**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**AGRA BENCH, AGRA**

**BEFORE : SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**
**AND**
**SHRI SUNIL KUMAR SINGH, JUDICIAL MEMBER**

**ITA No. 63/Agr/2025**
**Assessment Year: 2020-21**

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| AL Hamd Agro Food Products Pvt. Ltd., 5/50, B-5, Bima Nagar, Alampur, Sarsol, Aligarh. | **Vs.** | DCIT/ACIT, Income-tax, Aligarh. |
| **PAN : AAFCA0964R** | | |
| **(Appellant)** | | **(Respondent)** |

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| Assessee by | Sh. Deepak Singh, Advocate |
| Department by | Sh. Shailendra Srivastava, Sr. DR |

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| Date of hearing | 18.12.2025 |
| Date of pronouncement | 15.01.2026 |

**ORDER**

**PER : S. RIFAUR RAHMAN, ACCOUNTANT MEMBER:**

The assessee has preferred this appeal against the order of learned CIT(Appeals)-3, Gurgaon dated 10.12.2024 u/s. 250(6) of the Income-tax Act, 1961 ("the Act" for short) for the assessment year 2020-21.

2. Brief facts of the case are, the assessee filed its return of income for the assessment year 2020-21, declaring income of Rs.45,99,37,860/- on 29.10.2020. Case of the assessee was selected for scrutiny. Accordingly, notices u/s. 143(2) and 142(1) of the Act were issued and

served on the assessee. After considering the submissions of the assessee, the Assessing Officer made several additions, including disallowance of commission paid, but tax not deducted to the extent of Rs.1,85,6,973/-.

3. Aggrieved, assessee preferred an appeal before learned CIT(A), Gurgaon. Learned CIT(A) partly allowed the appeal preferred by assessee on another issue and dismissed the issue of commission paid to non-resident without TDS deduction.

4. Aggrieved with the above order, assessee is in this appeal, raising following grounds :

> "1. Because The CIT(A) has erred in confirming the addition of Rs.1,85,70,973 being the commission paid to foreign agents.
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> 2. Because the order appealed against is contrary to the facts, law and principles of natural justice. the appellant craves leave to add, delete, modify or substitute any or all the grounds of appeal at any appropriate time."

5. At the time of hearing, learned AR of assessee submitted that the assessee is a large exporter of meat and relevant details of commission paid to the non-residents are reproduced at page 5 of the assessment order and he submitted that the assessee has paid commission to the non-resident towards procurement of orders for the assessee outside India. All these services are rendered outside India. Therefore, there is no requirement for assessee to deduct TDS. He brought to our notice

two parties, to whom the assessee has paid oasis agency commission, B & G Export Corporation PTY Ltd. and Red Coral Business Consultants. He submitted that Oasis are exempt from tax in India. In this regard, he relied on the decision of Ho'ble Delhi High Court in the case of CIT vs. Harbalife International India Pvt. Ltd. He submitted that the facts are exactly similar to the facts in assessee's case. He brought to our notice the relevant findings and also Article 24 of the DTAA between India and Australia and submitted that Oasis commissions are exempt from tax in India.

6. On the other hand, learned DR relied on the findings of lower authorities.

7. Considered the rival submissions and the material placed on record.

8. We observe that the assessee has paid oasis commission to B & G Export Corporation PTY Ltd. and Red Coral Business Consultants to procure the orders for the assessee for export of meat. These parties procured the orders for assessee outside India and it is clear that the services are rendered outside India. These parties do not have any PE in India. Therefore, as held in Transmission Corporation of A.P. Ltd. and Another v. Commissioner of Income Tax (1999) 239 ITR 587 (SC), that the income, which is not chargeable to tax in India, the assessee is not

required to deduct TDS. Further, in the case of Harbalife International India Pvt. Ltd., Hon'ble Delhi High Court held as under :

> "52. Section 40 (a) (i), in providing for disallowance of a payment made to a non-resident if TDS is not deducted, is no doubt meant to be a deterrent in order to compel the resident payer to deduct TDS while making the payment. However, that does not answer the requirement of Article 26 (3) of the DTAA that the payment to both residents and non-residents should be under the same conditions' not only as regards deduction of TDS but even as regards the allowability of such payment as deduction. It has to be seen that in those same conditions' whether the consequences are different for the failure to deduct TDS.
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> 53. It is argued by the Revenue that since in the present case no condition of deduction of TDS was attracted, in terms of Section 40 (a) (i) of the Act as it then stood, to payments made to a resident, but only to payments made to non-residents, the two payments could not be said to be under the same condition'. The further submission is that if they are not made under the same condition', the non-discrimination rule under Article 26 (3) of the DTAA is not attracted.
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> 54. In the first place it requires to be noticed that DTAA is as a result of the negotiations between the countries as to the extent to which special concessional tax provisions can be made notwithstanding that there might be a loss of revenue. In Union of India v. Azadi Bachao Andolan (supra) the Supreme Court noted that treaty negotiations are largely a bargaining process with each side seeking concessions from the other, the final agreement will often represent a number of compromises, and it may be uncertain as to whether a full and sufficient quid pro quo is obtained by both sides. The Court acknowledged that developing countries allow 'treaty shopping' to encourage capital and technology inflows which developed countries are keen to provide to them. It was further noted that the corresponding loss of tax revenues could be insignificant compared to the other non-tax benefits to the economies of developing countries which need foreign investment. The Court felt that this was a matter best left to the discretion of the executive as it is -dependent upon several economic and political considerations.
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> 55. Consequently, while deploying the nexus' test to examine the justification of a classification under a treaty like the DTAA, the line of enquiry cannot possibly be whether the classification has nexus to the object of the statute' for the purposes of Article 14

of the Constitution of India, but whether the classification brought about by Section 40 (a) (i) of the Act defeats the object of the DTAA.

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

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

> -Thus, where a Double Taxation Avoidance Agreement provided for a particular mode of computation of income, the same should be followed, irrespective of the provision of the Income Tax Act. Where there is no specific provision in the Agreement, it is the basic law, i.e., Income Tax Act, that will govern the taxation of income."
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> 58. Further in Union of India v. Azadi Bachao Andolan (supra), after taking note of the decisions of various high courts on the purpose of Double Taxation Avoidance Conventions qua Section 90 of the Act, the Supreme court observed as under:
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> "A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the Income Tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the Legislature to make a departure from the general principle of chargeability to tax under Section 4 and the general principle of ascertainment of total income under Section 5 of the Act, then there was no purpose in making those sections subject to the provisions of the Act. The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under Section 90 towards implementation of the terms of the DTAs which would automatically override the provisions of the Income tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of the DTAC.
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> 59. Consequently, the Court negatives the plea of the Revenue that unless there are provisions similar to Section 40 (a) (i) of the Act in the DTAA, a comparison cannot be made as to which is more beneficial provision."

9. Respectfully following the above decisions and also in presence of the fact that the relevant payment is not taxable in India, there is no requirement for the assessee to deduct tax at source, as these payments are taxable outside India.

10. In the result, appeal filed by assessee is allowed.

***Order pronounced in the open court on 15.01.2026.***

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| ***Sd/-*** | ***Sd/-*** |
| **(SUNIL KUMAR SINGH)** | **(S. RIFAUR RAHMAN)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Dated: 15.01.2026

*aks/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, Agra