IN THE INCOME TAX APPELLATE TRIBUNAL, 'I' BENCH MUMBAI

BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.7827/Mum/2019 & 7828/Mum/2019
(**Assessment Year :2016-17**)

M/s. Reliance Commercial Dealers Limited 3rd Floor, Maker Chamber IV, Mumbai – 400 021	Vs.	Commissioner of Income Tax (Appeals)-58 Earnest House 222, Nariman Point Mumbai – 400 021
PAN/GIR No.AADCR6527M		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Nimesh Vora & Moksha Mehta
Revenue by	Ms. Bharati Singh
Date of Hearing	**19/05/2023**
Date of Pronouncement	**10/07/2023**

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeals have been filed by the assessee against two separate orders of even date 31/10/2019 passed by ld. CIT (A)-Mumbai both in the A.Y.2016-17. In both the appeals, the common grounds raised reads as under:-

Ground No. 1: On the facts and circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) [CIT(A)] has erred in holding that the jurisdiction to decide the claim under section 248 of the Income-tax Act, 1961 (Act) is absent and thereby not admitting the appeal filed.

Ground No. 2: On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that the relief sought by the Appellant is impermissible to be granted under section 248 of the Act

Ground No. 3: On the facts and circumstances of the case and in law, the learned CIT(A) should have held that sum payable to Flight Safety International Inc, USA (FSII) for availing training services should be subject to withholding tax at the rate of 10% as per the provisions of India-USA Double Taxation Avoidance Agreement (DTAA) read with section 195 and section 115A of the Act and not at the rate of 20% (plus applicable surcharge and education cess) under section 206AA of the Act.

2. The facts in brief are that the assessee is a company engaged in the business of Air Transport of Passengers and is a holder of Non-Scheduled Air Transport (Passenger) Services (NSOP) permit granted by the Director General of Civil Aviation / Ministry of Civil Aviation. During the Financial Year 2015-16, the assessee had made payment of USD 61,200 (amounting to Rs.40,30,020) to Flight Safety International Inc, USA (hereinafter referred to as "FSII" or "Deductee" for availing training of pilots. As per the arrangement between the foreign entity and the assessee, the taxes, if any, payable on said training of pilots were to be borne by the assessee. Since the services were in the nature of technical services, therefore, as per the provision of Section 115A of the Act (as stood at the relevant time), the applicable rate of tax was 10%. However, in the absence of PAN of deductee, the assessee deducted tax at source u/s.195 r.w.s. 206AA of the Act @25.94% being grossed up rate of 20% u/s.195A. Accordingly, the assessee made the following

payments and deposited Rs.10,45,390/- to the credit of the Government on 08/09/2015.

Amount in USD	Amount in INR	WHT Rate	WHT in USD	WHT in INR
61,200	40,30,200	25.94% (20.60% gross upto 25.94%)	15,875	10,45,390

3. However, after making the payment of taxes, the assessee filed an appeal before the ld. CIT(A) u/s. 248 contending that the deductee, being a tax resident of the USA and Double Taxation Avoidance Agreement between India and USA are applicable to the transaction in question. As per Article 12 of DTAA, the rate of tax on "fees for included services" shall not exceed 15%. It was further submitted that as per section 90 of the Act, the provisions of the Act can be applied only to the extent they are more beneficial to the assessee. In terms of section 115A of the Act, any income in the nature of "fees for technical services" is taxable in India @ 10% (plus applicable surcharge & education cess) and the grossed up rate u/s.195A would work out to 11.48%. Accordingly, the assessee deductor claimed that the tax is required to be deducted @ 11.48% u/s. 115A of the Act, in the appeal filed u/s 248 of the Act before the ld. CIT (A).

4. However, the ld. CIT (A) dismissed assessee's (Deductor) appeal as not maintainable on the ground that Section 248 states that appeal lies only if when a person claims that ***no tax***

was required to be deducted on such income and what assessee seeks to get relief for reduced rate of tax to be deducted and there is no jurisdiction to deal with such case u/s. 248. Accordingly, he dismissed the appeal as un-admitted.

5. Another important contention which was raised by the assessee before the ld. CIT (A) was that the Hon'ble Supreme Court in the case of CIT vs. Wesman Engg. Co. (P.) Ltd., [1991] 188 ITR 327, wherein the appeal u/s 248 was held to be admissible for determination of sum chargeable under the provisions of the Act. It was held that –

> *"Under section 248 a person having deducted and paid tax under section 195 may appeal to the AAC denying his liability to make such deduction and for a declaration that he is not liable to make such deduction. <u>It is, thus difficult to accept the argument that total denial may enable an appeal to be filed but not a part denial with reference to part of the payment subject to deduction of tax"</u>*

The ld. CIT (A) distinguished the aforesaid decision merely on the ground that the aforesaid decision was rendered in context of pre-amended section 248.

6. Before us ld. Counsel for the assessee submitted that the ld. CIT (A) has distinguished the pre-amended and amended provision of Section 248 to hold that decision of the Hon'ble Supreme Court is not applicable. He submitted that, from the plain reading of both these Sections, it could be seen that it is

quite similar in language and does not alter the provisions of Section 248 to say that only where assessee completely denies his liability to deduct tax at source, then alone he can file appeal u/s.248. The term *"no tax was required to be deducted on such income"* would mean that there is a denial of liability to the extent of excess tax deducted at source. Further, it uses the term 'no tax' and 'Nil tax' and the term 'no tax' should mean correct tax and accordingly, the judgment of the Hon'ble Supreme Court is clearly applicable.

7. He further submitted that section 206AA of the Act would not apply to the subject transaction. Further, as per the provisions of section 90 (2) of the Act, applying the provisions of the Act to the extent they are more beneficial to the Deductee Assessee, the applicable rate for deduction of tax would be 10% u/s 115A (plus applicable surcharge & education cess) and the grossed up rate u/s 195A would work out to 11.48%.

8. Without prejudice to the above, he submitted that FIS rate in any case cannot exceed 15% as per Article 12 of the India-USA DTAA.

9. On the other hand, ld. DR submitted that from the plain reading of the provision of Section 248 as it stood after the amendment, by the Finance Act 2007, it clearly states that the tax deductible on any income u/s.195 is to be borne by the person by whom the income is payable and such person having paid such tax claims that **no tax** was required to be deducted then only he can file the appeal to the ld. CIT(A) for a declaration

that no tax was deductible on such income. The word 'no tax' has to be interpreted literally and it cannot be read as 'low tax'. Thus, ld. CIT (A) has rightly not admitted the appeal. In any case, assessee should have invoked the provision of Section 197 and made an application before the ld. AO.

10. We have heard the rival submissions and also perused the relevant observation given by the ld. CIT(A). The entire controversy is that, whether on the facts of the case where assessee has deducted tax at source on the payment made to US based entity which admittedly was in the nature of technical services, was to deducted tax @10% u/s 115A (plus applicable surcharge & education cess) and if assessee had deducted tax at grossed up @ 25.94%, can an appeal be filed u/s.248 before the ld. CIT(A) for making a claim that low tax was required to be deducted and accordingly, refund should be granted. Secondly, whether within the scope of provision of Section 248, such an appeal can lie before ld. CIT (A).

11. At this point, it would be relevant to refer to the pre-amended Section of 248 which reads as under:-

> *"248. Appeal by person denying liability to deduct tax-Any person having in accordance with the provisions of sections 195 and 200 deducted and paid tax in respect of any sum chargeable under this Act, other than interest, who denies his liability to make such deduction, may appeal to the Commissioner (Appeals) to be declared not liable to make such deduction."*

The amended provisions of section 248 of the Act, vide Finance Act, 2007, reads as under-

> *"248. Where under an agreement or other arrangement the tax deductible on any income, other than interest, under section 195 is to be borne by the person by whom the income is payable, and such person having paid such tax to the credit of the Central Government, claims that no tax was required to be deducted on such income, he may appeal to the Commissioner (Appeals) for a declaration that no tax was deductible on such income.*

From the plain reading of pre-amended Section, it is seen that the appeal was to be filed by a person denying the liability to deduct tax, whereas the amendment to Section 248 provides for filing of appeal by the tax deductor (payer of income) when following conditions are fulfilled:

i. Tax deductible on any income u/s 195 shall be borne by the payer.

ii. Payer can file an appeal before the CIT (A) only after payment of taxes.

iii.Payer can file appeal claiming that no tax was required to be deducted on such income.

12. Since the aforesaid provision provides that tax deductible on any income u/s.195, therefore, it would relevant to incorporate the provision of Section 195 which reads as under:-

> *"(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not*

being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") 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

(2) Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application in such form and manner to the Assessing Officer, to determine in such manner, as may be prescribed, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable."

Ergo, as per Section 195(1), the deductor is required to deduct tax at source at the "***rates in force***". In case, the deductor believes that the whole sum is not chargeable to tax, he may apply to the assessing officer, for determination of sum chargeable to tax and then, the tax is required to be deducted as per section 195(1), i.e., at "the rates in force".

13. Section 2(37A) defines the term, "rates in force" and in clause (iii) therein, *the "rates in force' for the purpose of section 195 of the Act is the rates of income-tax specified in the relevant Finance Act or the rate or rates of income-tax specified in the DTAA.*

14. Ergo, the term 'no tax' was required to be deducted at source u/s. 248 of the Act would mean that tax in excess of

"rates in force" as referred to Section 195 of the Act when not required to be deducted at source. Undisputedly, "rates in force" would be the rates as per the relevant Finance Act or rates as per DTAA, whichever is more beneficial to the assessee. This has been clarified by the CBDT vide Circular No.728 of 1995 which has clarified that in case of remittance to a country with which a DTAA is in force, the tax should be deducted at the rate provided in the relevant Finance Act or at the rate provided in the DTAA, whichever is more beneficial to the assessee.

15. Now, in a conjoint reading of Section 195 and Section 248, it could be clearly inferred that the term '***no tax was required to be deducted'*** will mean and include the tax deducted at source in excess of the tax deductible u/s.195 at the rates in force. The term 'no tax' was required to be deducted in excess of the rate as per DTAA being beneficial to the deductee assessee, then it has to be reckoned that the rates provided in the DTAA are beneficial, then benefit has to be given; and in such a situation the tax can only be deducted at the rate which is beneficial to the deducted and hence, it tantamount t0 denial of liability of tax or no tax which is in excess.

16. The interpretation of Section 248 as given by the ld. CIT (A) and also as confessed before us by the ld. DR, if it is to be interpreted in such a manner, then it would lead to various anomalous situation. For instance if a deductor deducts tax at source u/s. 195 read with section 206AA on payment made to a non-resident and pays to the same to the Government. Having

done so, the Deductor files appeal u/s 248, and challenges in its main ground of appeal that the tax was not deductible at source at all, for the reason of non- chargeability of income in India; or if without prejudice raises a ground that in any case the tax would be deductible at source at the rates as per DTAA, then the CIT (A), in such appeal u/s 248, if he decides that the sum paid by the Deductor is chargeable in India. He, then, proceeds to decide on the alternate ground and decides that the tax should be deducted at source at the rates as per DTAA. Then in such a situation he is bound to give relief that the tax should have been deducted at source as per rates prescribed in DTAA. Now, as per the interpretation of the ld. CIT (A), this appeal is only maintainable that 'no tax' is to be deducted at all and if assessee claims that taxes are to be applied at the rate as per DTAA, then no relief will be granted. In our opinion, section does not curtail power of the ld. CIT(A) to decide about the applicable tax rates because the tax has to be levied as per the provisions of the statute and applicable tax rates and Section 90 clearly provides that benefit of DTAA has to be provided.

17. If in another instance, a deductor deducts tax at source u/s. 195 read with section 206AA on payment made to a non-resident and pays the same to the Government. The Deductor believes that the sum paid is chargeable to tax in India. However, the taxes should be withheld as per the rates prescribed under DTAA. He, therefore, files appeal u/s. 248, claiming that the tax deducted in excess of rates as per DTAA was not deductible at source. Now, as per the interpretation of ld CIT (A), merely

because the deductor has agreed that the payment is chargeable to tax and only the differential tax (between rates u/s. 206AA and as per DTAA) is not deductible at source, can ld. CIT (A) say that appeal is not maintainable? In our opinion, in such scenario also appeal could be maintainable before the ld. CIT (A) u/s.248. This proposition can be decided with an example, if the deductor approaches the ld. AO to obtain certificate u/s 195(2), the ld. AO applies the rate u/s 206AA and not as per DTAA though same is lower. Now if the deductor is aggrieved against said order, he can file appeal only u/s 248 as sections 246 and 246A do not provide for appeal against order u/s 195. Now, if the deductor files appeal u/s.248 against the order u/s. 195(2) challenges that 'no tax' was deductible at all as income is not chargeable to tax in India and without prejudice, challenges that rate of tax should be as per DTAA and not as per Section 206AA can it be said that if appeal is not maintainable, the answer would be in our opinion 'yes, it would be maintainable'.

18. Accordingly, we hold that the deductor can challenge excess deduction u/s. 248 seeking that the rate of tax should be as per DTAA and not as per Section 206AA, if it is found that otherwise income is chargeable to tax in India and then certainly an appeal would be maintainable u/s.248 seeking relief/refund for excess tax deducted. Thus, in our view, the word 'no tax was required to be deducted' in Section 248 should be interpreted in such a manner so as to include claim of the deductor that no tax was required to be deducted in excess of deductible at rates in force.

19. The ld. CIT (A) has held that under the pre-amended provisions of Section 248, the judgment of Hon'ble Supreme Court in the case of **CIT vs. Wesman Engg. Co. (P) Ltd.** supra is not applicable on the ground that it was rendered on the pre-amended Section 248 and it is not applicable on the amended provision. If the pre-amended section 248 and amended provision is kept in juxtaposition, the only major change is that, an additional condition has been brought that the deductor has to bear the subject tax and instead of denying the liability to make such deduction the statute in use the word "claims that no tax was required to be deducted".

20. There is another way to interpret this section that the heading to the Section itself says that ***"Appeal by a person denying liability to deduct tax in certain cases".*** Thus, the earlier phrase stating '*who denies his liability to make such deduction'* and now amended to phrase *"no tax was required to be deducted on such income'* will not alter the provision of Section 248 to say that only where the assessee completely denies his liability to deduct tax at source, he alone can file appeal u/s.248. The words, *"no tax was required to be deducted on such income"* would mean that there is denial of liability to the extent of excess tax deducted at source compared to rates in force as per Section 195(1). Thus, intention of the legislature would not render the deductor remediless merely because it admits deductibility of tax at source but disputes the rate of deduction. Thus, in our opinion, the judgment of the Hon'ble Supreme Court and principle laid down therein in the case of CIT

vs. Wesman Engg (supra) would also apply to the amendment to Section 248 of the Act.

21. Coming to the contention of the ld. DR that assessee has a remedy u/s.197. The said provision reads as under:-

> ***"****197. (1) Subject to rules made under sub-section (2A), where, in the case of any income of any person or sum payable to any person, income-tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of sections 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194I, 194J, 194K, 194LA, **[**194LBA**]**, 194LBB, 194LBC, 194M, 194O and 195, the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income-tax, as the case may be, the Assessing Officer shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate."*

Section 197 thus, provides that, assessee, here meant recipient deductee of the sum can approach the ld. AO to issue certificate for deduction of taxes at lower rate or for no deduction of tax. This Section 197 provides that the deductee or the recipient can approach to the ld. AO which here in this case deductee has not applied u/s.197 and deductor has filed remedy of the appeal u/s.248. Accordingly, we accept the contention of the ld. Counsel that appeal is maintainable and ld. AO is directed to apply rates in force which is the applicable rate of tax at 10% in accordance with law. Accordingly, the appeal of the assessee is allowed.

22. With regard to another appeal, the issue is exactly same except during the Financial Year 2015-16, the Appellant made payment of Euro 48,375 (amounting to Rs. 34,61,715) to Flight

Safety International SARL, France (hereinafter referred to as "FSIS" or "Deductee"), for availing training of pilots in the operation.

24. Since the aforesaid services are in the nature of technical services, as per section 115A of the Income-tax Act (as stood at the relevant time), the applicable rate of tax was 10%. However, in the absence of PAN of Deductee, the Appellant deducted tax at source u/s. 195 r.w.s. 20GAA of the Act @ 25.94% (being grossed up rate of 20% u/s. 195A of the Act). Accordingly, the Appellant made below payment and deposited Rs. 8,97,975 to the credit of the Government on 7th December, 2015.

Amount in Euro	Amount in INR	WHT Rate	WHT in USD	WHT in INR
48,375	34,61,715	25.94% (20.60% grossed upto 25.94%)	12,548	8,97,975

25. The claim of the assessee is that as per Article 12 of the DTAA between India and France, the rate of tax shall not exceed 10% and accordingly it filed appeal before the CIT (A) claiming that rate of tax to be deducted shall be 10%.

21. However, the aforesaid finding will also apply mutatis mutandis for this appeal also. Accordingly, both the appeals of the assessee are allowed.

22. In the result, both the appeals of the assessee are allowed.

Order pronounced on 10th July, 2023.

Sd/-	**Sd/-**
(S.RIFAUR RAHMAN)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 10/07/2023
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai