IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	20.02.2020
Pronounced On	13.03.2020

CORAM

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

W.P.No.4965 of 2011
and
M.P.No.1 of 2011

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. ... 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. ...Respondent

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 respondent and quash the impugned order passed by the first respondent in D.C.No.112(6)/264/2010-11 dated 17.02.2011 as illegal and without jurisdiction.

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 17.02.2011 passed by the 1st respondent in D.C.No.112(6)/264/2010-11.

2. The petitioner had engaged the service of a law firm namely M/s.Oentoeng Suria & Partners in Indonesia for acquiring an insurance business in Indonesia. Therefore, the petitioner filed an application under 195 of the Act, before the second respondent Income Tax officer, for exemption from deducting tax on the payment to be made to the aforesaid foreign law firm for the service rendered by the said firm in Indonesia. The request of the petitioner was rejected by the 2nd respondent on 29.09.2010 with the following observations.

"The above services rendered by the Non-resident company, with regard to the proposed acquisition of an Indonesian Insurance company, by M/s.Shriram Capital Limited. is in the nature of "consultancy services". M/s.Shriram capital limited is not having any business activity in Indonesia, and hence the proposed payments are not for the purpose of generation of any income from abroad by M/s. Shriram Capital Limited.. Hence the service rendered by the non-resident company are ultimately utilized by the resident company only.

"Consultancy services" rendered by the Non-resident company will fall under the category "Fees for Technical Services" and fees payable for such Technical services, though rendered outside India will be deemed as accruing or arising in India as per Sec.9(1)(vii)(b) of the Income-tax Act., read with Explanation to Sec.9(1) (vii), substituted by Finance Act 2010 with effect from 1.6.1976.

"Sec.9(1) : The following income shall be deemed to accrue or arise in India-

(vii): Income by way of fees for technical services payable by-

(b) : A person, who is resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India, or for the purpose of making or earning any income from any source outside India."

Explanation:- For the removal of doubts, it is hereby declared that for the purposes of this section, income of a Non -resident shall be deemed to accrue or arise in India under clause v. clause vi or clause vii of sub section (1) and shall be included in the total income of the Non-resident, **whether or not**.

i. the non-resident has a residence or place of business or business connection in India; or

ii. the non-resident has rendered services in

India.

From the above explanation it is clear that the services are taxable in India, irrespective of the place of rendition of the services, and accordingly the payments to the Non-resident company, in this case, are subjected to withholding tax @ 10%. Plus applicable surcharge and Education Cess, under normal circumstances.

But in this case the Non-resident (deductee) is not having a Permanent Account Number (PAN), as mandated U/s.206AA of the I.T.Act, 1961, and such payments effected to the Non-resident not having a P.A.Number, will attract Tax Deduction at source at a higher rate of 20%.

Hence M/s Shriram Capital Limited, is hereby authorised to make payment to M/s. Oentoeng Suria & Partners, Indonesia, arising out of the agreement, dated 6.9.2010, after deduction of tax @ 20% (Twenty Percent).

This authorization is valid till 3103.2011 unless cancelled earlier under limitation to you.

3. The petitioner preferred a Revision Petition under Section 264 of the Income Tax before the 1st respondent. The said Revision Petition has culminated in the impugned order. In the impugned order, the 1st respondent has observed as under:-

The services are not rendered for the purpose of the business activities of the assessee company abroad. Therefore it is clear that the services rendered have no nexus with the generation of income abroad, by the assessee. Since the assessee is not having any business activities in Indonesia, there is no

immediate possibility of earning any income from outside India also. Therefore the place of utilization of services is wholly in India only. It is also possible for M/s Shriram Capital Limited, the assessee to abandon the proposed acquisition of the Insurance Company in Indonesia, after availing the consultancy/advisory services, of the Non-resident company. In such a situation, the payments are not for the purpose of earning any income from outside India event on a future date, though the Income-Tax Act does not specify creation of a business or generation of Income outside India at future date. In such a situation also, the utilization of the services rendered by the Non-resident company is wholly in India. In both the above possible circumstances, the services are deemed to have been rendered in India, in terms of Section 9(1) (vii) (b) of the I.T.Act.

4.The learned counsel for the petitioner would submit that to deduct tax at source under Section 194 of Income Tax Act, 1961, such incomes should be either by received in India by the recipient or deemed to have accrued or arise in India within the meaning of Section 5(2) of the Income Tax Act, 1961. He further submits that the question deduction of tax at source for payment would arise only in the circumstances, specifically mentioned in the Section 5 of the Income Tax Act, 1961, which reads as under:-

Scope of total income.

5. (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—

(*a*) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(*b*) accrues or arises or is deemed to accrue or arise to him in India during such year ; or

(*c*) accrues or arises to him outside India during such year :
Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(*a*) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(*b*) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1.—Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

> *Explanation 2.*—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.

5. To deduct tax for the payment made to a non-resident, income should be either is received or is deemed to be received in India in such year or on behalf of such person or accrues or arises or is deemed to accrue or arise to him in India during such year.

6. The learned counsel for the petitioner further drew my attention to Section 9(1)(vii) of the Income Tax Act, 1961, which reds as under:-

> **Section 9: Income deemed to accrue or arise in India:-**
> (1) The following incomes shall be deemed to accrue or arise in India:-
> (i).....
> (ii).....
> (iii).....
> (iv).....
> (v).....
> (vii) income by way of fees for technical services payable by—
> (*a*) the Government ; or

(*b*) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(*c*) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

[**Provided** that nothing contained in this clause shall apply in relation to any income by way of fees for technical services payable in pursuance of an agreement made before the 1st day of April, 1976, and approved by the Central Government.]

[*Explanation* 1.—For the purposes of the foregoing proviso, an agreement made on or after the 1st day of April, 1976, shall be deemed to have been made before that date if the agreement is made in accordance with proposals approved by the Central Government before that date.]

Explanation [2].—For the purposes of this clause, "fees for technical services" **means** any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".]

7. It is submitted that the transaction which is under consideration fell within under exception to of Section 9(1)(vii)(b) of the Income Tax Act, 1961, since the fees payable was in respect of services utilised in a business or profession carried by the petitioner outside India and for the purpose of making or earning any income from any source outside India.

8. It is submitted that the amount which was paid by engaging services of the aforesaid law firm was for the purpose of "making or earning any income from any source outside India" within the meaning of Section 9(1)(vii)(b) of the Income Tax Act, 1961. The expenditure incurred was for service procured for a future business to be carried on by the petitioner in Indonesia. Therefore, the petitioner cannot made liable to deduct tax under the Income Tax Act, 1961.

9. The learned counsel for the petitioner also submits that the fact that Section 5(2) does not have a clause similar to clause (c) to Section 5(1). It makes it clear that when a non-resident is not liable to pay tax in India for service provided outside India, as such income can neither

accrue nor arise nor deemed to accrue or arise in India.

10. The learned counsel for the petitioner also referred to Double Taxation Agreement between the Government of India and Government of Indonesia, notified by Notification No.S.O.1144(E) [No.17/2016 (F.No.503/4/2005-FTD-II0], dated 16.03.2016.

11. He referred to Article 12 of the aforesaid agreement. A particular reference was made to Article 12(3)(b) of the said Double Taxation Agreement. As per Article 12(3)(b), the term "fees for technical services" as used in the said Article means payments of any kind, other than those mentioned in Articles 14 and 15 of the said Agreement as consideration for managerial or technical or consultancy services, including the provision of services of technical or other personnel.

12. The learned counsel for the petitioner further submits that the petitioner is not liable to pay tax in terms of Section 5(2) read with Section 9(1)(vii)(b) of the Income Tax 1961. He further submits that income neither accrued nor received from India, the tax in resident tax in

India.

13. Even otherwise, there was neither technical nor consultancy services. As per the Article 12(3)(b) of the Double Taxation Agreement dated 16.03.2016 of the Government of India, in other words, thus the petitioner at best non-residential taxable at 10% and not 20%.

14. The learned counsel for the petitioner relied on the following decisions:-

i. **Evolv Cloathing Co. (P.) Ltd.,** Vs. **Assistant Commissioner of Income Tax, Company Circle – II(1), Chennai**, order dated 14.06.2018 passed by this Court in T.C.(A).No.572 of 2013.
ii. **Director of Income Tax** Vs. **Lufthansa Cargo India**, 2015 SCC OnLine Del 9760.
iii. **Commissioner of Income Tax** Vs. **Toshoku Ltd.**, 1980 Supp SCC 614.
iv. **Commissioner of Income Tax** Vs. **Faizan Shoes (P.) Ltd.**, order dated 22.07.2014 passed by this Court in T.C.(A).No.789 of 2013.

v. **Principal Commissioner of Income Tax-2** Vs. **Motif India Infotech (P) Ltd.**, order dated 16.10.2018 passed by the Hon'ble Gujarat High Court in T.A.No.1177 of 2018.

vi. **Clifford Chance** Vs. **Deputy Commissioner of Income Tax, Circle 2(6), Mumbai**, (2009) 318 ITR 237.

vii. **Commissioner of Income Tax (International Taxation)** Vs. **Indusind Bank Ltd.,** (2019) 415 ITR 115 (Bom).

viii. **Jindal Thermal Power Company Limited** Vs. **Deputy Commissioner of Income Tax (TDS)**, (2010) 321 ITR 31 (Kar).

ix. **GVK Industries Ltd.**, Vs. **Income Tax Officer**, (2015) 11 SCC 734.

15. On the other hand, the learned counsel for the respondents would contend that as per Explanation 2 to Section 9(1)(vii)(b), “fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel). She submits that it does not include consideration for

any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries". She further submits that any amount paid by a resident to a non-resident for managerial, technical or consultancy service is considered to be fees for technical service and therefore the petitioner is bound to deduct tax in India.

16. As per Article 12 of the Double Taxation Agreement, fees for technical service can be taxed in the state in which it "arises" and fees for technical service means payment for any managerial, technical or consultancy service.

17. She submits that the arguments of the petitioner that payment does not qualify as fees for technical service since it is only made for getting legal service and does not have any technical component is based on a restrictive reading of the Act and the Double Taxation Agreement. They both include "consultancy" as fee for technical service as well M/s.Oentoeng Suria & Partners has been roped in to provide consultancy to the petitioner in connection to the acquisition of an Indonesian

company. Any payment made for the legal counsel therefore falls within the ambit of fees for technical service as per both the Income Tax Act and Double Taxation Agreement.

18. The submission of the petitioner that the service rendered in Indonesia only and payment was also received in Indonesia, is to be rejected as neither the Income Tax Act nor the Double Taxation Agreement say that only is such a service is rendered in India can the sum be taxed here. The technical or consultancy service can be rendered anywhere, the Income accrued in India. The source of income is from the petitioner who based in India, hence income accrued in India due to the connection.

19. It is submitted that the exception in Section 9(1)(vii)(b) of the Income Tax Act, 1961, does not apply because the payment was not made for earning any income in Indonesia. It was only for the acquisition of an Indonesian company, which is part of the investment of the petitioner company. Hence, the payment does not have any nexus with any income earned abroad but only for an investment, which is part of the business of

the petitioner operated from India.

20. I have considered the arguments advanced by the learned counsel for the petitioner and the respondents.

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.

C.SARAVANAN, J.

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

13.03.2020

Internet :Yes/No
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