

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'B' BENCH, BANGALORE**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER AND  
SHRI YOGESH KUMAR US, JUDICIAL MEMBER**

SN	IT(IT)A No. & Asst. Year	Revenue	Assessee
1	1312/Bang/2024 2014-15	The Dy. Commissioner of Income Tax, Intl. Taxn., Circle - 1(2), Bangalore.	IBM Deutschland GMBH, C/o M/s IBM India Pvt. Ltd., 12 Subramanya Arcade -1, Bannerghatta Main Road, Bangalore- 560 29.  <b>PAN – AAFCI 9549 E</b>
2	1325/Bang/2024 2014-15	The Dy. Commissioner of Income Tax, Intl. Taxn., Circle - 1(2), Bangalore.	IBM Italia SPA, India C/o M/s IBM India Pvt. Ltd., 12 Subramanya Arcade -1, Bannerghatta Main Road, Bangalore- 560 29.  <b>PAN – AAFCI 9667 P</b>
3	1329/Bang/2024 2017-18	The Dy. Commissioner of Income Tax, Intl. Taxn., Circle - 1(2), Bangalore.	IBM Singapore Pte., Limited, C/o M/s IBM India Pvt. Ltd., 12 Subramanya Arcade -1, Bannerghatta Main Road, Bangalore- 560 29.  <b>PAN – AACCI 2917 B</b>
4	1330 /Bang/2024 2014-15	The Dy. Commissioner of Income Tax, Intl. Taxn., Circle - 1(2), Bangalore.	IBM Canada Limited, C/o M/s IBM India Pvt. Ltd., 12 Subramanya Arcade -1, Bannerghatta Main Raod, Bangalore- 560 29.  <b>PAN – AAFCI 9552 H</b>

Assessee by	:	Shri Sharath Rao, CA, Dhiraj R, Advocate
Revenue by	:	Shri Subramanian S, JCIT

Date of hearing	:	21.08.2024
Date of Pronouncement	:	23.08.2024

**ORDER**

**PER BENCH:**

These appeals filed by the assessee are against the order passed by the NFAC, Delhi all dated 14/05/2024 in DIN No. ITBA/APL/S/250/2024-25/1064874540(1), No. ITBA/APL/S/250/2024-25 /1064874331(1), No. ITBA/APL/S/250/2024-25/1064874035(1) for the assessment years 2014-15 and DIN No. ITBA/APL/S/250/2024-25/1064874679(1) for the assessment year 2017-18.

**IT(IT)A No. 1312/Bang/2024 for the Assessment Year 2014-15**

2. The only issue raised by the Revenue is that Id. CIT-A erred in granting benefit of TDS credit in the proceedings carried out 147 r.w.s. 143(3) of the Act which are meant for the benefit of the Revenue.

3. The necessary facts are that assessee in the present case is a foreign company based in Germany. The assessee company is a part and parcel of IBM group. IBM India private limited has made a payment of ₹ 2,97,69,953.00 to the assessee in the year under consideration which was in the nature of fees for technical services in the manner provided under section 9(1)(vii) of the Act and also as per the provisions of the DTAA between India and Germany. IBM India did not deduct any TDS on such payment made to the assessee being foreign company. Thus, the proceedings under section 201 of the Act were initiated in the case of IBM India private limited and demand for non-deduction of TDS was raised in the name of IBM India private limited which was paid by IBM India private limited in the VSVS 2020.

4. Based on the proceedings carried out in the case of IBM India private limited, a notice under section 148 was issued to the assessee being a foreign company on account of escapement of income chargeable to tax in the hands of the assessee being a foreign company amounting to ₹ 2,97,69,953.00 which was admittedly chargeable to tax at the rate of 10% under India Germany DTAA. However, the assessee, filed the return of income in response to the notice issued under section 148 of the Act amounting to Rs. 11,28,93,610 which was charged to tax at the rate of 10% under the DTAA between India and Germany. As such the tax liability at ₹ 1,12,89,361.00 being 10% of the gross amount was calculated by the assessee in the income tax return. The assessee subsequently in the income tax return has adjusted the impugned tax liability of Rs. 1,12,89,361.00 against the TDS at Rs. 2,23,58,292 and claimed a refund of Rs. 1,10,68,930.00. However, the AO in the assessment framed under section 143(3) read with section 147 of the Act has denied the refund claimed by the assessee in the return of income.

5. On appeal before the learned CIT-A, it was directed by the learned CIT-A to grant the refund to the assessee by observing as under:

*"5. FINDINGS AND DECISIONS*

*5.1 Claim of refund by assessee after getting credit of TDS paid On this issue the assessee relied on judgment of High Court of Allahabad in the case of CIT vs. Vali Brothers wherein it was held that:*

*"7. We do not agree with the submissions of learned Standing Counsel. In the present case, in the return filed in pursuance of notice under section 148 of the Act, the assessee has not admitted any liability of tax and the refund of the amount which was deposited by way of advance tax, was claimed.*

*8. In the case of Shelly Products (supra), the Apex Court held that the assessee was not entitled to claim the refund of tax paid by way of advance tax or on self-assessment to the extent of liability of tax admitted. In the said case, the assessee filed return admitting certain liability of tax and in pursuance thereof, assessment was made which was subsequently set aside and nullified, but the*

*Assessing Authority failed to make fresh assessment. The Apex Court held that the assessee is entitled for the refund of the excess amount of tax, but not entitled for refund, which was admitted. In this view of the matter, the view of the Apex Court does not help to the revenue rather help to the assessee,*

*Section 237 of the Act contemplates refund which reads as follows:-*

*"Refunds—If any person satisfies the Income-tax Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess."*

*9. Under section 237 of the Act, if the Assessing Officer is satisfied that the amount of tax paid by the assessee for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, the assessee be given refund of the excess amount. In the present case, admittedly, no amount has been held chargeable, therefore, the entire amount deposited towards advance tax was in excess and was refundable. The argument of learned Standing Counsel that in the present case, proceedings under section 148 of the Act was dropped, therefore, there was no assessment and as such, the assessee was not entitled for refund, has no merit. In the case of *Esthuri Aswathiah v. ITO (1961] 41 ITR 539 (SC)*, their Lordships of the Supreme Court held that 'no proceedings' terminated to the assessment proceedings, and that it should be construed as meaning that the assessee had no assessable income. In the case of *M. C T. Muthuraman v. CIT (1963) 50 ITR 656*, the Madras High Court held as follows:*

*"We are of opinion that the proceedings for 1953-54 and 1954-55 were lawfully terminated by the Income-tax Officer, It is true that section 23 does not in express terms provide foreclosing the assessment proceedings with an order that no assessment would be levied. Though, the assessee had offered an item of income for assessment as his, the Income-tax Officer came to the conclusion that it was the Hindu undivided family that was liable to be assessed on that income and not the assessee. It was a conclusion, whether it was right or wrong, that he had jurisdiction to reach; and, once he reached that conclusion, he could not tax the assessee. In *Esthuri Aswathiah v. ITO (1961) 41 ITR 539 (Mys.)*, their Lordships of the Supreme Court pointed out that the order 'No proceedings' terminated the assessment proceedings, and that it should be construed as meaning that the assessee had no assessable income. The assessment proceedings that commenced with the returns filed by the assessee were lawfully terminated when they were closed with the entry 'N.A.'. Thereafter, the finality of the termination of those assessment proceedings could be vacated only by recourse to section 34, as this was not a case for the application of section 35." (p. 659)*

*10. The aforesaid view has been subsequently followed by the Madras High Court in the case of *V.S. Sivalingam Chettiar v. CIT [1966] 62 ITR 678* and by the Rajasthan High Court in the case of *Manak Lal Purwal v, CIT (1985] 155 ITR 6481*. In this case, Rajasthan High Court has held that the order for filing the proceedings is held to be order of assessment.*

*11. In view of the above decision, we are of the view that in the present case, order for dropping the proceedings amounts to order of assessment in pursuance of return filed in pursuance of notice under section 148 of the Act and assessee was entitled for refund of excess amount deposited.*

*12. For the aforesaid reasons, we answer the question referred to us in the affirmative i.e., in favour of the assessee and against the revenue. However, there shall be no order as to costs."*

*The AO also did not record anything as to how the refund was determined as Nil in spite of the fact that the TDS credit available is more than the tax liability. Therefore, the AO is directed to give credit to the TDS paid by the assessee and accordingly grant refund.*

*5.2 Credit of taxes paid by IBM India under VsV Scheme to the assessee*

*The assessee contended that under the VsV Scheme IBM India. paid Rs. 29,76,885/- and the credit for that tax should be given to the assessee in terms of Board's Circular No.9/2020 dated 22 April 2020 (Q No. 30 and its Answer).*

*The AO is directed to verify the said taxes paid and accordingly give credit to the assessee.*

*5.3 In the result, the appeal is allowed for statistical purpose."*

6. Being aggrieved by the order of the learned CIT-A, the revenue is in appeal before us.

7. The Ld. DR before us vehemently supported the grounds raised in the memo of appeal and the findings contained in the assessment order.

7.1 On the contrary the learned AR before us filed a paper book running from pages 1 to 120, case law compilation having 1 to 53 pages and contended that there was a regular payment made by IBM India private limited to the assessee after deducting TDS which was deducted at a rate higher than the rate specified under DTAA, but the assessee never claimed any refund of TDS by filing any return of income.

7.2 However, there was another payment by the IBM India private limited amounting to ₹ 2,97,69,953 to the assessee towards the services of seconded employees for the year under consideration which IBM India failed to deduct TDS. Accordingly, the proceedings under section 201 of the Act were initiated in the name of IBM India private limited which came to be settled under VSVS 2020.

7.3 Nevertheless, based on the proceedings under section 201 of the Act in the case of IBM India private limited, a notice was issued in the case of the assessee under section 148 of the Act on account of escapement of income of ₹ 2,97,69,953.00 only. However, the assessee being a foreign company has also included the income which was paid by IBM India private limited after deducting the TDS. As the TDS was deducted at a higher rate by IBM India private limited than the rate specified under the treaty, the assessee claimed the refund in the return of income.

8. As per the Ld. AR it was the 1<sup>st</sup> assessment framed by the revenue in the hands of the assessee under section 147 of the Act and therefore the assessee was entitled for making all the claims in the return of income which were not subject matter of the notice issued under section 148 of the Act on account of escapement of income. The Ld. AR in support of his contention relied on the judgement of Hon'ble Karnataka High Court in the case of Karnataka State Co-operative Apex Bank Ltd. in ITA No. 392 of 2015 vide order dated 6-07-2021.

9. Both the Ld. DR and the AR before us relied on the order of the authorities below as favourable to them.

10. We have heard the rival contentions of both the parties and perused the materials available on record. Undeniably, it was the 1<sup>st</sup> time when the assessment was framed under section 147 read with section 143(3) of the Act by the revenue vide order dated 31.3.2022 in the hands of the assessee. Likewise, the proceedings were initiated on

account of escapement of income of Rs. ₹ 2,97,69,953.00 which has been elaborated in the preceding paragraph.

10.1 However, the assessee at its own has also included other income which was not disclosed on the earlier occasion in the return filed under section 148 of the Act and the same was accepted by the revenue in the assessment framed under section 147 read with section 143(3) of the Act. In other words, the gross income shown by the assessee at Rs. 11,28,93,610.00 includes the income escaped from the assessment amounting to ₹ 2,97,69,953.00 for which the proceedings under section 147 of the Act were initiated and the same was duly accepted by the revenue. The assessee calculated the tax liability on such gross income at Rs. 1,12,89,361.00 which was allowed to be adjusted against the TDS shown by the assessee by the Revenue. But the fact is this that the amount of TDS was much more than the tax liability shown by the assessee which was also accepted by the revenue. In simple words, the TDS claimed by the assessee stands at Rs. 2,23,58,292 against the tax liability of Rs. 1,12,89,361 leaving the excess amount of TDS amounting to Rs. 1,10,68,930.00 which was claimed as refund by the assessee in the income tax return. But the same was denied by the revenue.

10.2 Now the controversy arises whether the refund claimed by the assessee in the proceedings under section 147 of the Act which are beneficial to the revenue and not to the assessee in the light of judgement of Hon'ble Madras High Court in the case of Chettinad Corporation private Ltd versus CIT and Hon'ble Supreme Court in the case of Sun engineering reported in 64 taxman 442 is to be granted in the given facts and circumstances.

10.3 This question has been answered by the Hon'ble Karnataka High Court in the case of Karnataka State Co-operative Apex Bank Ltd. in ITA No. 392 of 2015 vide order dated 6-07-2021. The relevant question before the Hon'ble Karnataka High Court and the finding thereon is reproduced as under:

*"(1) Whether the Tribunal is right in applying the ratio of the decision of the Hon'ble Supreme Court in CIT vs. Sun Engineering Pvt. Ltd. 198 ITR 297 (SC) and holding that concluded issue in the original proceeding cannot be re-agitated in reassessment proceedings even though the case of the appellant is distinguishable in as much as there was no original assessment proceedings on the facts and circumstances of the case?"*

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*"11. In the instant case, admittedly, there is no original assessment order in the case of the assessee and it was only an intimation under Section 143(1) of the Act, which cannot be treated to be an order in view of decision of the Supreme Court in Rajesh Jhaveri supra. Therefore, the question of re-assessment of the income of the assessee by the Assessing Officer does not arise. In the proceeding under Section 148 of the Act, it was the first assessment and the same could have been done considering all the claims of the assessee. Therefore, the decision rendered by the Supreme Court in Sun Engineering Works (P.) Ltd had no application to the fact situation of the case. Even assuming for the sake of argument that it an intimation under Section 143(1) of the Act is considered to be an order of assessment, in the subsequent re-assessment proceeding, the original assessment proceeding get effaced and the Assessing Officer was required to consider the proceeding de novo and to consider the claim of the assessee.*

*In view of preceding analysis, the first and second substantial question of law is answered in the negative and in favour of the assessee. In the instant case, the authorities under the Act have not considered the claim of the assessee. Therefore, it is not necessary for us to express any opinion with regard to substantial question of law Nos.3 and 4 as the aforesaid claims have to be adjudicated afresh by the Assessing Officer. Accordingly, the order dated 29.02.2016, 31.07.2014 & 30.03.2013 are quashed and the matter is remitted to the Assessing Officer to adjudicate the claims of the assessee."*

10.4 It is the admitted position that it is the 1<sup>st</sup> assessment proceedings carried out in the hands of the assessee under the provisions of section 147 read with section 143(3) of the Act. Accordingly, we hold that such proceedings were the de-novo proceedings and therefore the assessee was entitled to make any fresh claim in the return of income. Accordingly, we do not find any infirmity in the order of the learned CIT-A. Hence the ground of appeal of the revenue is hereby dismissed.

11. In the result, the appeal filed by the revenue is hereby dismissed.

**Coming to IT(IT)A Nos. 1325, 1329 & 1330/Bang/2024 for the assessment years 2014-15 and 2017-18**

12. The facts of the case on hand are identical to the facts of the case discussed above in all the three captioned appeals for the assessment years 2014-15 and 2017-18, therefore, respectfully following the same, grounds of appeals of the revenue are hereby dismissed. Hence the grounds of appeal of the revenue are hereby dismissed.

12. In the result, three appeals filed by the revenue are hereby dismissed.

13. In the combined result, all the appeals filed by the revenue are hereby dismissed.

Order pronounced in court on 23<sup>rd</sup> day of August, 2024

Sd/-

**(YOGESH KUMAR US)**

Judicial Member

Bangalore

Dated, 23<sup>rd</sup> August, 2024

Sd/-

**(WASEEM AHMED)**

Accountant Member

/ vms /  
Copy to:

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

By order

Asst. Registrar, ITAT, Bangalore