IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH : BANGALORE

BEFORE SHRI ARUN KUMAR GARODIA, ACCOUNTANT MEMBER AND

SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA Nos. 556 to 560/Bang/2019
Assessment Years : 2012-13 to 2016-17

M/s. Manthan Software Services Pvt. Ltd., No. 40/4, Lavelle Road, Bangalore – 560 001. **PAN: AADCM7750M**	Vs.	The Deputy Commissioner of Income Tax (International Taxation), Circle – 1 (2), Bangalore.
APPELLANT		RESPONDENT

&

IT(IT)A Nos. 968 to 972/Bang/2019

(Assessment Years : 2012-13 to 2016-17)

(By Revenue)

Assessee by	:	Shri Padam Chand Khincha, CA
Revenue by	:	Shri S.S. Parida, CIT (DR)

Date of hearing	:	25.07.2019
Date of Pronouncement	:	28.08.2019

O R D E R

Per Bench

Out of this bunch of ten appeals, there are cross appeals of assessee and revenue for five Assessment Years i.e. Assessment Years 2012-13 to 2016-17 and these appeals are directed against a combined order of ld. CIT(A)-12, Bangalore dated 28.02.2019. All these appeals were heard together and are being disposed of by way of this common order for the sake of convenience.

2. The grounds raised by the assessee for Assessment Year 2012-13 in ITA No. 556/Bang/2019 are as under.

> "*1. The order of Honourable Commissioner of Income Tax (Appeals) (hereinafter referred as "CIT(A)" for brevity) to the extent prejudicial to the Appellant is bad in law.*
>
> *2. The CIT(A) has erred confirming the action of Assessing Officer (`A0') without appreciating that::*
>
> *(i) Payment for sales commission is not chargeable to tax in India as*

per the provisions of the Income Tax Act, 1961 (`Ace) and therefore there is no liability to deduct TDS;

(ii) Services provided by Manthan Systems Inc (`MSI') does not qualify as Royalty both under the Act and DTAA; and

(iii) Services provided by MSI does not qualify as FTS as per Act and does not satisfy the test of 'Make Available' as envisaged in India-USA DTAA and therefore does not qualify as fees for Included services under DTAA.

3. The learned CIT(A) have erred in conforming the action of AO in treating the Appellant as assessee in default without appreciating that there cannot be non-compliance of section 195 of the Act, when the payment for sales commission to MSI were not chargeable to tax in India.

4. The learned CIT(A) has erred in conforming the action of AO in not explicitly concluding whether the payment for sales commission to MSI was in the nature of Royalty or FTS under the Act and DTAA.

5. The learned CIT(A) and AO have erred in placing reliance on the judicial decisions which are distinguishable both on facts of the case and provisions of law.

6. The learned CIT(A) has erred in concluding that software development services has been provided by MSI to the Appellant during the relevant previous year without appreciating the fact that no such services were rendered by MSI to the Appellant.

7. The learned CIT(A) has erred in stating that the payments made for sales commission are composite in nature and concluding that the payments for software development services, customer database, etc. as Royalty and evaluation of clients, lead generation, etc. as Consultancy Services.

8. The learned CIT(A) erred in making reference and drawing conclusions relating exception clause provided in section 9(1)(vii)(b) of the Act, without stating relevance of same in the Appellant's case.

9. The learned CIT(A) has erred in concluding that since payments are of composite nature the Appellant must have made application before AO u/s 195(2) of the Act.

10. The learned AO has erred in making incorrect conclusions by drawing reference to clauses in the agreement, LinkedIn profile of employees, Sworn statement of Mr. Sanjib Kumar and e-mail conversations in the order passed under section 201(1) of the Act. The

learned CIT(A) has erred in not adjudicating Appellant's submission in this regard.

11. The learned CIT(A) has erred in confirming the action of AO in levying interest u/s 201(1A) of the Act. The Appellant denies its liability to pay interest. Even otherwise, interest charged is excessive.

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays accordingly."

3. The grounds raised by the assessee for Assessment Year 2013-14 in ITA No. 557/Bang/2019 are as under.

"*1. The order of Honourable Commissioner of Income Tax (Appeals) (hereinafter referred as "CIT(A)" for brevity) to the extent prejudicial to the Appellant is bad in law.*

2. The CIT(A) has erred confirming the action of Assessing Officer (`A0') without appreciating that::

(i) Payment for sales commission is not chargeable to tax in India as per the provisions of the Income Tax Act, 1961 (`Ace) and therefore there is no liability to deduct TDS;

(ii) Services provided by Manthan Systems Inc (`MSI') does not qualify as Royalty both under the Act and DTAA; and

(iii) Services provided by MSI does not qualify as FTS as per Act and does not satisfy the test of 'Make Available' as envisaged in India-USA DTAA and therefore does not qualify as fees for Included services under DTAA.

3. The learned CIT(A) have erred in conforming the action of AO in treating the Appellant as assessee in default without appreciating that there cannot be non-compliance of section 195 of the Act, when the payment for sales commission to MSI were not chargeable to tax in India.

4. The learned CIT(A) has erred in conforming the action of AO in not explicitly concluding whether the payment for sales commission to MSI was in the nature of Royalty or FTS under the Act and DTAA.

5. The learned CIT(A) and AO have erred in placing reliance on the judicial decisions which are distinguishable both on facts of the case and provisions of law.

6. The learned CIT(A) has erred in concluding that software development services has been provided by MSI to the Appellant during the relevant previous year without appreciating the fact that no such services were rendered by MSI to the Appellant.

7. The learned CIT(A) has erred in stating that the payments made for sales commission are composite in nature and concluding that the payments for software development services, customer database, etc. as Royalty and evaluation of clients, lead generation, etc. as Consultancy Services.

8. The learned CIT(A) erred in making reference and drawing conclusions relating exception clause provided in section 9(1)(vii)(b) of the Act, without stating relevance of same in the Appellant's case.

9. The learned CIT(A) has erred in concluding that since payments are of composite nature the Appellant must have made application before AO u/s 195(2) of the Act.

10. The learned AO has erred in making incorrect conclusions by drawing reference to clauses in the agreement, LinkedIn profile of employees, Sworn statement of Mr. Sanjib Kumar and e-mail conversations in the order passed under section 201(1) of the Act. The learned CIT(A) has erred in not adjudicating Appellant's submission in this regard.

11. The learned CIT(A) has erred in confirming the action of AO in levying interest u/s 201(1A) of the Act. The Appellant denies its liability to pay interest. Even otherwise, interest charged is excessive.

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays accordingly."

4. The grounds raised by the assessee for Assessment Year 2014-15 in ITA No. 558/Bang/2019 are as under.

"*1. The order of Honourable Commissioner of Income Tax (Appeals)*

(hereinafter referred as "CIT(A)" for brevity) to the extent prejudicial to the Appellant is bad in law.

2. The CIT(A) has erred confirming the action of Assessing Officer (`A0') without appreciating that::

(i) Payment for sales commission is not chargeable to tax in India as per the provisions of the Income Tax Act, 1961 (`Ace) and therefore there is no liability to deduct TDS;

(ii) Services provided by Manthan Systems Inc (`MSI') does not qualify as Royalty both under the Act and DTAA; and

(iii) Services provided by MSI does not qualify as FTS as per Act and does not satisfy the test of 'Make Available' as envisaged in India-USA DTAA and therefore does not qualify as fees for Included services under DTAA.

3. The learned CIT(A) have erred in conforming the action of AO in treating the Appellant as assessee in default without appreciating that there cannot be non-compliance of section 195 of the Act, when the payment for sales commission to MSI were not chargeable to tax in India.

4. The learned CIT(A) has erred in conforming the action of AO in not explicitly concluding whether the payment for sales commission to MSI was in the nature of Royalty or FTS under the Act and DTAA.

5. The learned CIT(A) and AO have erred in placing reliance on the judicial decisions which are distinguishable both on facts of the case and provisions of law.

6. The learned CIT(A) has erred in concluding that software development services has been provided by MSI to the Appellant during the relevant previous year without appreciating the fact that no such services were rendered by MSI to the Appellant.

7. The learned CIT(A) has erred in stating that the payments made for sales commission are composite in nature and concluding that the payments for software development services, customer database, etc. as Royalty and evaluation of clients, lead generation, etc. as Consultancy Services.

8. The learned CIT(A) erred in making reference and drawing conclusions relating exception clause provided in section 9(1)(vii)(b) of the Act, without stating relevance of same in the Appellant's case.

9. The learned CIT(A) has erred in concluding that since payments are

of composite nature the Appellant must have made application before AO u/s 195(2) of the Act.

10. The learned AO has erred in making incorrect conclusions by drawing reference to clauses in the agreement, LinkedIn profile of employees, Sworn statement of Mr. Sanjib Kumar and e-mail conversations in the order passed under section 201(1) of the Act. The learned CIT(A) has erred in not adjudicating Appellant's submission in this regard.

11. The learned CIT(A) has erred in confirming the action of AO in levying interest u/s 201(1A) of the Act. The Appellant denies its liability to pay interest. Even otherwise, interest charged is excessive.

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays accordingly."

5. The grounds raised by the assessee for Assessment Year 2015-16 in ITA No. 559/Bang/2019 are as under.

"*1. The order of Honourable Commissioner of Income Tax (Appeals) (hereinafter referred as "CIT(A)" for brevity) to the extent prejudicial to the Appellant is bad in law.*

2. The CIT(A) has erred confirming the action of Assessing Officer (`A0') without appreciating that::

(i) Payment for sales commission is not chargeable to tax in India as per the provisions of the Income Tax Act, 1961 (`Ace) and therefore there is no liability to deduct TDS;

(ii) Services provided by Manthan Systems Inc (`MSI') does not qualify as Royalty both under the Act and DTAA; and

(iii) Services provided by MSI does not qualify as FTS as per Act and does not satisfy the test of 'Make Available' as envisaged in India-USA DTAA and therefore does not qualify as fees for Included services under DTAA.

3. The learned CIT(A) have erred in conforming the action of AO in

treating the Appellant as assessee in default without appreciating that there cannot be non-compliance of section 195 of the Act, when the payment for sales commission to MSI were not chargeable to tax in India.

4. The learned CIT(A) has erred in conforming the action of AO in not explicitly concluding whether the payment for sales commission to MSI was in the nature of Royalty or FTS under the Act and DTAA.

5. The learned CIT(A) and AO have erred in placing reliance on the judicial decisions which are distinguishable both on facts of the case and provisions of law.

6. The learned CIT(A) has erred in concluding that software development services has been provided by MSI to the Appellant during the relevant previous year without appreciating the fact that no such services were rendered by MSI to the Appellant.

7. The learned CIT(A) has erred in stating that the payments made for sales commission are composite in nature and concluding that the payments for software development services, customer database, etc. as Royalty and evaluation of clients, lead generation, etc. as Consultancy Services.

8. The learned CIT(A) erred in making reference and drawing conclusions relating exception clause provided in section 9(1)(vii)(b) of the Act, without stating relevance of same in the Appellant's case.

9. The learned CIT(A) has erred in concluding that since payments are of composite nature the Appellant must have made application before AO u/s 195(2) of the Act.

10. The learned AO has erred in making incorrect conclusions by drawing reference to clauses in the agreement, LinkedIn profile of employees, Sworn statement of Mr. Sanjib Kumar and e-mail conversations in the order passed under section 201(1) of the Act. The learned CIT(A) has erred in not adjudicating Appellant's submission in this regard.

11. The learned CIT(A) has erred in confirming the action of AO in levying interest u/s 201(1A) of the Act. The Appellant denies its liability to pay interest. Even otherwise, interest charged is excessive.

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of

hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays accordingly."

6. The grounds raised by the assessee for Assessment Year 2016-17 in ITA No. 560/Bang/2019 are as under.

"*1. The order of Honourable Commissioner of Income Tax (Appeals) (hereinafter referred as "CIT(A)" for brevity) to the extent prejudicial to the Appellant is bad in law.*

2. The CIT(A) has erred confirming the action of Assessing Officer (`AO') without appreciating that:

(i) Payment for sales commission is not chargeable to tax in India as per the provisions of the Income Tax Act, 1961 (`Act') and therefore there is no liability to deduct TDS;

(ii) Services provided by Manthan Systems Inc (`MSI'), Manthan Systems Pte Limited, Singapore (`MSPL') and Manthan Systems FZ LLC, Dubai (`MSFU) does not qualify as Royalty both under the Act and DTAA;;

(iii) Services provided by MSI and MSPL does not qualify as FTS as per Act and does not
satisfy the test of 'Make Available' as envisaged in India-USA DTAA and India-Singapore DTAA respectively and therefore does not qualify as fees for Included services or fee for technical services under DTAA.

(iv) Services provided by MSFL does not qualify as FTS as per Act.

(v) There exists tax treaty between India and UAE and in the absence of article on fees for technical services in the treaty, the payment of sales commission would get covered under article on Business Income and shall not be liable to tax in India as MSFL does not have a permanent establishment in India.

3. The learned CIT(A) have erred in conforming the action of AO in treating the Appellant as assessee in default without appreciating that there cannot be non-compliance of section 195 of the Act, when the payment for sales commission to MSI were not chargeable to tax in India.

4. The learned CIT(A) has erred in conforming the action of AO in not explicitly concluding whether the payment for sales commission to MSI was in the nature of Royalty or FTS under the Act and DTAA.

5. The learned CIT(A) and AO have erred in placing reliance on the judicial decisions which are distinguishable both on facts of the case and provisions of law.

6. The learned CIT(A) has erred in confirming the action of AO in considering the Appellant as assessee in default in respect payment of sales commission made to MSPL and MSFL without providing an opportunity of being heard to the Appellant to substantiate its contentions.

7. The learned CIT(A) has erred in concluding that software development services has been provided by MSI to the Appellant during the relevant previous year without appreciating the fact that no such services were rendered by MSI to the Appellant.

8. The learned CIT(A) has erred in stating that the payments made for sales commission are composite in nature and concluding that the payments for software development services, customer database, etc. as Royalty and evaluation of clients, lead generation, etc. as Consultancy Services.

9. The learned CIT(A) erred in making reference and drawing conclusions relating exception clause provided in section 9(1)(vii)(b) of the Act, without stating relevance of same in the Appellant's case.

10. The learned CIT(A) has erred in concluding that since payments are of composite nature the Appellant must have made application before AO u/s 195(2) of the Act.

11. The learned AO has erred in making incorrect conclusions by drawing reference to clauses in the agreement, LinkedIn profile of employees, Sworn statement of Mr. Sanjib Kumar and e-mail conversations in the order passed under section 201(1) of the Act. The learned CIT(A) has erred in not adjudicating Appellant's submission in this regard.

12. The learned CIT(A) has erred in confirming the action of AO in levying interest u/s 201(1A) of the Act. The Appellant denies its liability to pay interest. Even otherwise, interest charged is excessive.

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays accordingly."

7. The grounds raised by the revenue for Assessment Year 2012-13 in IT(IT)A No. 968/Bang/2019 are as under.

"*1. The learned Commissioner of Income Tax (Appeals) has erred in law and facts of the case in allowing the appeal of the assessee on the issue of applicability of section 206AA of the Income-tax Act, 1961, in respect of payments made to non-resident entities.*

2. The learned Commissioner of Income Tax (Appeals) erred in law as well as on facts in holding that there is no scope for deduction of tax at the rate of 20%, as provided under the provisions of Section 206AA when the benefit of DTAA is available, despite the overriding effect of Section 206AA of the Income-tax Act, 1961 due to the presence of a non-obstante clause in the Section and a plain reading of the section indicates that it overrides other provisions of the Act including Section 90(2).

3. The learned Commissioner of Income Tax (Appeals), erred in relying on the decisions of the Hon'ble ITAT Bangalore in ITA No. 143/(B)/2013 in the case of Infosys BPO and Delhi High Court in the case of Danisco India Pvt. Ltd (WP(C) 5908/2015 dated 5.2.2015.

4. The learned Commissioner of Income Tax (Appeals)ought to have appreciated the fact that the Hon'ble ITAT, Bangalore in the case of of Bosch Ltd Vs ITO, International Taxation in ITA Nos.552 to 558/B/2011 dated 10/11/2012 has actually upheld the applicability of section 206AA of the Income-tax Act in favour of revenue, hence has erred in allowing the appeal of the assessee.

3. The learned Commissioner of Income Tax (Appeals)ought to have appreciated the fact that the Hon'ble ITAT, Bangalore in the case of DCIT Vs Infosys BPO [ITA No.1143(B) and 8&8/2014 has misinterpreted its own earlier decision in the case of Bosch Ltd Vs ITO, International Taxation in ITA Nos.552 to 558/B/2011 and has allowed the assessee's appeal without distinguishing its own decision. Hence, the CIT(A) has erred in relying on the decision of the Hon'ble ITAT in the case of DCIT Vs Infosys BPO ltd and allowing relief to the assessee.

4. The learned Commissioner of Income Tax (Appeals), erred in not considering the decision of the jurisdictional ITAT in the case of Bosch Ltd Vs ITO, International Taxation on the applicability of section 206AA to the assessee's case.

7. For these and such other grounds that may be urged at the time of hearing, it is prayed that the order of the AO be restored and that of the CIT(A) be cancelled."

8. The grounds raised by the revenue for Assessment Year 2013-14 in IT(IT)A No. 969/Bang/2019 are as under.

"*1. The learned Commissioner of Income Tax (Appeals) has erred in law and facts of the case in allowing the appeal of the assessee on the issue of applicability of section 206AA of the Income-tax Act, 1961, in respect of payments made to non-resident entities.*

2. The learned Commissioner of Income Tax (Appeals) erred in law as well as on facts in holding that there is no scope for deduction of tax at the rate of 20%, as provided under the provisions of Section 206AA when the benefit of DTAA is available, despite the overriding effect of Section 206AA of the Income-tax Act, 1961 due to the presence of a non-obstante clause in the Section and a plain reading of the section indicates that it overrides other provisions of the Act including Section 90(2).

3. The learned Commissioner of Income Tax (Appeals), erred in relying on the decisions of the Hon'ble ITAT Bangalore in ITA No. 143/(B)/2013 in the case of Infosys BPO and Delhi High Court in the case of Danisco India Pvt. Ltd (WP(C) 5908/2015 dated 5.2.2015.

4. The learned Commissioner of Income Tax (Appeals)ought to have appreciated the fact that the Hon'ble ITAT, Bangalore in the case of of Bosch Ltd Vs ITO, International Taxation in ITA Nos.552 to 558/B/2011 dated 10/11/2012 has actually upheld the applicability of section 206AA of the Income-tax Act in favour of revenue, hence has erred in allowing the appeal of the assessee.

3. The learned Commissioner of Income Tax (Appeals)ought to have appreciated the fact that the Hon'ble ITAT, Bangalore in the case of DCIT Vs Infosys BPO [ITA No.1143(B) and 8&8/2014 has misinterpreted its own earlier decision in the case of Bosch Ltd Vs ITO, International Taxation in ITA Nos.552 to 558/B/2011 and has allowed the assessee's appeal without distinguishing its own decision. Hence, the CIT(A) has erred in relying on the decision of the Hon'ble ITAT in the case of DCIT Vs Infosys BPO ltd and allowing relief to the assessee.

4. The learned Commissioner of Income Tax (Appeals), erred in not considering the decision of the jurisdictional ITAT in the case of Bosch Ltd Vs ITO, International Taxation on the applicability of section 206AA to the assessee's case.

7. For these and such other grounds that may be urged at the time of hearing, it is prayed that the order of the AO be restored and that of the CIT(A) be cancelled."

9. The grounds raised by the revenue for Assessment Year 2014-15 in IT(IT)A No. 970/Bang/2019 are as under.

> "*1. The learned Commissioner of Income Tax (Appeals) has erred in law and facts of the case in allowing the appeal of the assessee on the issue of applicability of section 206AA of the Income-tax Act, 1961, in respect of payments made to non-resident entities.*
>
> *2. The learned Commissioner of Income Tax (Appeals) erred in law as well as on facts in holding that there is no scope for deduction of tax at the rate of 20%, as provided under the provisions of Section 206AA when the benefit of DTAA is available, despite the overriding effect of Section 206AA of the Income-tax Act, 1961 due to the presence of a non-obstante clause in the Section and a plain reading of the section indicates that it overrides other provisions of the Act including Section 90(2).*
>
> *3. The learned Commissioner of Income Tax (Appeals), erred in relying on the decisions of the Hon'ble ITAT Bangalore in ITA No. 143/(B)/2013 in the case of Infosys BPO and Delhi High Court in the case of Danisco India Pvt. Ltd (WP(C) 5908/2015 dated 5.2.2015.*
>
> *4. The learned Commissioner of Income Tax (Appeals)ought to have appreciated the fact that the Hon'ble ITAT, Bangalore in the case of of Bosch Ltd Vs ITO, International Taxation in ITA Nos.552 to 558/B/2011 dated 10/11/2012 has actually upheld the applicability of section 206AA of the Income-tax Act in favour of revenue, hence has erred in allowing the appeal of the assessee.*
>
> *3. The learned Commissioner of Income Tax (Appeals)ought to have appreciated the fact that the Hon'ble ITAT, Bangalore in the case of DCIT Vs Infosys BPO [ITA No.1143(B) and 8&8/2014 has misinterpreted its own earlier decision in the case of Bosch Ltd Vs ITO, International Taxation in ITA Nos.552 to 558/B/2011 and has allowed the assessee's appeal without distinguishing its own decision. Hence, the CIT(A) has erred in relying on the decision of the Hon'ble ITAT in the case of DCIT Vs Infosys BPO ltd and allowing relief to the assessee.*
>
> *4. The learned Commissioner of Income Tax (Appeals), erred in not considering the decision of the jurisdictional ITAT in the case of Bosch Ltd Vs ITO, International Taxation on the applicability of section 206AA to the assessee's case.*
>
> *7. For these and such other grounds that may be urged at the time of hearing, it is prayed that the order of the AO be restored and that of the CIT(A) be cancelled.*"

10. The grounds raised by the revenue for Assessment Year 2015-16 in IT(IT)A No. 971/Bang/2019 are as under.

"*1. The learned Commissioner of Income Tax (Appeals) has erred in law and facts of the case in allowing the appeal of the assessee on the issue of applicability of section 206AA of the Income-tax Act, 1961, in respect of payments made to non-resident entities.*

2. The learned Commissioner of Income Tax (Appeals) erred in law as well as on facts in holding that there is no scope for deduction of tax at the rate of 20%, as provided under the provisions of Section 206AA when the benefit of DTAA is available, despite the overriding effect of Section 206AA of the Income-tax Act, 1961 due to the presence of a non-obstante clause in the Section and a plain reading of the section indicates that it overrides other provisions of the Act including Section 90(2).

3. The learned Commissioner of Income Tax (Appeals), erred in relying on the decisions of the Hon'ble ITAT Bangalore in ITA No. 143/(B)/2013 in the case of Infosys BPO and Delhi High Court in the case of Danisco India Pvt. Ltd (WP(C) 5908/2015 dated 5.2.2015.

4. The learned Commissioner of Income Tax (Appeals)ought to have appreciated the fact that the Hon'ble ITAT, Bangalore in the case of of Bosch Ltd Vs ITO, International Taxation in ITA Nos.552 to 558/B/2011 dated 10/11/2012 has actually upheld the applicability of section 206AA of the Income-tax Act in favour of revenue, hence has erred in allowing the appeal of the assessee.

3. The learned Commissioner of Income Tax (Appeals)ought to have appreciated the fact that the Hon'ble ITAT, Bangalore in the case of DCIT Vs Infosys BPO [ITA No.1143(B) and 8&8/2014 has misinterpreted its own earlier decision in the case of Bosch Ltd Vs ITO, International Taxation in ITA Nos.552 to 558/B/2011 and has allowed the assessee's appeal without distinguishing its own decision. Hence, the CIT(A) has erred in relying on the decision of the Hon'ble ITAT in the case of DCIT Vs Infosys BPO ltd and allowing relief to the assessee.

4. The learned Commissioner of Income Tax (Appeals), erred in not considering the decision of the jurisdictional ITAT in the case of Bosch Ltd Vs ITO, International Taxation on the applicability of section 206AA to the assessee's case.

7. For these and such other grounds that may be urged at the time of hearing, it is prayed that the order of the AO be restored and that of the CIT(A) be cancelled."

11. The grounds raised by the revenue for Assessment Year 2016-17 in IT(IT)A No. 972/Bang/2019 are as under.

> "*1. The learned Commissioner of Income Tax (Appeals) has erred in law and facts of the case in allowing the appeal of the assessee on the issue of applicability of section 206AA of the Income-tax Act, 1961, in respect of payments made to non-resident entities.*
>
> *2. The learned Commissioner of Income Tax (Appeals) erred in law as well as on facts in holding that there is no scope for deduction of tax at the rate of 20%, as provided under the provisions of Section 206AA when the benefit of DTAA is available, despite the overriding effect of Section 206AA of the Income-tax Act, 1961 due to the presence of a non-obstante clause in the Section and a plain reading of the section indicates that it overrides other provisions of the Act including Section 90(2).*
>
> *3. The learned Commissioner of Income Tax (Appeals), erred in relying on the decisions of the Hon'ble ITAT Bangalore in ITA No. 143/(B)/2013 in the case of Infosys BPO and Delhi High Court in the case of Danisco India Pvt. Ltd (WP(C) 5908/2015 dated 5.2.2015.*
>
> *4. The learned Commissioner of Income Tax (Appeals)ought to have appreciated the fact that the Hon'ble ITAT, Bangalore in the case of of Bosch Ltd Vs ITO, International Taxation in ITA Nos.552 to 558/B/2011 dated 10/11/2012 has actually upheld the applicability of section 206AA of the Income-tax Act in favour of revenue, hence has erred in allowing the appeal of the assessee.*
>
> *3. The learned Commissioner of Income Tax (Appeals)ought to have appreciated the fact that the Hon'ble ITAT, Bangalore in the case of DCIT Vs Infosys BPO [ITA No.1143(B) and 8&8/2014 has misinterpreted its own earlier decision in the case of Bosch Ltd Vs ITO, International Taxation in ITA Nos.552 to 558/B/2011 and has allowed the assessee's appeal without distinguishing its own decision. Hence, the CIT(A) has erred in relying on the decision of the Hon'ble ITAT in the case of DCIT Vs Infosys BPO ltd and allowing relief to the assessee.*
>
> *4. The learned Commissioner of Income Tax (Appeals), erred in not considering the decision of the jurisdictional ITAT in the case of Bosch Ltd Vs ITO, International Taxation on the applicability of section 206AA to the assessee's case.*
>
> *7. For these and such other grounds that may be urged at the time of hearing, it is prayed that the order of the AO be restored and that of the CIT(A) be cancelled.*"

12. At the outset, it was submitted by ld. AR of assessee that the grounds raised by the assessee before CIT (A) are reproduced by ld. CIT(A) on pages 3 to 8 of his order and in particular, our attention was drawn to Ground no. 3 raised before ld. CIT(A) by assessee which is identical in all the five years. This ground is as under.

> "*3. Aggrieved by the order of the AO the appellant has filed the present five appeals.*
>
> *For AY 2012-13*
> *1. The learned Deputy Commissioner of Income Tax (International Taxation), Circle-1(2), Bangalore (hereinafter referred as "AO" for short) has erred in passing the Order in the manner passed by him. The Order being bad in law is liable to be quashed.*
>
> *2. The learned AO has erred in:*
> *(i) Not appreciating that payment for sales commission is not chargeable to tax in India as per the provisions of the Income Tax Act, 1961 ('Act') and therefore there is no liability to deduct TDS,.*
>
> *(ii) Not appreciating that services provided by Manthan Systems Inc ('MSI') does not qualify as Royalty both under the Act and DTAA; and*
>
> *(iii) Not appreciating that services provided by MSI does not qualify as FTS as per Act and does not satisfy the test of 'Make Available' as envisaged in India-USA DTAA and therefore does not qualify as fees for Included services under DTAA.*
>
> *3. The learned AO has erred in treating the Appellant as assessee in default without appreciating that there cannot be non-compliance of section 195 of the Act, when the payment for sales commission to MSI were not chargeable to tax in India.*
>
> *4. The learned AO has erred in placing reliance on the judicial decisions which are distinguishable both on facts of the case and provisions of law.*
>
> *5. The learned AO has erred in not explicitly concluding whether the payment for sales commission to MSI was in the nature of Royalty or FTS under the Act and DTAA.*
> *6. The learned AO has erred in making incorrect conclusions by drawing reference to clauses in the agreement, Linkedln profile of employees, Sworn statement of Mr. Sanjib Kumar and email conversations in the order passed under section 201(1) of the Act.*
> *7. Without prejudice to the above grounds and assuming without admitting that payment for sales commission to MSI is liable to tax in*

India, the learned AO has erred in invoking the provisions section 2o6AA of the Act without appreciating the fact that section 2o6AA is not applicable to Non-residents and in such cases, the beneficial rate as per Section 115A of the Income Tax Act or DTAA has to be adopted.

8. Without prejudice to the above ground, the learned AO has erred in levying surcharge @ 2% and education cess @ 3% on the TDS amount, without appreciating that as per Section 2o6AA of the Act, the maximum rate that can be applied in the instant case is 20%.
9. The learned AO has erred in levying a sum of Rs. 57,68,256/- as interest u/s 201(1A) of the Act. The Appellant denies its liability to pay interest. Even otherwise, interest charged is excessive."

13. Thereafter he submitted that there is no finding of ld. CIT(A) on this aspect of the matter raised by the assessee as per Ground No. 3 in all these years. It was submitted that this issue was not decided by ld. CIT(A). He also submitted that this is the decision of ld. CIT(A) that the payment in question is FTS / Royalty but there is no finding that this is not commission as claimed by the assessee. In this regard, he drawn our attention to page no. 8 of the order of ld. CIT(A) where it is noted by ld. CIT(A) that as per main claim and arguments of the assessee, this is the contention raised that the payments made is in the nature of sales commission and therefore, it is not chargeable to tax in India as per the provisions of the IT Act, 1961 and hence, there is no liability to deduct TDS. He submitted that this contention of the assessee should have been decided by ld. CIT(A) first before proceeding to hold that the amount in question is FTS / Royalty.

14. The ld. DR of revenue supported the orders of authorities below. He also submitted that on page no. 20 of the assessment order, a clear finding is given by the AO that the email communications with the / services of the subsidiary is not with the dealer or agent but which results in business above, decision making covered benefit to the user and hence, this is not correct to say that there is no decision on this aspect. He also submitted that in para no. 73 on page no. 54 of his order, ld. CIT(A) has also held that the payment for customer database, market analysis, maintenance of online data etc. are in the nature of royalty.

15. We have considered the rival submissions. First of all, we reproduce the relevant portion from page no. 8 of the impugned order of ld. CIT(A) in which

the ld. CIT(A) has summarized the main claims and arguments of the assessee. The same is as under.

> "*The main claims and arguments of the appellant are as under:*
> *i. Payment made is in the nature of sales commission - it is not chargeable to tax in India as per the provisions of the Income Tax Act, 1961 ('Act') and therefore there is no liability to deduct TDS;*
>
> *ii. the payment for services provided by Manthan Systems Inc ('MSI') do not accrue or deemed to accrue in India u/s 5(2)*
>
> *iii. services provided by Manthan Systems Inc ('MSI') does not qualify as Royalty both under the Act and DTAA; and*
>
> *iv. services provided by MSI does not qualify as FTS as per Act and DTAA*
>
> *v. services provided by MSI- even if held to be FTS - does not satisfy the test of 'Make Available' as envisaged in India-USA DTAA*
>
> *vi. AO has not explicitly concluded whether the payment for sales commission to MSI was in the nature of Royalty or FTS Therefore, non-compliance of section 195 of the Act is not there*
>
> *vii. the beneficial rate as per Section 115A of the Income Tax Act or DTAA has to be adopted.*"

16. From the above, it is seen that this is noted by ld. CIT(A) also that this is the main argument of assessee that the payments in question is in the nature of sales commission and therefore, it is not chargeable to tax in India. On this aspect of the matter, there is no finding of ld. CIT(A) as to whether the payment in question is in the nature of sales commission or not. Hence, we feel it proper to restore back the matter to the file of ld. CIT(A) for fresh decision with the direction that he should pass a speaking and reasoned order regarding this argument of assessee that the payment in question is in the nature of sales commission or not for which no tax is deducted. We order accordingly. We would like to observe that if some claim / argument is made before any quasi-judicial authority, the same should be disposed of by way of a speaking and reasoned order. But this has not been done by ld. CIT(A) in the present case. We therefore, set aside the order of ld. CIT(A) and restore the entire matter back to his file for fresh decision by way of a speaking and reasoned order regarding this claim / argument of the assessee that the

payment in question is in the nature of sales commission and therefore, it is not chargeable to tax in India as per the provisions of IT Act resulting into no liability on the assessee payer for making TDS. We want to make it clear that ld. CIT(A) should provide adequate opportunity of being heard to both sides and then pass reasoned and speaking order in all aspects dealing with all the claims and arguments of both sides.

17. In the appeals of the revenue, this is the only grievance of the revenue that ld. CIT(A) has erred in law and on facts in allowing the appeal of assessee on the issue of applicability of section 206AA of the IT Act in respect of payments made to non-resident entities. On this aspect, it was held by ld. CIT(A) after following various judicial pronouncements as per para no. 71 of his order that section 206AA does not override section 90 (2) of I T Act and therefore, the rate prescribed under DTAA or Act whichever is lower is applicable. We would like to observe that we have restored back the matter to the file of ld. CIT(A) for fresh decision regarding the requirement of TDS itself and hence, if it is found that TDS is not required to be made by the assessee than the issue regarding rate of TDS will not survive but if it is found and held that TDS liability is there, in that case also, the rate of TDS has to be the rate prescribed under DTAA or Act whichever is lower and on this issue, we find o reason to interfere in the order of CIT (A) because the decision of CIT (A) on this issue is by following various judicial pronouncements and no contrary decision was brought to our notice by the learned DR of the revenue.

18. In the result, all the five appeals filed by the assessee are allowed for statistical purposes and all the five appeals filed by the revenue are dismissed.

Order pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(ARUN KUMAR GARODIA)
Judicial Member	Accountant Member

Bangalore,
Dated, the 28th August, 2019.
/MS/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Bangalore.