clearance Inc. v. Income Tax Officer(supra) is no assistance to the Revenue since the said decision is

said to be overruled by the Special Bench of the ITAT in the case of Rajeev Sureshbhai Gajwani vs ACIT (2011) 8 ITR (Trib) 616 (Ahmedabad).

61. In light of the above discussion, question (b) is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue by holding that Section 40 (a) (i) of the Act is discriminatory and therefore, not applicable in terms of Article 26 (3) of the Indo-US DTAA."

16. Following the decision rendered by coordinate Bench of the Tribunal in assessee's own case in AY 2010-11 and the decision rendered by Hon'ble High Court in ***CIT vs. Herbalife International India (P.) Ltd.***, wherein the assessee was an intervener, we are of the considered view that AO/DRP have erred in disallowing of Rs.30,41,71,07,047 regarding purchases made by the assessee from its AEs u/s 40A(i) as section 40A(i) is not applicable to the assessee due to non-discrimination clause under DTAA and due to the fact that AEs do not have a permanent PE in India. So, the issue is determined in favour of the assessee. Consequently, the appeal filed by the assessee is hereby allowed.

Order pronounced in open court on this 22nd day of September, 2017.

Sd/-	**sd/-**
(R.K. PANDA)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 22nd day of September, 2017
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT (A)
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.