IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	28.02.2020
Pronounced On	19.05.2020

CORAM

THE HON'BLE **MR.JUSTICE C.SARAVANAN**

W.P.No.845 of 2012

M/s.Shriram Capital Limited,
A Limited Company represented by
its Vice-President,
Mr.N.Mani,
Mookambika Complex,
No.4, Lady Desika Road,
Mylapore, Chennai – 600 004. ... Petitioner

Vs.

1.The Director of Income Tax,
(International Taxation),
VII Floor, Annexe Building,
121, Nungambakkam High Road,
Chennai – 600 034.

2.The Income Tax Officer,
International Taxation – I(2),
VII Floor, Annexe Building,
121, Nungambakkam High Road,
Chennai – 600 034. ...Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the

records on the file of the respondents and quash the impugned order passed by the first respondent in D.C.No.112(2)/264/2011-12 dated 24.11.2011 as illegal and without jurisdiction and consequently direct the second respondent herein to issue NIL deduction certificate u/s. 195 of the Act.

For Petitioner : Mr.R.Sivaraman

For Respondents : M/s. Hema Muralikrishnan
Standing Counsel.

O R D E R

In this Writ Petition, the petitioner has challenged the impugned order dated 24.11.2011 passed by the 1st respondent in bearing reference D.C.No.112(2)/264/2011-12.

2. In the impugned order, the 1st respondent has rejected the revision petition filed by the petitioner under Section 264 of the Income Tax Act, 1961, on 06.09.2011, on the ground that there was no undertaking furnished by the petitioner waiving right of appeal before the appropriate appellate forums.

3. The petitioner had entered into an agreement with the abroad company namely M/s.MD IN Services Pvt. Limited in United Kingdom,

for getting Insurance Product development. The petitioner was payable to the said abroad company of 2000 pounds per month for the service to be rendered abroad and utilised by the petitioner company abroad.

4. Therefore, the petitioner had sent a letter dated 24.05.2011 to the 2nd respondent for waiver of interest from deducting tax at source for the payments made to the said non-resident company under Section 195 of the Income Tax Act, 1961.

5. By an order dated 01.08.2011, the 2nd respondent ordered deducting of tax at the source of payment at 20% under the Double Taxation Avoidance Agreement (hereinafter referred as DTAA) entered between the Government of India and the Government of UK. The operative portion of the said order reads as under:-

> As per Article 13(2) of the India – U.K. DTAA also the proposed payments for availing consultancy services are taxable in India as "fees for technical services".
>
> Therefore as per the India – UK DTAA also, the proposed payments are taxable in India, subject to certain tax rates:-
>
> In this case the Non-resident (deductee) is not

having a Permanent Account Number (PAN), as mandated under Section 206AA of the I.T. Act, 1961 and such payments effected to the Non-resident not having a PAN will attract tax deduction at sourced at a higher rate of 20%.

Hence M/s. Shriram Capital Limited (petitioner) is hereby authorised to make payment to M/s. MD IN Services P. Ltd., U.K., arising out of the agreement dated 01.01.2011, after deduction of tax @ 20% (Twenty Percent).

This authorization is valid till 31.03.2012 unless cancelled earlier under intimation to you.

6. Aggrieved by the said order of the 2nd respondent, the petitioner filed a revision petition under Section 264 of the Income Tax Act, 1961 before the 1st respondent. By the impugned order 24.11.2011, the 1st respondent has rejected the same. Against the same, the present Writ Petition has been filed to quash the impugned order.

7. Heard the learned counsel for the petitioner and the learned Standing Counsel for the respondents.

8. A similar arrangement was entered into by the petitioner with an Indonesian law firm for procuring services in Indonesia. The authorities had rejected the request of the petitioner, which was subject matter of

W.P.No.4965 of 2011. The said Writ Petition was disposed on 13.03.2020. The operative portion of the said order reads as under:-

21.Section 195 of the Income Tax Act, 1961 reads as under:-

Other sums.

195. *(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :*

Provided *that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23D) of section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode :*

Provided further *that no such deduction shall be made in respect of any dividends referred to in section 115-O.*

Explanation 1.—For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

Explanation 2.—For the removal of doubts, it is

hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—
(i) a residence or place of business or business connection in India; or
(ii) any other presence in any manner whatsoever in India.

(2) Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application [48] ***[****in such form and manner to the Assessing Officer, to determine in such manner, as may be prescribed****]****, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.*

(3) Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum on which income-tax has to be deducted under sub-section (1) may make an application in the prescribed form to the Assessing Officer for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).

(4) A certificate granted under sub-section (3) shall remain in force till the expiry of the period specified therein or, if it is cancelled by the Assessing Officer

before the expiry of such period, till such cancellation.

(5) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (3) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.

(6) The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed.

(7) Notwithstanding anything contained in sub-section (1) and sub-section (2), the Board may, by notification in the Official Gazette, specify a class of persons or cases, where the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall make an application ***[****in such form and manner to the Assessing Officer, to determine in such manner, as may be prescribed****]****, the appropriate proportion of sum chargeable, and upon such determination, tax shall be deducted under sub-section (1) on that proportion of the sum which is so chargeable.*

22. As per decision of the Hon'ble Supreme Court in ***G.V.K.Industries Ltd.,*** *Vs.* ***Income Tax Officer****, (2015) 11 SCC 734, Section 9(1)(vii)(b) of the Income Tax Act, 1961 carves out an exception. The exception carved out in the*

latter part of sub-clause (b) applies to a situation when fee is payable in respect of services utilised for business or profession carried out by an Indian payer outside India or for the purpose of making or earning of income by the Indian assessee i.e. the payer, for the purpose of making or earning any income from a source outside India. On a studied scrutiny of the said clause, it becomes clear that it lays down the principle what is basically known as the "source rule", that is, income of the recipient to be charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located. The clause further mandates and requires that the services should be utilised in India.

23. Thus, to attract exception under Section 9(1)(vii)(b) of the Income Tax Act, 1961, the service should be utilized in India. Any payment by way of fees and technical service to a non-resident by an resident is an income deemed to have accrued or arisen in India and is thus liable to tax. The expression "Fees" for "Technical Service" has been defined in Explanation 2 to Section 9(1)(vii)(b) of the Income Tax Act, 1961.

24. The expression used in Explanation 2 is "means". When the expression "means" is used, it is a hard and fast definition and no meaning other than that which is put in the definition can be assigned to the same [see:

Bharat Coop. Bank (Mumbai) Ltd. *Vs.* ***Employees Union****, (2007) 4 SCC 685 and* ***P.Kasilingam*** *Vs.* ***P.S.G. College of Technology****, AIR 1995 SC 1395]. In* ***Bharat Coop. Bank (Mumbai) Ltd.*** *Vs.* ***Employees Union****, (2007) 4 SCC 685, it was observed that it is trite to say that when in the definition clause given in any statute the word "means" is used, what follows is intended to speak exhaustively. When the word "means" is used in the definition, to borrow the words of Lord Esher, M.R. in Gough v. Gough, (1891) 2 QB 665, it is a "hard-and-fast" definition and no meaning other than that which is put in the definition can be assigned to the same.*

25. The expression "Managerial", "Technical" or "Consultancy Service" have not defined. The expression "Management" has been defined in Oxford Advanced Learner's Dictionary, New 9th Edition published by the Oxford University Press reads as follows:-

> ***Management:*** ***1.*** *the act of running and controlling a business or similar organization: a carrier in management, hotel/project management, a management training course. The report blames bad management.* ***2.*** *the people who run and control a business or similar organization: The management is/are considering closing the factory. The shop is now under new management, junior/middle/senior management, a management decision/job. My role is to act as a mediator between employees and management. Most managements are keen to avoid strikes.* ***3.*** *the act or skill of dealing with people or*

situations in a successful way: classroom management, time management, management of staff. Diet plays an important role in the management of heart disease.

26. In Black's Law Dictionary, 10th Edition published by Thomson Reuters, the expression "Management" has been defined as follows:-

> ***Management.*** ***1.*** *The people in an organization who are vested with a certain amount of discretion and independent judgment in managing its affairs.*
> ***C-level management.*** *(2001) Collectively, the officers of an organization holding titles prefixed by "chief"; the upper tier of top management <she promoted from senior vice president to the c-level> - Also termed c-board.*
> ***Middle management.*** *(1941) Company employees who exercise some discretion and independent judgment in carrying out top management's directives.*
> ***Top management.*** *(1937) A high level of company management at which major policy decisions and long-term business plans are made. - Also termed upper management.*
> ***2.*** *The act or system of controlling and making decisions for a business, department, etc.*
> ***line management.*** *A system of management in which information and instructions are passed from one person to someone immediately higher or lower in rank and to no one else.*

27. The expression "Technical Service" and "Consultancy Service" also have not been defined in the Act. The "Technical Service" would include any service in connection with the "engineering service" as it is associated with the service provided by the person

technically qualified in the field of engineering. The "Consultancy Service" is again very wide, it can include the service of every nature.

28. The expression "Consultancy Service" has been defined in the Oxford Advanced Learner's Dictionary, New 9th Edition published by the Oxford University Press, as follows:-

> ***Consultancy:*** ***1.*** *a company that gives expert advice on a particular subject to other companies or organizations: a management/design/computer, etc. consultancy* ***2.*** *expert advice that a company or person is paid to provide on a particular subject: consultancy fees.*

29. Thus, the expression "Managerial", "Technical or Consultancy Services" are wide of import.

30. In fact, from the nature of work that was to be undertaken by the Indonesian firm was purely not that of work carried out by the law firms. These services provided by any person holding expertise in the relevant field.

31. Thus, if the service provided by the Indonesian law firm was for managerial, technical or consultancy service or provision of technical or other personnel, the petitioner would be liable to deduct tax at source under Section 195 of the Act, 1961.

32. The service provided by the Indonesian law firm

is for the following:-

(a) Share Purchase Agreement (SPA) with appropriate warranties and indemnities;
(b) Notarial share transfer deed;
(c) Assist in obtaining all necessary regulatory approvals for the acquisition including, but not limited to approval from the Ministry of Finance / Indonesian Insurance regulators. The scope of assistance will include advising on all legal aspects of the approval application and process, preparation / vetting of all related papers / documents and accompanying your representative / representing you before the regulatory authorities as and when required;
(d) Power of Attorneys (as may be required);
(e) Public announcements in respect of the acquisition (as required by the Indonesian company law);
(f) Form in respect of shares transfers (e.g. Shares certificates, shareholders register); and
(g) Amended Articles of Association of the Target Company.

33. From the scope of work undertaken, it is evident that the Indonesian law firm has provided consultancy services.

34. In this case, the Indonesian firm has provide "Consultancy Service". Therefore, I am of the view that it is not open for the petitioner to state that the said service fell within exception provided in Section 9(1)(vii)(b) of the Income Tax Act, 1961 or outside the Explanation 2 to said Section.

35. If the service utilized by the petitioner abroad was for pre-existing business in Indonesia, the petitioner

could have legitimately stated that the service provided was utilized for a business of profession carried out outside India or for the purpose of making or earning any income from any source from outside India. There is no source that is existing in Indonesia.

36. In this case, there was a mere proposal for acquiring the insurance business in privately or Indonesian Insurance Policy. The service of the said law firm was sought for a range of service which are approval consultancy service.

37. In the light of the above discussion, I am of the view, decision impugned in this Writ Petition, cannot be assailed. During the period in dispute, the Double Taxation Avoidance Agreement as notified vide Notification No.GSR 77 (E), dated 04.02.1988, was in force. However, what was produced before me is the notification notifying the agreement signed on 27th July, 2012 and notified vide Notification No.S.O. 1144(E) [No.17/2016 (F.No.503/4/2005-FTD-II)], dated 16.03.2016, which is not relevant. The Double Taxation Avoidance Agreement signed between India and Indonesia as notified vide Notification No.GSR 77 (E), dated 04.02.1988 has not been produced for my perusal.

38. In ***Danisco India (P.) Ltd.*** *Vs.* ***Union of India****, 2018 SCC OnLine Del 7304, the Delhi High Court observed*

as follows:-

> ***9.*** *In this context, the ITAT in Dy. DIT Vs. Serum Institute of India Ltd., (2015) 68 SOT 254/56 taxmann.com 1 (Pune – Trib.), discussed this very issue in some detail and stated, as follows:*
>
> *"……..where section 90(2) of the Act provides that DTAAs override domestic law in cases where the provisions of DTAAs are more beneficial to the assessee and the same also overrides the charging sections 4 and 5 of the Act which, in turn, override the DTAAs provisions especially section 206AA of the Act which is the controversy before us. Therefore, in our view, where the tax has been deducted on the strength of the beneficial provisions of section DTAAs, the provisions of section 206AA of the Act cannot be invoked by the Assessing Officer to insist on the tax deduction @ 20%, having regard to the overriding nature of the provisions of section 90(2) of the Act. The CIT(A), in our view, correctly inferred that section 206AA of the Act does not override the provisions of section 90(2) of the Act and that in the impugned cases of payments made to non-residents, assessee correctly applied the rate of tax prescribed under the DTAAs and not as per section 206AA of the Act because the provisions of the DTAAs was more beneficial. Thus, we hereby affirm the ultimate conclusion of the CIT(A) in deleting the tax demand relatable to difference between 20% and the actual tax rate on which tax was deducted by the assessee in terms of the relevant DTAAs. As a consequence, Revenue fails in its appeals.*
>
> *10.Having regard to the position of law explained in Azadi Bachao Andolan(supra) and later followed in numerous decisions that a Double Taxation Avoidance Agreement acquires primacy in such cases, where reciprocating states mutually agree upon acceptable principles for tax treatment, the provision in Section 206AA (as it existed) has to be read down to mean that where the deductee i.e the overseas resident business concern conducts its operation from a territory, whose*

Government has entered into a Double Taxation Avoidance Agreement with India, the rate of taxation would be as dictated by the provisions of the treaty.

39. Therefore, the issue as to whether the petitioner was entitled to the benefit of any Clause in the said Double Taxation Avoidance Agreement as notified in Notification No.GSR 77(E), dated 04.02.1988, is left open. It is for the petitioner to file appropriate application before the 2nd respondent within a period of thirty days from the date of receipt of a copy of this order.

40. Accordingly, the Writ Petition is dismissed with the above observations. No cost. Consequently, connected Miscellaneous Petition is closed.

9. The agreement entered into by the petitioner with M/s. MD IN Services Pvt. Ltd. in United Kingdom is for the following services:-

i. Evaluation, development of risk management and insurance products for the renewable energy sector for various overseas ventures of Shriram.
ii. Insurance and pricing considerations for SME & specialist insurances e.g. Bankers Indemnity, Jewellers Block etc.
iii. Co-ordination for RI placements including getting quotations for large industrial risks and other major

risks.

iv. Explore London market for types and scope of insurance available for serious complex fraud, etc.

v. Provision of information on general matters of interest, innovative risks transfer, new products and risks from UK market etc.

vi. Provide facilitation and overseas the services as part of UK retainers responsibilities mainly to ensure that Shriram and International brokers are using, providing and capitalizing on the relationship for mutual business development etc.

10. From the reading of letter dated 01.01.2011 of the said MD IN Services Private Limited UK, the non-resident overseas company indicates that the service provided by them to the petitioner was in the nature of consultancy services. Therefore, the payments made by the petitioner to the said UK company would be an income deemed to accrue/arise in India within the meaning of Section 9(1)(vii)(b) of the Income Tax Act, 1961.

11. The payments made by the petitioner to the said UK company

cannot be said to be towards fees payable in respect of services utilised in a business or profession carried out by the petitioner outside India as no such business had been established at the time of such payment. Petitioner was merely prospecting such business and therefore engaged the services of the said UK company as a consultant. As the petitioner has not established any business, the payment would not come within the purview of the exception provided in the Section 9(1)(vii)(b) of the Income Tax Act, 1961.

12. The Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion with United Kingdom of Great Britain and Northern Ireland also makes it clear that payments for fees towards technical services may also be taxed in the contracting state in which they arise and according to the law of that states.

13. The expression fees for technical service has been defined in Article 13 Paragraph 4 to mean payments of any kind of any person in consideration for the rendering of any technical or consultancy services (including the provision of services offered technical or other personnel).

14. The exception to the definition of fees for technical services in Paragraph 4 has been specified in Paragraph 5 to Article 13. It is to be noted that none of the exception provided in Paragraph 5 are attracted.

15. Therefore, I do not find any merits in the present Writ Petition. Therefore, this Writ Petition is devoid of merits and is liable to be dismissed. Accordingly, the writ petition is dismissed. No cost.

19.05.2020

Index : Yes/No
Internet :Yes/No
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C.SARAVANAN, J.

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To

1.The Director of Income Tax,
(International Taxation),
VII Floor, Annexe Building,
121, Nungambakkam High Road,
Chennai – 600 034.

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Pre-Delivery Order
in
W.P.No.845 of 2012

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