आयकर अपीलीय अधिकरण, 'बी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, CHENNAI

श्री एबी टी वर्की, न्यायिक सदस्य एवं श्री एस. आर. रघुनाथा, लेखा सदस्य के समक्ष

BEFORE SHRI ABY T VARKEY, HON'BLE JUDICIAL MEMBER AND SHRI S. R. RAGHUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./**ITA Nos.: 935, 936 & 937/Chny/2023**
निर्धारण वर्ष / Assessment Years: 2012-13, 2013-14 & 2014-15

M/s. Datalog Technologies Private Limited, Flat No. 6, 3rd Street, Narayandas layout, Tatabad, Coimbatore – 641 012. **[PAN: AABCD-5720-C]**	v.	Deputy Commissioner of Income-tax, International Taxation, Coimbatore.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Shri. Vikram Vijayaraghavan, Advocate
प्रत्यर्थी की ओर से/Respondent by : Shri. D. Hema Bhupal, JCIT

सुनवाई की तारीख/Date of Hearing : 08.05.2024
घोषणा की तारीख/Date of Pronouncement : 31.05.2024

आदेश /O R D E R

PER S. R. RAGHUNATHA, ACCOUNTANT MEMBER:

These three appeals filed by the assessee for Assessment Years (AY) 2012-13 to 2014-15 which arises out of separate orders dated 20.07.2023, 21.07.2023 and 21.07.2023 respectively, of learned first appellate authority. The Ld. CIT(A) had dismissed the appeals filed by the assessee against the orders of the Ld.DCIT, International Taxation, Coimbatore under Section 201(1) and 201(1A) of the Income Tax Act, 1961 for the aforesaid Assessment years. However, the facts as well as

issues are identical for all the years, these appeals are heard together and are being disposed off by way of this common order.

2. The sole ground in these appeals is applicability of TDS u/s. 195 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") on payments made by the assessee to the agent appointed at Indonesia.

3. The brief facts are that, the assessee is a resident Indian Company, is engaged in the business of manufacture of "Textile Process Monitoring Equipment". The assessee had appointed a non-resident M/s. PT AGANSA PRIMATMA, (AGANSA) Indonesia, as an agent for sale of its products as well as for various after sales services of its products in Indonesia. Accordingly, the assessee had entered into an "Agency Agreement" with AGANSA on 18/10/2005. During the Assessment years 2012-13 to 2014-15, the Assessee had made the following payments to AGANSA without deducting any Tax at Source U/s.195.

AY	**Nature of Payment**	**Amount in Rs.**
2012-13	Commission	9,97,060/-
	Exhibition Participation	3,44,750/-
	Maintenance & Service Charges	7,60,220/-

Total		**21,02,030/-**

AY	Nature of Payment	Amount in Rs.
2013-14	Service Charges	6,68,080/-
Total		**6,68,080/-**

AY	Nature of Payment	Amount in Rs.
2014-15	Service Charges	14,23,900/-
Total		**14,23,900/-**

4. Based on the data available with the department, it was found that the assessee had made above remittances to non-resident AGANSA, Indonesia without deduction U/s.195 of the Act. The Ld.DCIT, International taxation, issued a notice U/s.201(1) and (1A) of the Act. The assessee Company furnished the relevant details and documents to the Ld. DCIT and on perusal of the Agency agreement, the AO passed an impugned orders on even date 30.08.2018 for all three assessment years separately, by treating that the remittances made to AGANSA by the Assessee was towards services rendered in the nature of "consultancy services", which is falling under the provisions of Section 9(1)(vii) of the Act, and thus liable for deduction of Tax at source under Section 195 of the

Act. The rate of tax to be deducted shall be 20%, since the recipient Company is Non-resident and has not furnished the PAN.

5. Aggrieved by the impugned order of the Ld.DCIT, the assessee preferred an appeal before the Ld.CIT(A). Before the ld.CIT(A), the assessee contended that, the liability of TDS u/s.195 of the Act, is not applicable and submitted the following written submissions and prayed for quashing the impugned orders of the Ld.DCIT.

> *(1) The interpretation of the Assessing Officer that the payment was made for consultancy services is absolutely wrong, as it is purely marketing services rendered by the recipient in Indonesia in the ordinary course of its business carried on outside India and the recipient did not have and render any service to the appellant through its, permanent establishment, in India. Therefore, no income arose or accrued to the non-resident enterprise in India.*
>
> *(2) The Test of Taxability as per the Income Tax Act, 1961 shall fail as per section 9(vii)(b) of the Income-tax Act, 1961, vide the order of the Income Tax Appellate Tribunal'B' Bench, Chennai in ITA No.755/Mds/2011- Gama Industries Coimbatore Vs. the CIT-III dated 11 July 2012, and the decision of the Honourable Bombay High Court in the case 0l Grasim Industries Ltd. Vs. CIT 332 ITR 276 even if it is treated as FTS. This is because the amount payable were in respect of services utilised in a business carried on by the payee outside India and the appellant did not have any source of income outside India.*
>
> *(3.1) So far as the Test of Taxability of payments as per DTAA, Article 7.1 'The profits on an enterprise of a contracting State U the enterprise carried on business in the other Contracting State through a permanent establishment situated therein. If*

the enterprise carries on business as aforesaid, the profits of the, enterprise may be taxed in the other State, but only so much of them as is attributable to

(a)That permanent establishment

(b) Sales in that other State of goods or merchandise of the same or similar kind as those sold through the permanent establishment."

(3.2) The above article is emphatic enough to reject the observation of the Assessing Officer about DTAA being silent over taxation of the income in the nature of "Fee for Technical Services" (FTS), in the rates of TDS as per the Income Tax Act, 1961 shall apply.

(3.3) Admittedly, in the absence of specific mention of taxability of FTS in DTAA Article 7.7, "Where profits include items of income which are dealt with separately in other articles of this Agreement, then the provisions of those articles shall not be affected by the provisions of this article" shall not apply.

(3.4) As a result only Article 7.1 shall apply and therefore, the Test of Taxability would be in favour of the payee on the basis of Article 7.1 and leaving the case out of the scope of section 195/201/206AA of the Income Tax Act, 1961 as no income is chargeable to tax in India, 'in the hands of the Indonesian enterprise.

(3.5) As held by the ITAT, Ahmedabad in DCIT Vs Wellspun Corporation Ltd. 55 ITR (Tribunal) 405. "The key to taxability of an amount under section 9(1)(vii) is that is should constitute "consideration" for rendition of technical services. The case of the revenue fails on this short test, as in the present case the amounts paid by the assessee are "consideration" for orders secured by the assessee/irrespective of how and whether or not the agents have performed the so called technical services"....."Therefore, irrespective of whether any technical services are rendered during the course of carrying on such agency commission business on behalf of Indian principal, the consideration for securing business cannot be taxed under section 9(1)(vii) at all. This profits of such a business can have taxability in India only to the extent such profits relate to the business operations in India, but then, as are the admitted facts of this case, no part of operations of

business were carried out in India. The commission agents employed by the assessee, therefore, did not have any tax liability in India in respect of the commission agency business so carried out."

(3.6) The rate charged by invoking section 206AA for non-mentioning of Permanent Account Number of non-resident, is contrary to the provisions of DTAA applicable between India and Indonesia.

Recently, the Honourable Delhi High Court, in Danisco India Private Limited Vs. Union of India & Ors. In W.P.(C) 5908/2015 vide its order dated 05.02.2018, after taking note of the amendment to sub-section (7) in section 206AA, the amendment is mitigating to a large extent, the rigors of the pre-existing laws. The law, as it existed, went beyond the provisions of DTAA which in most cases mandates a 10% cap on the rate of tax applicable to the state parties. Section 206AA (prior to its amendment) resulted in a situation, where, over and above the mandated 10%, a recovery of an additional 10%, in the event, the non - resident payee, did not possess PAN.

The Honourable High Court at paragraph 8, has held as under:

> *"8. Having regard to the position of law explained in Azadi Bachao Andolan (supra) and later followed in numerous decisions that a Double Taxation Avoidance Agreement acquires primacy in such cases, where reciprocating states mutually agree upon acceptable principles for tax treatment, the provision in Section 206AA (as it existed) has to be read down' to mean that where the deductee i.e. the overseas resident business concern conducts its operation from a territory, whose Government has entered into a Double Taxation Avoidance Agreement with India, the rate of taxation would be as dictated by the provisions of the treaty."*

Therefore, section 206AA(7) is inapplicable.

(3.7) It is further, submitted, the above decision supports the case of the appellant, that in the absence of specific Article dealing with FTS in the DTAA with Indonesia, Article 7.1 shall prevail over section 9(1){vii) even assuming without conceding that the Assessing Officers view that the nature of payment is FTS is correct, as the same cannot be

taxed in India u/s 9(1)(vii), but should be exempted by virtue of Article 7.1 of DTAA, as it constituted the income from profits and gains of business carried on by the payee outside India and not within India.

(4) In view of the above.

(i) The provisions of section 195 is not applicable in respect of the payments made to the non-resident enterprise in Indonesia, during the three Asst. Years in question.

(ii) The appellant is therefore, not an assessee im default within the meaning of section 201, in respect to payments made.

(iii) Consequently, the provisions of section 201(1A) are not attracted.

(iv) Section 206AA is not applicable to the non-resident recipient.

(v) Higher rate of deduction @ 20% is arbitrary.

It is submitted that the impugned orders u/s 201(1A) be quashed in respect of the following appeal Nos. and Asst. Years.

Appeal No	*Asst. Year*
51	*2012-13*
52	*2013-14*
53	*2014-15*

And relief due to the appellant from the demand raised may be granted."

4.2 *The Authorized Representative of the appellant has also filed the following paper book containing all the below mentioned details on 16.04.2019 which is available on record.*

INDEX

S.No	*Description*	*Page No.*
1.	*Written submissions in brief dated 13.04.2019*	*1-5*
2.	*Agency Agreement entered into between Datalog Technologies Pvt Ltd. And PT Agansa Primatama,*	*6-10*

	Indonesia dated 18.10.2005	
3.	*Codicil to Agency Agreement dated 17.10.2006*	*11*
4.	*Agreement for avoidance of Double Taxation with Indonesia- Notification No.GSR 77(E)- Article 7 dated 04.02.1988*	*12-13*
5.	*Copy of order of ITAT, 'B' Bench Chennai in ITA No. 755/Mds/2011 in Gama Industries Coimbatore Ltd vs CIT – III dated 11.07.2012*	*14-22*

4.3 *Further, the authorized representative of the appellant has also filed the following submission on 14.09.2020, which is reproduced below:*

"Responding to your notice u/s 250 of the Income-tax Act, 1961, dated 28.08.2020, it is submitted the Authorised Representative of the appellant has already filed his written submission along with enclosures as listed in the index, on 16.04.2019, including Asst. Year 2014-15.

In addition, the undersigned Authorised Representative is enclosing head noted of the decision of the Madras High Court reported in 407 ITR 72, as in his opinion, the said decision may have to be considered, relevant to the appellant.

It is requested that the written submission, already submitted, may be considered along with the decision of the Madras High Court and the appeal may be disposed of, accepting the appellant's grounds, for relief as justified."

6. On perusal of the impugned orders of the AO and the submissions of the Assessee, the Ld. CIT (A), vide orders dated 20.07.2023, 21.07.2023 & 21.07.2023 for assessment years 2012-13, 2013-14 & 2014-15 respectively, confirms the action of the AO by dismissing the appeal of the assessee.

7. Aggrieved by the impugned orders passed by the Ld.CIT(A) for all the aforesaid Assessment years, the Assessee is before us, with the sole issue whether the liability of TDS U/s.195 of the Act, is applicable on the remittances made by the assessee to AGANSA.

8. The Ld. AR strongly assailed the orders of the below authorities, submitted the paper book consisting of 61 pages and paper book containing (Pages 1-192) bunch of cases relied on to justify the inapplicability of TDS under the provisions of section 195 of the Act for the remittances made by assessee to its agent AGANSA. He further argued that, AGANSA acts as an independent agent in Indonesia for procuring orders, providing after sales service and procuring space for various exhibitions. The payments / remittances made to AGANSA is in the nature of commission on the sales effected through them in addition to reimbursement of expenses towards after sales service and looking for booths in the exhibitions for products of the assessee. The said amount received by them from assessee constitute business Income to them and taxable only in Indonesia as per the DTAA of India and Indonesia, since the payee do not have PE in India.

9. The ld.counsel furthermore stated that the assessee's agent AGANSA do not have PE in India and hence the Income earned / accrued by way of commission from India is taxable only in Indonesia as per the DTAA and hence the provisions of section 195 of the Act does not apply. The Ld. Counsel for the assessee further stated:

"It is a well settled that provisions of DTAA between India and other countries over ride the provisions of Income tax. As held by the Supreme Court in the case of Azadi Bacho Andolan 263 ITR 706 (SC) (which was also referred to in our earlier submissions filed on 21.02.2020), We are also enclosing DTAA between India and Indonesia which has already been submitted.

As per Article 7 of the DTAA , the business profit of an enterprise in Indonesia will be taxable only in that State unless it carries on the business in India to a Permanent establishment in India .

AGANSA does not have permanent establishment in India and therefore business profit in that entity is taxable only in Indonesia.

Article 7 of the DT AA is provides for taxing of business profit also provides under sub-clause (7) that where profits are dealt with separately in other Articles of the agreement then the provisions of such article will prevail in the DTAA between India and Indonesia.

Article 8 deals with shipping and transport. Article 9 deals with dividend and Article 10 deals with interest and Article 12 deals with royalty.

There is no specific clause for dealing with technical services. Therefore the entire payment is taxable as business profit of the

AGNSA and no part of it can be segregated as fees for technical services under DTAA.

As held by the Madras High Court in the case of Bangkok Glass Industry Co Ltd Vs ACIT reported in 257 CTR 326, fees paid for technical services could be brought towards business income in the absence of any material to show that the same is not related to the business of the Assessee.

Further, without prejudice to the above, if the above income is stated as not part of the business of the Assessee, Article 22 of the DTAA provides that Items of income of resident of Indonesia wherever arising which are not expressly dealt with on the foregoing article of the agreement shall taxable in Indonesia.

Therefore the entire payment made to AGANSA constitute their business income and as they do not have any permanent establishment in India under Article 7 of the DTAA, it is taxable only in Indonesia.

Without prejudice to the same, commission payment for procurement of exports orders has been held as not taxable by the Madras High Court in the case of Evolv Clothing Company Pvt Ltd Vs ACIT - 407 ITR 72 (Mad)

The after sales services carried out in Indonesia constitute part of the obligations at the time of sale of the goods and hence should form part of the profit on sale of goods and cannot be treated independently as fees for technical services and hence not taxable in India.

Procurement of booth space in exhibitions will not constitute any technical services rendered and hence payment for the same would only constitute reimbursement expenses and not taxable in India."

10. The ld.counsel for the assessee apart from the above citations, further relied on the following decisions of various courts in favour of the assessee in relation to non-applicability of TDS on payments/remittances made to Indonesian Agent AGANSA under the provisions of Section 195 of the Act and the order of ld.CIT(A) needs to be quashed.

1. Diamond Manufacturing Management and Consultancy Ltd vs ACIT in ITA No. 49/Viz/2022 dated 26.03.2024

2. Paramina Earth Technologies Inc vs DCIT in ITA NO. 539/Viz/2017, 540/Viz/2017 dated 26.02.2020

3. CIT vs AIR India Ltd in ITA No. 233 f 2022 dated 28.07.2022

4. DCIT vs Serum Institute of India Ltd in ITA No. 323/Pun/2021 dated 15.09.2022

5. IBM India Private Limited vs DDIT in IT(IT)A Nos. 489 to 498/Bang./2013 dated 24.04.2014

6. GE India Technology Centre (P) Ltd vs CIT – 327 ITR 456 (SC)

11. Per contra, the Ld. DR has relied on the orders of the AO and of the Ld.CIT(A). The payments / remittances made to AGANSA by the asseessee is in the nature of Fee for technical services by referring to the Agency agreement of the Assessee

and liable for TDS u/s. 195 of the Act and the appeal of the assessee needs to be dismissed.

12. We have perused the orders, paper books and heard the rival submissions. The assessee is a resident Indian Company, is engaged in the business of manufacture of "Textile Process Monitoring Equipment". It is admitted fact that, the assessee had entered into an Agency agreement with AGANSA, Indonesia, to find customers and eligible for commission, on the business orders procured by them to the assessee. During the relevant assessment years, the assessee has made payments / remittances to its Agent AGANSA and has not deducted TDS under Section 195. The lower authorities contended that, based on the Agency agreement, the nature of payment to AGANSA by the asseessee is in the nature of Fee for technical services by referring to the Agency agreement of the Assessee and liable for TDS u/s. 195 of the Act. As pleaded by the Ld. Counsel for the assessee, the payment made is in the nature of commission and reimbursement of expenses to the Indonesian agent AGANSA, who do not have PE in India. As per Article 7 of the India-Indonesia DTAA, the income of the payee is not taxable in India unless the entity has a PE in India. Further, the Ld.

Counsel for the assessee stated that assuming the payments are in the nature of fee for technical service without prejudice what is stated above, the TDS provisions are not applicable as the Article 12 of the said DTAA consisting of only royalty and does not contain fee for technical service. Therefore, invoking provisions of section 195 of the Act for the payments made to the Indonesian agent for applicability of TDS is erroneous and needs to be quashed.

13. Aforesaid findings shows that in absence of Article dealing with fee for technical services, the payments made for services rendered in the course of business would be covered only by Article 7 of the DTAA dealing business profit.

14. Section 195 of the IT Act attracts tax only on chargeable income, if any, paid to a non-resident. Where there is no liability, the question of tax deduction does not arise. Where no part of the income is chargeable in India, even clearance under Section 195(2) or 195(3) of the IT Act is not necessary. The decision of the Karnataka High Court in Commissioner of Income Tax (International Taxation) v. Samsung Electronics Co. Ltd., reported in (2010) 320 ITR 209 (Kar), has been overruled

by the Supreme Court in GE India Technology Centre P. Ltd. v. CIT, reported in (2010) 327 ITR 456 (SC). The Supreme Court held as under:

> *"This reasoning flows from the words 'sum chargeable under the provisions of the Act' in Section 195(1). The fact that the Revenue had not obtained any information per se cannot be a ground to construe Section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all. We cannot read Section 195, as suggested by the Department, namely, that the moment there is remittance the obligation to deduct TAS arises. If we were to accept such a contention it would mean that on mere payment income would be said to arise or accrue in India. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression sum chargeable under the provisions of the Act from Section 195(1)."*

15. In the case of GE India Technology Centre P. Ltd., supra, the Supreme Court clearly held that no tax is deductible under Section 195 of the IT Act on commission payments and consequently the expenditure on export commission payable to non-residents for services rendered outside India becomes allowable expenditure. In the case of Toshoku Ltd., supra, the Supreme Court held that payments to agents for performance of services outside India are not liable to be taxed in India.

16. In the case of Commissioner of Income Tax, Delhi-IV, New Delhi v. EON Technology (P) Ltd., (2011) 15 Taxmann.com 391 (Delhi), the High Court of Delhi held that payment of sales commission to non-resident who operates outside the country would not attract tax, if payment was remitted abroad directly. Merely because an entry had been made in the books of accounts of the appellant/assessee, that would not mean that the non-resident agent had received payment in India and, therefore, disallowance under Section 40(a)(i) of the IT Act was found uncalled for.

17. Having gone through the entire conspectus of matter, we are of considered view that, the payments made to non-resident required to be taxed under Article 7 under the head business profits of the DTAA. There is no PE in India to non-resident. Therefore, the payment made to non-resident are not to be taxed in India as business profits. Accordingly, we hold that the lower authorities have erred in framing the assessment for the payments made to the agent of Indonesia as liable for TDS u/s. 195 of the Act. Accordingly, the orders of the lower authorities are set aside and appeals of the assessee for all three assessment years are allowed.

18. In the result, appeals filed by the assessee for all the three assessment years are allowed.

Order pronounced in the open court on 31st May, 2024 at Chennai.

Sd/-	**Sd/-**
(एबी टी वर्की **)**	**(**एस**.** आर**.** रघुनाथा**)**
(ABY T VARKEY)	**(S. R. RAGHUNATHA)**
न्यायिक सदस्य**/Judicial Member**	लेखासदस्य**/Accountant Member**

चेन्नई/Chennai,
दिनांक/Dated, the 31st May, 2024
JPV
आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT – Chennai/Coimbatore/Madurai/Salem
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF