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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA 7/2007**

Reserved on: March 30, 2016
Decision on: May 13, 2016

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Ashok K. Manchanda, Senior Standing counsel with Mr. Raghvendra Singh, Ms. Vibhooti Malhotra, Junior standing counsel and Mr. Aamir Aziz, Advocate.

versus

HERBALIFE INTERNATIONAL INDIA PVT. LTD. .....Respondent
Through: Mr. Ajay Vohra, Senior Advocate with Mr. Mukesh Butani, Mr. Vishal Kalra and Ms. Khyati Dadhwal, Advocates.
Mr. M. S. Syali, Senior Advocate with Mr. Mayank Nagi, Ms. Husnal Syali and Mr. Tarun Singh, Advocates for Interveners.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

J U D G M E N T
% **13.05.2016**

Dr. S. Muralidhar, J.:

1. This appeal by the Revenue is directed against the impugned order dated 28th February 2006 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 1771/Del/2005 for the Assessment Year ('AY') 2001-02.

Background facts

2. The background facts are that the Assessee, which is the Indian

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subsidiary of Herbalife International Inc. ('HII'), USA, carries on business of trading and marketing of herbal products for use in weight management, to improve nutrition and enhance personal care. The Assessee was incorporated as a company in India with 100% foreign equity participation, pursuant to an approval granted by the Department of Industrial Policy and Promotion, Secretariat for Industrial Assistant, Ministry of Industry, Government of India. The approval was obtained by HII. In terms of the approval, the Assessee was to manufacture herbal products on contract basis in India and should not import these items.

3. It is stated that HII developed significant expertise over the years. It provided data processing services, record keeping, distributor/supervisor information and order and shipment processing etc. HII also provided financial and marketing services. Apart from the direct services, HII also rendered some indirect administrative services. Thus, services are rendered to several subsidiaries worldwide and the costs incurred in this regard are centralized costs, which is allocated to the overseas subsidiaries on a scientific basis.

4. The Assessee entered into an Administrative Services Agreement ('ASA') dated 10th November 1999 with M/s. Herbalife International of America Inc. (HIAI) in terms of which HIAI agreed to provide data processing services, accounting, financial and planning services, marketing services, long term financial planning for the Assessee, analysis of prospects etc., for the purpose of obtaining approval for the products from government and regulatory bodies and if necessary to assist in protecting the trademark, trade name logo of the products. The Assessee was to pay an administrative fee to HIAI in terms of the ASA.

5. For the purpose of manufacturing the products in India on a contract

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basis, the Assessee entered into Licence and Technical Assistance Agreement ('LTAA') dated 10th November 1999 with HII, the owner of the incorporeal right relating to the process of manufacture of the various products. As the owner of the technical know-how regarding manufacture, HII permitted the Assessee, as a licensee, to manufacture the products.

6. For the AY in question, in the returns filed by it, the Assessee claimed an expenditure of Rs. 5.83 crores as administrative fee paid to HIAI as consideration for the various services provided to the Assessee under the ASA. The breakup of the said sum on the basis of the period it relates to is as follows:

1st January 2000 to 31st December 2000	10,00,000 US$
1st January 2001 to 31st March 2001	2,50,000 US$
	12,50,000 US$

12,50,000 US$ is equivalent to Rs. 5.83 crores.

7. It is stated that HIAI followed the calendar year and the annual charges payable for the calendar year 2000 was 10,00,000 US$. The case of the Revenue was that since the administrative fee claimed as deduction by the Assessee for the period 1st January 2000 to 31st March 2000 related to the previous year relevant to AY 2000-01, it could not be claimed as a deduction in AY 2001-02. On the other hand the plea of the Assessee was that the payment by the Assessee to HIAI required the prior permission of the Reserve Bank of India ('RBI') under the Foreign Exchange Regulation Act, 1973 ('FERA'). Though the Assessee had applied for grant of such permission on 24th March 2000, the RBI granted permission only on 30th June 2000. The RBI directed the Assessee to remit only 10,00,000 US$ as reimbursement of head office expenses. The RBI

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further directed that income tax should be paid on the remittances in terms of the Income Tax Act, 1961 ('Act'). The case of the Assessee was that the expenditure in question cannot be deemed to have accrued to the Assessee in accordance with law without the RBI approval. The Assessee accordingly treated the expenditure as having accrued only during the previous year relevant to AY 2001-02.

8. The further submission was that by 31st March 2000 when the accounting year for AY 2000-01 ended, the Assessee had not received the details regarding the share of common expenses payable by it to HIAI. The Assessee pointed out that since the ASA commenced only from 11th September 2000 (M/s. HIAI had waived ASA fee from 11th September 2000 to 31st December 2000) there was no past precedent which enabled the Assessee to make a provision for administrative fee on an estimate basis. The Assessee stated that an interim invoice was received on 30th June 2000 for US$ 333,333. The second interim invoice for the same sum was raised on 30th September 2000 and the final invoice on the same amount on 31st December 2000. The last invoice duly supported with cost allocation sheets was received on 31st January 2001 and the total amount payable to HIAI towards administrative fee worked out to US$ 1,015,240. In terms of the approval granted by the RBI only an amount of US$ 1 million was remitted. The balance US$ 15,240 was waived by HIAI. According to the Assessee, this formed a prudent basis for determining accrual of such expenses for the first quarter of 2001 (1st January to 31st March 2001) in the Assessee's books.

9. For the period 1st January 2001 to 31st March 2001, the Assessee pointed out that the bills up to 31st December 2000 were received from HIAI and on the basis of the above proceeds, it had estimated the same at

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1/4th of the sum payable for a period of 12 months. The second plea was that with the Foreign Exchange Management Act, 1999 ('FEMA') becoming effective from 1st June 2000, the payment could be made on current account transactions. In terms of Section 5 of FEMA foreign exchange could be drawn from an authorized dealer without RBI's prior permission. On account of both factors it was contended that the sum payable by the Assessee to HIAI could be ascertained, and had accrued and arisen to the Assessee and was, therefore, allowable as deduction during the AY in question.

Assessment order

10. The AO, in the assessment order dated 10th March 2004, held that since the services were rendered in the previous year 1999-2000, the liability had to be accounted for in the accounts for the year ending on 31st March 2000. The AO held that the approval from the RBI was only for the purposes for remittance. The said administrative expenses were, therefore, disallowed. As regards the fees in relation to the present year 2000-01, the AO observed that under Section 9 (1) (vii) of the Act, the income by way of fees for technical services ('FTS') payable by a person who is a resident in India would be deemed to accrue or arise in India because the services have been utilized in India. Therefore, under Section 195 of the Act, the Assessee was liable to deduct tax at source ('TDS') on the said amount. The case of the Assessee was that this was only a cost sharing arrangement and was not in the nature of a fee being remitted overseas and therefore, it was not liable to deduct tax at source. However, the AO disagreed and disallowed this expenditure invoking Section 40 (a) (i) of the Act.

11. As regards the fees relating to the period from 1st January 2001 to 31st

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March 2001 the AO observed that the amount was not to be paid by the Assessee as it was a dead liability not to be discharged at any future date. The Assessee had not provided any liability on this account in the subsequent years as well. The AO has, therefore, not allowed the said expenses.

12. The AO has also disallowed the claim of Rs. 53,63,731 on account of lease hold improvements made by the Assessee during the AY in question although the amount had been capitalized in its books. The AO observed that the details filed by the Assessee showed that the expenditure was on account of fixing of new aluminium sliding windows, new interior work including aluminium partition, cupboards, counters, storage, tables, chairs, electrical fittings etc. This was treated as capital expenditure by the AO as the expenditure was not in the nature of current repairs and depreciation was allowed on the same

13. The third issue related to the loss in the sum of Rs. 73,17,184 on account of foreign exchange ('FE') fluctuation. The Assessee had booked a net loss of Rs. 5,97,184 on account of year and re-statement of liabilities. The AO observed that the loss on account of exchange rate would arise only at the time of remission and therefore, disallowed the said loss.

Order of the CIT (A))

14. Aggrieved by the aforementioned assessment order, the Assessee filed an appeal before the Commissioner of Income Tax (Appeals) ['CIT (A)']. By an order dated 25th February 2005, the CIT (A) disposed of the Assessee's appeal by holding that the administrative expense was in the nature of FTS rendered and was taxable in India in the hands of HIAI and therefore, Section 40 (a) (i) stood attracted. CIT (A) did not discuss the

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allowability of the expenses for the quarters ending on 31st March 2000 and 31st March 2001.

Order of the ITAT

15. The Assessee then went in appeal before the ITAT. By the impugned order dated 28th February 2006 the ITAT allowed the appeal of the Assessee and held that a sum of Rs. 5.83 crores being administrative fee paid by the Assessee to HIAI was allowable as deduction. It was held that Section 40 (a) (i) of the Act could not be invoked by the AO to disallow the claim for deduction as the payment in question was not taxable at the hands of the payee, i.e., HIAI as business income. It was held that HIAI did not have a permanent establishment (PE) in India. Further, even if it was taxable, it had to be examined whether it was fees for included services (FIS) under Article 12 (4) of the Double Taxation Avoidance Agreement ('DTAA') entered into between USA and India. Further in light of Article 26 (3) of the DTAA, Section 40 (a) (i) of the Act was discriminatory and could not be invoked to disallow the claim of the Assessee for deduction even if the sum in question was chargeable to tax in India.

16. As regards the fee attributable to the period from 1st January 2000 to 31st March 2000, the ITAT observed that the payment could not be made by the Assessee without seeking prior approval of the RBI which came about only on 30th June 2000. The liability accrued to the Assessee during the AY in question and was allowable as deduction during the year. Even as regards the fees payable for the period from 1st January 2001 to 31st March 2001, the ITAT observed that though the approval from the RBI was not required and though the Assessee had not received any bill for the this period from HIAI, it was still allowable as deduction since the

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Assessee had estimated it on a reasonable basis i.e. on the basis of the bill received for the period from 1st January 2000 to 31st December 2000. Reference was made by the ITAT in the impugned order to the decision of the Supreme Court in ***Bharat Earthmovers v. Commissioner of Income Tax (2000) 245 ITR 428.*** The ITAT allowed the entire sum of Rs. 5.83 crores as deduction.

17. The ITAT also allowed expenditure of Rs. 53,63,731 towards improvements carried out in respect of the premises taken on lease, relying on the earlier order passed by the ITAT in the case of same Assessee for the AYs 1999-2000 and 2000-01 in ITA Nos. 3098 and 2664/Del/04. Relying on the decision of the Special Bench of the ITAT in ***ONGC Limited v. Deputy Commissioner of Income Tax (2002) 83 ITD 151 [ITAT(Del)]***, the ITAT allowed a sum of Rs. 5,97,184 towards loss on account of FE fluctuation.

Questions of law

18. At the time of admission of the appeal, on 21st October 2009 the following questions of law were framed by the Court:

> "(a) Whether the ITAT was correct in law in allowing the sum of Rs. 5.83 crores being administrative fee paid by the Assessee to M/s. Herbalife International of America Inc.?
>
> (b) Whether the ITAT was correct in holding that the sum of Rs. 5.83 crores was not taxable in the hands of payee in India either as fees for technical services or as business income?
>
> (c) Whether the ITAT was correct in holding that the provisions of Section 40 (a) (i) of the Act is discriminatory and therefore not applicable in the present case as per provisions of Article 26 (3) of the Indo-US DTAA.
>
> (d) Whether ITAT was justified in law in allowing the payment relating to the period for 1st January 2000 to 31st March 2000 to the

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Assessee as deduction despite the fact that it was for a prior period expense and liability to pay the same was not accrued during the year?

(e) Whether the ITAT was correct in law in holding that the liability to pay the amount relating to the period from 1st January 2000 to 31st March 2000 accrued during the year as RBI had accorded its approval during the year?

(f) Whether the ITAT was correct in law in allowing the expenditure on account of administrative fee relating to the period from 1st January 2001 to 31st March 2001 to the Assessee as deduction despite the fact that the foreign company had not raised the bill for the same?"

19. On 15th October 2015 the questions were reframed as under:

"(a) Whether the ITAT was correct in law in allowing the sum of Rs. 5.83 crores being the administrative fee paid by the Assessee to M/s. Herbalife International America Inc.?

(b) Whether the ITAT was correct in holding that Section 40 (a) (i) of the Act is discriminatory and therefore, not applicable in the present case as per provisions of Article 26 (3) of the Indo-US DTAA?

(c) Whether the ITAT was justified in law in allowing the payment relating to the period for 1st January 2000 to 31st March 2000 to the Assessee as deduction despite the fact that it was a prior period expense and liability to pay the same did not accrue during the year?

(d) Whether the ITAT was correct in law in allowing the expenditure on account of administrative fee relating to the period from 1st January 2001 to 31st March 2001 to the Assessee as deduction despite the fact that the foreign company had not raised the bill for the same?"

Submissions on behalf of the Revenue

20. At the outset it is pointed out by Mr. Ashok Manchanda, learned Senior standing counsel appearing for the Revenue, that the during the pendency of the above proceedings the Assessee invoked the Mutual

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Agreement Procedure ('MAP') of the DTAA. The MAP culminated with the finding of the Bangalore Bench of the ITAT by its order date 23rd December 2009 in ITA Nos. 842 to 844 (Bang.)/2007 [***M/s. Herbalife International India Private Limited v. The Income Tax Officer***] that 25% of the income on account of administrative fees is taxable in India. The Bangalore Bench of the ITAT had also directed that TDS under Section 195 of the Act ought to be deducted at 25% of the administrative expenses amount.

21. The first submission made by Ms. Vibhooti Malhotra, learned counsel also appearing on behalf of the Revenue in the present appeal, is that without determining the character of the payment it is not possible to resort to the provisions of non-discrimination contained in Article 26 (3) of the DTAA. It is submitted that non-discrimination in deduction rule in terms of Article 26(3) of the DTA applies only when the payments in question are in the nature of either interest, royalty and FTS or other disbursements. Further, on the question of allowability of the payment as deduction, such payment have to be tested on the 'same condition' as if the payment in question has to be made to a resident, and where the exceptions mentioned in Article 26 (3) are not applicable. It is submitted that in the absence of a determination of the character of administrative fees, the first step of enquiry for applying the non-discrimination rule fails.

22. It is further submitted that if the exceptions mentioned in Article 26 (3) of the DTAA can be broadly classified as situations where excessive payments have been made due to the special relationship between the parties [Articles 9(1), 11(7) and 12(8)]. Article 9 (1) is applied in the context of domestic transfer pricing regulations. Article 11 (7) envisaged

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excessive interest having been paid on account of a special relationship between payer and payee. Article 12 (8) envisaged excessive royalty or FIS being paid on account of such special relationship. It is submitted that the ITAT failed to record any specific finding in relation to the above exceptions. Further, in the course of the assessment proceeding, no objection was raised regarding the question of applicability of Article 26 (3) of the DTAA and, therefore, there was no determination whether the payment made by the Assessee to its US parent was excessive or not.

23. It is further submitted that the next step in application of the non-discrimination rule was to examine under the 'same conditions' deduction would have been allowed if the same payment had been made to a resident. It is pointed out that Article 26 (1) prohibits discrimination on the basis of nationality and uses the expression ‘same circumstances’. Article 26 (2) prohibits discrimination vis-a-vis computing tax liability of PEs and uses the expression ‘same activities’. It is submitted that while the expressions ‘similar circumstances’ and ‘same activities’ have been discussed in the OECD Commentaries there is little indication on what is implied by the expression ‘same conditions’ found in Article 24 (4) of the OECD Model which is more or less similar to Article 26 (3) of the DTAA.

24. It is contended that Section 40 (a) (i) of the Act does not discriminate between a resident doing business with a non-resident and resident doing business with a resident under ‘similar conditions’. Accordingly, is submitted that Section 40 (a) (i) cannot be covered by Article 26 (3) of the DTAA. It is submitted that requirement of withholding taxes while making payments to non-residents does not offend the principle of non-discrimination. It is submitted that the onus is on the payer to deduct

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TDS. However, to ensure compliance on the part of the payer, Section 201 was introduced in the Act which provides that in event of failure to deduct, the person making payment will be treated as assessee in default and the tax shall be recovered from it. Section 40 (a) (i) was also a deterrent provision which promotes compliance on the part of resident payers. Section 40 (a) (i) provided that the in the event the resident payers do not deduct tax on payments to non-residents, they will not be entitled to deduction for the said expenditure. The distinction in Section 40 (a) (i) is *situs* of payment which was not a prohibited differentia under the DTAA.

25. It is further submitted that Section 40 (a) (i) of the Act did not create any classification between resident payments and non-resident payments. It deals with disallowance of expenditure where TDS has not been deducted. Secondly, assuming that Section 40 (a) (i) creates a distinction between resident payments and non-resident payments, it was built on intelligible differentia having a rational nexus with the object of Section 40 (a) (i) of the Act. The basis is that while there are several sources for collection and recovery of tax from resident, the same opportunities may not be available in the case of a non-resident. Consequently, the Act envisages TDS only on non-resident payments to collect tax at the very source of income. Reference is made to the decision of Pune Bench of the ITAT in ***Automated Securities Clearance Inc. v. Income Tax Officer (2008) 118 TTJ 619 [ITAT(Pune)]***. It is submitted that the impugned order of the ITAT has been passed on the basis of a very superficial and *prima facie* reading of provisions of Article 26 (3) of the DTAA.

26. It is contended that Section 40 of the Act is not a deductibility provision and hence outside the purview of Article 23 of the DTAA. In

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terms thereof the plea of non-discrimination can be raised only by the non-resident and not by a resident making the payment. It is further pointed out that the treaty benefit can be availed only where the specific provision overrides the modus provided in the Act. Since no such provision existed in the treaty, Section 40 (a) (i) needed to be given full effect to, unbridled by the treaty.

Submissions on behalf of the Assessee

27. On behalf of the Assessee it is submitted as under:

(a) Section 40 (a) (i) of the Act cannot be invoked in view of Article 26 (3) of the DTAA which mandates that the conditions for allowance or disallowance of expenses in case of payment made to residents and non-residents have to be the same.

(b) Prior to its amendment by the Finance (No. 2) Act, 2004 Section 40 (a) (i) of the Act provided for disallowance of payments made to non-residents where tax is not deducted at source, whereas a similar payment to resident did not result in such disallowance. After its amendment in 2004, certain payments to residents without deduction of TDS was disallowed under Section 40 (a) (i) of the Act.

(c) A Circular 5 of 2005 dated 15th July 2005 issued by the Central Board of Direct Taxes ('CBDT') explained that the purpose of introduction of clause (1a) to Section 40 of the Act was "to augment compliance of TDS provisions for residents." It is pointed out that there were no deterrent measures for failure to deduct TDS on payments to residents. Such measures existed only in respect of payment to non-residents. Thus, there existed a differential treatment which amounted to discrimination as envisaged under

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Article 26 (3) of the DTAA.

(d) A resident left with a choice of dealing with a resident or a non-resident would opt to deal with a resident rather than a non-resident owing to Section 40 (a) (i) of the Act and to this extent the non-resident is discriminated against.

(e) Reference is made to Article 24 of the OECD Model Convention which is *pari materia* with Article 26 (3) of the DTAA. The OECD Commentary on Article 24 explains that the above article was designed to end a particular form of discrimination resulting from the fact that the deduction of interest, royalties and other disbursements allowed without restriction when the recipient is resident, is restricted or even prohibited when he is a non-resident. Reference is also made to Article 24 (4) of the UN Model Convention which is also identical terms as Article 26 (3) of the DTAA.

(f) Relying on the decisions in ***Union of India v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC), Ishikawajima Harima Heavy Industries Ltd. v. DIT (2007)288 ITR 408 (SC), DIT v. Morgan Stanley & Co. (2007) 292 ITR 416 (SC), Asia Satellite Tel. Co. Ltd. v. DIT (2011) 332 ITR 340 (Del)*** and ***CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Del)*** it is submitted that international commentaries can be relied upon on the interpreting the provisions of DTAA. Reference is also made to the book '*The International Tax Primer*' authored by Brain J. Arnold and Michael J. Mcintyre as well as 'Double Taxation Conventions and International Tax Laws' manual by Phillip Baker.

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(g) There is a categorical finding of the AO which has been confirmed by the CIT (A) that the payment made to HIAI was in the nature of FTS as defined in Explanation 2 to Section 9 (1) (vii) of the Act. In that view of the matter, the contention of the Revenue that ITAT could not have proceeded to apply the non-discrimination provision in Article 26 (3) of the DTAA without recording a finding as to the nature of the payment made was untenable. The ITAT had correctly proceeded on the basis that the payment was in the nature of FTS liable to tax in India consistent with the stands of the Revenue before the AO as well as before the CIT (A).

(h) Section 40 of the Act is in the nature of a non-obstante provision, which overrides other provisions including Sections 30 to 38 of the Act. The expenditure allowable under Sections 30 to 38 of the Act in computing business income is subject to the deductibility condition in Section 40 of the Act.

(i) Section 40 (a) (i) of the Act imposes a condition precedent, i.e., deduction of TDS as regards taxability of payment to a non-resident including payment of FTS. However, the resident is not governed by the 'same condition' and to that extent Article 26 (3) of the DTAA stood attracted. Article 26 (3) of the DTAA was not concerned with discrimination in terms of nationality but with treatment of enterprises of a Contracting State under the domestic tax laws of ‘other state’.

(j) The expression ‘under the same conditions’ refers to the conditions for deductibility in relation to payments made under the domestic law and does not refer to discrimination on account of

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compliance requirements. This essentially meant that conditions for allowance or disallowance of expenses in case of payments made to residents and non-residents had to be same. Under Section 90 of the Act, where the DTAA is more beneficial to the Assessee taxpayer, it would prevail over the Act.

(k) The disallowance of expenses pertaining to the quarter ended 31st March 2000 as a 'prior-period' item was erroneous considering that the first debit note/invoice was raised by HIAI on 30th June 2000 and there was no possibility of an estimation of the liability in the absence of any past precedents or basis. Reliance is placed on the decisions in ***Bharat Earth Movers v. CIT*** (*supra*) and ***Saurashtra Cement & Chemical Industries Limited v. CIT (1995) 213 ITR 523 (Guj).***

(l) The remittance for the period from 1st April 2000 onwards, did not require the prior approval of the RBI. As regards the period up to 31st March 2000, the RBI approval was received on 30th June 2000 for remittance of amount up to US$ 1 million. The said expenditure cannot be said to have accrued under law without approval having being so accorded by the RBI.

(m) Reliance is placed on the decisions in ***Nonsuch Tea Estate Ltd. v. CIT (1975) 98 ITR 189 (SC), Dorr-Oliver (India) Ltd. v. CIT (1998) 234 ITR 723 (Bom),*** and ***Pfizer Corporation v. CIT (2003) 259 ITR 391 (Bom).***

(n) As regards the disallowance of the expenses pertaining to the period 1st January 2001 to 31st March 2001, a reasonable estimate was made on the basis of the invoices raised by HIAI for the period

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1st January 2000 to 31st December 2000. This formed a prudent basis for accrual of such expenses for the first quarter of the year 2001 in the books of the period ended 31st March 2001. After the enactment of FEMA, the payment in question by the Assessee to HIAI would fall in the category of current account transaction. Therefore, such payments did not call for any permission from the RBI. As per the mercantile system of accounting, the Assessee claimed the expenditure accrued for the relevant financial year. The mere non-payment of the said expenses by the Assessee to HIAI during the AY in question will postpone the accrual of the liability. Therefore, the disallowance made by the AO was not in accordance with law.

Submissions of the intervener

28. The impugned order of the ITAT refers to the decision of the ITAT in the case of ***Mitsubishi Corporation India Limited*** where similar questions are involved. Mr. M.S. Syali, learned Senior counsel for Mitsubishi Corporation India Limited was, therefore, permitted to address the Court. It is pointed out that the non-discrimination envisaged by Article 26 (3) of the DTAA is a sub-set of the discrimination based on nationality and need not be construed independently. The words 'other disbursement' in Article 26 (3) of DTAA takes colour from context. They cannot be restricted to income of a passive character. The doctrines of *noscitur-a-sociis* and *ejusdem generis* would not apply.

29. A reference is made to several passages of the decision of the Supreme Court in ***Union of India v. Azadi Bachao Andolan*** (*supra*). It is pointed out that the treaty embodies a well thought out modus of bringing about equality in treatment of a resident and the non-resident in

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determining profits, and, giving deduction of the specified items. It is submitted that the inconvenience of collecting tax from the payee who is not resident, but within reach, as compared to deduction at source by the payer at the time of payment is not a factor that can negate the intent of Article 26 (3) of the DTAA.

30. It is further submitted that the scope of Section 40 (a) (i) was expanded by insertion of Section 40 (a) (ia). The latter provision was to ensure that there was parity in the disallowance. However, if the nature of payment (as in the present case) does not fall under Section 40 (a) (ia) of the Act then the discrimination shall ensue. It is further submitted that the expression 'under same conditions' qualifies deductibility and not its being subject to deduction of tax at source. It is further submitted that since Article 9 contemplates an AE, once the status is that of an AE the entire Article 26 (3) is ruled out.

Exceptions to Article 26 (3) DTAA do not apply

31. The questions that have been framed by this Court revolve around the interpretation of Article 26 (3) of the DTAA and Section 40 (a) (i) of the Act.

32. Article 26 (3) of the DTAA reads as under:

> "Except where the provisions of paragraph 1 of Article 9 (Associated Enterprises), paragraph 7 of Article 11 (Interest), or paragraph 8 of Article 12 (Royalties and Fees for included Services) apply, interest, royalties, and other disbursements paid by a resident of a Contracting State to a resident of the other Contracting State shall, for the purposes of determining the taxable profits of the first-mentioned resident, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State."

33. There are specific kinds of payments mentioned in Article 26 (3) of

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the DTAA. These require treatment in the same manner vis-a-vis a resident and a non-resident. They include interest, royalty and "other disbursements". Article 26 (3) therefore states that for the purpose of determining the taxable profits of a resident of a contracting State (in the present case the Assessee who is a resident and HIAI of the other contracting State, i.e., USA). The payment of the above amounts shall be deductible under the 'same conditions' that apply to such payment being made to a resident of the contracting State (India). Article 26 (3) borrows the text and language of Article 24 of the OECD Model Convention.

34. There are three exceptions as far as Article 26 (3) is concerned. These are when the following provisions apply namely Article 9 (1) relating to AE, Article 11 (7) (interest) or Article 12 (8) (royalties and fees for Included Services). At the outset it requires to be noticed that fees for included services (FIS) is different from FTS. It is not even the Revenue's case that the payment made by the Assessee to HIAI which is sought to be allowed as a deduction, is in the nature of FIS. It is also not the case of the Revenue that Article 9 (1) or Article 11 (7) applies in the instant case.

35. Article 9 (1) provides for adjustment and reason the transfer price mechanism. This provision is not invoked in the present case in the context of the present deduction. Likewise, it is not the Revenue's case that Article 11 (7) or 12 (8) of the DTAA is attracted. Throughout, the case of the Revenue has been that the payment is in the nature of FTS. There is a specific finding of the AO as well as CIT (A) to this effect. It is not therefore open to the Revenue to now contend that the ITAT "erroneously and hastily" applied Article 26 (3) without first returning a finding on the nature and character of the payment made by the Assessee to HIAI.

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36. Consequently, the Court proceeds on the basis that the exceptions mentioned in the Article 26 (3) do not apply in the facts and circumstances of the case.

37. At this juncture, it has to be noticed that Bangalore Bench of the ITAT did render its opinion on 23rd December 2009 reported at ***2009 taxmann.com 1024*** (Bangalore Tribunal) that TDS under Section 195 of the Act ought to be deducted at 25% of the administrative expenses amount and that by no means settles the issue of the nature and character of the payment as far as the present appeals are concerned. For the AY in question, the AO and the CIT (A) have proceeded on the basis that the payment was in the nature of the FTS as defined in Explanation 2 to Section 9 (1) (vii) of the Act and this is confirmed by the CIT (A).

'Other disbursements'

38. The question that next arises is whether the payment by the Assessee to HIAI qualifies as 'other disbursements' for the purpose of Article 26 (3) DTAA?

39. To recapitulate, the case of the Revenue is that the expression 'other disbursements' should take colour from the context and would apply only to income which is of passive character just like interest and royalties. The Revenue invokes the doctrines of '*noscitur-a-sociis'* and *'ejusdem generis'*. It is submitted that FTS does not qualify as 'other disbursements' since it is not a passive character like royalties and interest.

40. The Court is unable to agree with the above submissions of the Revenue. In the context of which the expression 'other disbursement'

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occurs in Article 26 (3), it connotes something other than ‘interest and royalties’. If the intention was that ‘other disbursements’ should also be in the nature of interest and royalties then the word 'other' should have been followed by ‘such’ or ‘such like’. There is no warrant, therefore, to proceed on the basis that the expression ‘other disbursements’ should take the colour of ‘interest and royalties’.

41. The expression ‘other disbursements’ occurring in Article 26 (3) of the DTAA is wide enough to encompass the administrative fee paid by the Assessee to HIAI which the Revenue has chosen to characterize as FTS within the meaning of Explanation 2 to Section 9 (1) (vii) of the Act.

42. At one stage of the proceedings, the Assessee sought to contend that the payment was FIS covered under Article 12 (4) of the DTAA. The ITAT did not address this issue. It addressed the question whether, even assuming it was FIS, Section 40 (a) (i) of the Act cannot be applied and consequently, no disallowance can be made. Before this Court no question has been framed at the instance of the Assessee that the payment is covered by Article 12 (4) of the DTAA. Consequently, this question is not examined by the Court.

Section 40 (a) (i) of the Act

43. Once it is held that the FTS is covered within the expression ‘other disbursements’, the question that next arises is whether for the purpose of determining the taxable profits of the Assessee, the payment made by it to HIAI is ‘deductable under the same conditions’ as would apply if it had been paid to resident in India.

44. In order to determine what is non-deductible, Section 40 (a) of the Act as it stood at the relevant time reads as under:

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"Section 40 – Amounts not deductible

Notwithstanding anything to the contrary in Sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head 'Profits and gains of business or profession-

(a) in the case of any assessee—

(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable outside India, on which tax has not been paid or deducted under Chapter XVII-B:

Provided that where in respect of any such sum, tax has been paid or deducted under Chapter XVII-B in any subsequent year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid or deducted.

Explanation.—For the purposes of this sub-clause,—

(A) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;

(B) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains;

(iia) any sum paid on account of wealth-tax.

Explanation.—For the purposes of this sub-clause, "wealth-tax" means wealth-tax chargeable under the Wealth-tax Act, 1957 (27 of 1957), or any tax of a similar character chargeable under any law in force in any country outside India or any tax chargeable under such law with reference to the value of the assets of, or the capital employed in, a business or profession carried on by the assessee, whether or not the debts of the business or profession are allowed as a deduction

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in computing the amount with reference to which such tax is charged, but does not include any tax chargeable with reference to the value of any particular asset of the business or profession;

(iii) any payment which is chargeable under the head "Salaries", if it is payable outside India and if the tax has not been paid thereon nor deducted therefrom under Chapter XVII-B;

(iv) any payment to a provident or other fund established for the benefit of employees of the assessee, unless the assessee has made effective arrangements to secure that tax shall be deducted at source from any payments made from the fund which are chargeable to tax under the head "Salaries";"

45. Section 40 (a) was later amended by the Finance (No. 2) Act, 2004 and the amended section reads as under:

"Section 40 – Amounts not deductible

Notwithstanding anything to the contrary in Sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head 'Profits and gains of business or profession-

(a) in the case of any assessee—

(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,—

(A) outside India; or

(B) in India to a non-resident, not being a company or to a foreign company,

on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200:

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Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation.—For the purposes of this sub-clause,—

(A) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;

(B) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(ia) any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200:

Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation.—For the purposes of this sub-clause,—

(i) "commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to section 194H;

(ii) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

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(iii) "professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;

(iv) "work" shall have the same meaning as in Explanation III to section 194C ;

(ib) any sum paid on account of securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004;

(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains;

(iia) any sum paid on account of wealth-tax.

Explanation.—For the purposes of this sub-clause, "wealth-tax" means wealth-tax chargeable under the Wealth-tax Act, 1957 (27 of 1957), or any tax of a similar character chargeable under any law in force in any country outside India or any tax chargeable under such law with reference to the value of the assets of, or the capital employed in, a business or profession carried on by the assessee, whether or not the debts of the business or profession are allowed as a deduction in computing the amount with reference to which such tax is charged, but does not include any tax chargeable with reference to the value of any particular asset of the business or profession;

(iii) any payment which is chargeable under the head "Salaries", if it is payable—

(A) outside India; or

(B) to a non-resident,

and if the tax has not been paid thereon nor deducted therefrom under Chapter XVII-B;

(iv) any payment to a provident or other fund established for the benefit of employees of the assessee, unless the assessee has made effective arrangements to secure that tax shall be deducted at source from any payments made from the fund which are chargeable to tax under the head "Salaries";

(v) any tax actually paid by an employer referred to in

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clause (10CC) of section 10;"

46. Section 40 is in the nature of a non-obstante provision and therefore, it overrides the other provisions as contained in Sections 30 to 38 of the Act. This means that the expenditure which is allowable under Sections 30 to 38 of the Act in computing business income would be subject to deductibility condition in Section 40 of the Act. The payment of FTS to HIAI would be allowable in terms of Section 37 (1) of the Act but before such payment can be allowed the condition imposed in Section 40 (a) (i) of the Act regarding deduction of TDS has to be complied with. In other words if no TDS is deducted from the payment of FTS made to HIAI by the Assessee, then in terms of Section 40 (a) (i) of the Act, it will not be allowed as a deduction under Section 37 (1) of the Act for computing the Assessee's income chargeable under the head 'profits and gains of business'.

47. Article 26(3) of the DTAA calls for an enquiry into whether the above condition imposed as far as the payment made to HIAI, i.e., payment made to a non-resident, is any different as far as allowability of such payment as a deduction when it is made to a resident.

48. Section 40 (a) (i) of the Act, as it was during the AY in question i.e. 2001-02, did not provide for deduction in the TDS where the payment was made in India. The requirement of deduction of TDS on payments made in India to residents was inserted, for the first time by way of Section 40 (a) (ia) of the Act with effect from 1st April 2005. Then again as pointed out by Mr. M.S. Syali, learned Senior Advocate for the Intervener, Section 40 (a) (ia) refers only to payments of "interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a

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contractor or sub-contractor" etc. It does not include an amount paid towards purchases. Correspondingly, there is no requirement of TDS having to be deducted while making such payment.

49. However, the element of discrimination arises not only because of the above requirement of having to deduct TDS. The OECD Expert Group which brought out a document titled 'Application and Interpretation of Article 24(Non-Discrimination), Public discussion Draft, May 2007" did envisage deduction of tax while making payments to non-residents. It is viewed only as additional compliance of verification requirement which would not attract the non-discrimination rule. The OECD Expert Group noted that "the non-discrimination obligation under tax conventions is restricted in scope when compared with equal treatment or non-discrimination clauses in an investment agreement." Specifically, in relation to withholding taxes, the Expert Group in the note by its chairman titled "Non-Discrimination in Bilateral Tax Conventions" noted as follows:

> "6. The more limited non-discrimination obligations in tax conventions reflect the practical problems of cross-border taxation. For example, countries frequently collect taxes from non-residents through a system of withholding at source. Withholding is most frequently imposed on passive income, such as dividends, interest, rents, and royalties. Because the recipient may have no connection with the country of source other than the investment generating the income, withholding at the time of payment is likely to be the only realistic opportunity for the source country to collect its tax. ***Withholding is often not required on payments to residents. However, the application of withholding tax systems is appropriate. Residents have substantial economic connections with their country of residence; so that country is likely to have ample opportunity to collect its tax later, when a tax return is filed. Non-residents may be beyond the collection jurisdiction of the taxing country."***(emphasis supplied)

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50. While the above explanation provides the rationale for insisting on deduction of TDS from payments made to non-resident, the point here is not so much about the requirement of deduction of TDS *per se* but the consequence of the failure to make such deduction. As far as payment to a non-resident is concerned, Section 40 (a) (i) of the Act as it stood at the relevant time mandated that if no TDS is deducted at the time of making such payment, it will not be allowed as deduction while computing the taxable profits of the payer. No such consequence was envisaged in terms of Section 40 (a) (i) of the Act as it stood as far as payment to a resident was concerned. This, therefore, attracts the non-discrimination rule under Article 26 (3) of the DTAA.

51. The arguments of counsel on both sides focussed on the expression 'same conditions' in Article 26(3) of the DTAA. To recapitulate, a comparison was drawn by learned counsel for the Revenue with Article 26(1) which speaks of preventing discrimination on the basis of nationality and which provision employs the phrase 'same circumstances'. Article 26 (2) which talks of prevention of discrimination vis-a-vis computing tax liability of PEs and employs the expression 'same activities'. The expression used in Article 26 (3) is 'same conditions'. Learned counsel for the Revenue sought to justify the difference in the treatment of payments made to non-residents by referring to Article 14 of the Constitution of India and contended that the line of enquiry envisaged examining whether (a) the classification was based on an intelligible differentia and (b) whether the classification had a rational nexus with the object of the statute.

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

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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.

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.

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

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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."

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

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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."

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."

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.

60. The reliance by the Revenue on the decision of this Court in ***Hyosung Corporation v. AAR (2016) 382 ITR 371 (Del)*** is misplaced. There the Court negatived a challenge to the constitutionality of Section 245R (2)(i) of the Act on the ground that it was violative of Article 14 of the Constitution as well as Article 25 of the DTAA between India and South Korea. Section 245R (2) of the Act barred a non-resident applicant from approaching the Authority for Advance Ruling (AAR) where the matter was pending before any income tax authority. The matter, therefore, only pertained to the procedure of filing a petition before the AAR and not as regards any substantive right. The decision of the Pune Bench of the ITAT

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in ***Automated Securities Clearance Inc. v. Income Tax Officer*** (*supra*)is no assistance to the Revenue since the said decision is said to be overruled by the Special Bench of the ITAT in the case of ***Rajeev Sureshbhai Gajwani vs ACIT (2011) 8 ITR (Trib) 616 (Ahmedabad).***

61. In light of the above discussion, question (b) is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue by holding that Section 40 (a) (i) of the Act is discriminatory and therefore, not applicable in terms of Article 26 (3) of the Indo-US DTAA.

62. Accordingly, question (a) is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue by holding that the ITAT was correct in allowing a deduction of Rs. 5.83 crores being the administrative fee paid by the Assessee to HIAI.

Questions (c) and (d)

63. Question (c) concerns the prior expenses for the period 1st January 2000 to 31st March 2000 which was allowed to the Assessee as deduction by the ITAT.

64. The case of the Revenue which was accepted by the AO as well as by the CIT (A) is that the expenses for the above period did not accrue in the previous year relevant to AY 2001-02 and therefore, could not be allowed. The ITAT accepted the plea of the Assessee that the remittance could not have been made to HIAI without prior approval of the RBI. The approval could be obtained only on 30th June 2000. It is not in dispute that HIAI first raised a debit note/invoice on 30th June 2000 on the Assessee and there was no possibility of an estimation of the liability in the absence of any past precedent. There was no basis on which an estimate of the expenses could be ascertained.

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65. In ***Nonsuch Tea Estates Limited v. CIT*** (*supra*), the payments made by the Assessee to its managing agent which required the permission of the Central Government under the Companies Act, 1956. Though the remuneration paid by the Assessee to the managing agent related to the period prior to AY 1959-60, it was claimed during the said AY on the ground that the central government's approval was obtained only in the previous year related to AY 1959-60. The High Court did not agree with the plea of the Assessee but the Supreme Court reversed the High Court and held that liability towards royalty accrued only when the approval was granted by the Central Government for the appointment of the managing agent.

66. Consequently, the Court concurs with the view expressed by the ITAT in the present case, that the expenses for the period 1st January 2000 to 31st March 2000 accrued as a liability to the Assessee only during the previous year and that the said expenditure was rightly allowed as deduction during the AY in question. Question (c) is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue.

67. Question (d) pertains to the payment of administrative fee by the Assessee to HIAI during the period 1st January 2001 to 30th March 2001. The reason given by the AO for the disallowance that there was no evidence to show that the Assessee applied for such permission to the RBI for the period subsequent to 31st December 2000.

68. As noted by the ITAT, after 1st June 2000 consequent to the repeal of Foreign Exchange Regulation Act, 1973 ('FERA') and introduction of FEMA 1999, there was no requirement of RBI permission for making remittances. The payment to HIAI in terms of FEMA 1999, fell within the

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meaning of current account transactions. Authorized dealers were permitted to make remittances in connection with the current account transactions without prior permission of the RBI. Although the Assessee did not receive any bill from HIAI for this period it had made an estimate on the basis of the bill that it had received from HIAI for the period 1st January 2000 to 31st December 2000. In terms of the law explained by the Supreme Court in ***Bharat Earthmovers v. Commissioner of Income Tax*** (*supra*) "if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain in the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible."

69. For the aforesaid reasons, the Court concurs with the view expressed by the ITAT that in respect of the fee paid for the period relating to the period 1st January 2001 to 31st March 2001, the liability should be held as accrued and arisen during the previous year relevant to the AY 2001-02 and therefore, is rightly allowed by the ITAT. Question (d) is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue.

Conclusion

70. The appeal is accordingly dismissed but, in the facts and circumstances of the case, with no orders as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

MAY 13, 2016

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