आयकर अपीलीय अधिकरण "डी" न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, CHENNAI

माननीय श्री मनोज कुमार अग्रवाल ,लेखासदस्य एवं
माननीय श्री मनु कुमार गिरि, न्यायिक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
AND HON'BLE SHRI MANU KUMAR GIRI, JM

1. आयकरअपील सं. ITA No.1255/Chny/2019
(निर्धारणवर्ष / Assessment Year: 2010-11)
&
2. आयकरअपील सं. ITA No.1662/Chny/2019
(निर्धारणवर्ष / Assessment Year: 2011-12)

DCIT Corporate Circle-1(1), Chennai.	बनाम/ Vs.	**M/s. Allsec Technologies Limited** 560, 562, 7H Century Plaza, Teynampet, Anna Salai, Chennai-600 018.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.**AACCA-5106-G**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Revenue by**	:	Ms. Kavitha (Addl.CIT) - Ld. Sr. DR
प्रत्यर्थीकीओरसे/ **Assessee by**	:	Shri Vikram Vijayaraghavan (Advocate) - Ld.AR

सुनवाईकीतारीख/**Date of Hearing**	:	20-11-2024
घोषणाकीतारीख /**Date of Pronouncement**	:	03-12-2024

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1.1 Aforesaid appeals by Revenue for Assessment Year (AY) 2010-11 & 2011-12 has common issues. First we take up appeal for AY 2010-11 which arises out of the order of learned Commissioner of Income Tax (Appeals)-1, Chennai [CIT(A)] dated 31-01-2019 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s. 143(3) r.w.s.

92CA of the Act on 28-04-2014. The registry has noted delay of 5 days in the appeal which stand condoned.

1.2 The grounds taken by the revenue are as under:

1. The order of the Ld. CIT(A) is contrary to law, facts and circumstances of the case.
2. The Ld.CIT(A) erred in giving relief to the assessee on selling commission paid to non-resident company, when it being in the nature of marketing and consultancy services is taxable in India @ 15% as per Article 12 Clause 2(a)(2) of India-USA Double Taxation Avoidance Agreement (DTAA) and taxable @ 10% as per Article 12 Clause 1(a)(ii).
3. The Ld.CIT(A) erred in giving relief to the assessee on selling commission when the same is within the ambit of section 195 of the Act in view of the DTAA clauses with USA.
4. The Ld.CIT(A) erred in giving relief to the assessee under section 14A despite the decision of the Hon'ble Supreme Court in Maxopp Investments Ltd v. CIT (2018) 91 taxmann.com 154 (SC) & no express qualifying provisos in the section against application of section 14A.
5. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the Ld. CIT(A) be set aside and that of the AO restored.

1.3 The revenue has filed additional grounds of appeal on 13-09-2021 which read as under:-

The Learned Commissioner of Income Tax (A) erred in giving relief to the assessee on disallowance u/s 40(a)(i) for connectivity charges paid without TDS as the payments falls in the nature of "fees for included services" under Article 12 4(a) of India-USA DTAA and explanation 6 to Section 9(1)(vi) and accordingly whether on the facts and circumstances of the cases and in law. is it correct on the part of Ld. CIT/A) to allow assessee 's appeal without appreciating the fact that connectivity charges paid to non-resident company, being in the nature of fees for included services, is taxable in India @ 15% as per Article 12 Clause 2(a)(2) of India-USA?

Since all the facts in respect thereof are available on record, we admit the same and proceed for adjudication thereof.

1.4 As is evident three issues fall for our consideration – (i) Disallowance u/s 40(a)(i) against selling commission; (ii) Disallowance u/s 14A; (iii) Disallowance u/s 40(a)(i) on connectivity charges.

1.5 The Ld. Sr. DR advanced arguments and relied on the decision of Tribunal in assessee's own case for AYs 2012-13 to 2015-16 in ITA

Nos.1985 to 1987/Chny/2019 dated 11-01-2023 (148 Taxmann.com 98) to submit that the issue of connectivity charges stood covered against the assessee. The Ld. AR, likewise, advanced arguments and sought distinction in the case laws as cited by revenue. Having heard rival submissions and upon perusal of case records, our adjudication would be as under. The assessee being resident corporate assessee is stated to be engaged as domestic BPO.

2. Disallowance u/s 14A

2.1 The assessee earned exempt income of Rs.59.41 Lacs but did not offer any disallowance u/s 14A on the ground that no such expenditure was incurred. However, rejecting the same, Ld. AO computed disallowance u/s 14A r.w.r. 8D(2)(iii) for Rs.11.21 Lacs which was computed at 0.5% of average investments. The Ld. CIT(A), referring to the decision of Special Bench of Tribunal in **Vireet Investments Pvt. Ltd. (82 Taxmann.com 415),** directed Ld. AO to compute disallowance by considering only those investments which have yielded exempt income during the year.

2.2 We find that aforesaid adjudication is in line with the decision of Special Bench of Tribunal. Therefore, no interference is required in the same. The corresponding ground stand dismissed.

3. Disallowance of Connectivity Charges

3.1 The assessee paid amount of Rs.86.32 Lacs to M/s Savvis NIC and another sum of Rs.162.46 Lacs to M/s Novatel Ltd. However, no TDS was deducted against the same on the ground that the recipient did not have any business connection or permanent establishment in India. In such a case, there would be no TDS liability u/s 195. However, Ld. AO referred to Explanation-6 to Sec. 9(1)(vi) which provide that the process

include transmission by satellite, cable, optic, fiber or any other similar technology. These payments were in the nature of royalty for which income would accrue in India though the deductee may not have any PE in India. Accordingly, the aggregate sum of Rs.248.79 Lacs was disallowed u/s 40(a)(i) for want of TDS on these payments.

3.2 The Ld. CIT(A) noted that M/s Savvis NIC provided services pertaining to physical infrastructure and physical security. This entity essentially provided space and security for the equipment used by the assessee. The use of service clause in para-6 of the Savvis Master Services Agreement prohibits the use or access to the services or any Savvis data by customers and end-users in violation of their information security programme. The invoices would indicate that these were mainly recurring charges for the services rendered. Therefore, impugned disallowance was not justified. Accordingly, the disallowance of Rs.86.32 Lacs was deleted.

3.3 With respect to payment made to M/s Novatel Ltd, the assessee relied upon the decision of Bangalore Tribunal in **ITO vs. Clear Water Technology Services (P) Ltd. (ITA No.1146/Bang/2013 dated 12-09-2014)** wherein it was held that there was no obligation to deduct tax at source. The Tribunal noted that the payments were not in the nature of managerial, consultancy or technical services nor was it for the use of or right to use industrial, commercial or scientific equipment. Following the same, the impugned disallowance of Rs.162.46 Lacs was also deleted. Aggrieved, the revenue is in further appeal before us.

Our findings on this issue

4. It is admitted position that the aforesaid payment to both the entities are in relation to connectivity charges. As rightly submitted by the

revenue, this issue of payment of connectivity charges stood covered against the assessee in the earlier decision of Tribunal in ITA Nos.1985 to 1987/Chny/2019 & ors. for AYs 2012-13 to 2015-16 (148 Taxmann.com 98). The relevant findings of the Tribunal were as under: -

9. We have heard rival contentions and gone through the facts and circumstances of the case. We noted that the assessee-company is incorporated under the Companies Act and is engaged in the business of running a data and call centre for export of services and domestic BPO. The A.O noted that the connectivity charges in relation to TATA Communications (UK) Ltd. and TATA Communications (USA) are in the nature of royalty in term of Explanation 2 to s. 9(1)(vii) of the Act. The CIT(A) also held, after perusing the agreement between the assessee and TATA Communications, noted that it provides for specialized and customized services to be rendered by the supplier to the customers pertaining to plant maintenance on customers equipment. The CIT(A) perused para 3.3 of the Services Schedule to the said agreement that, if requested by the customer, the supplier may at its option install certain customer specified communication equipment and render miscellaneous services to the customer. According to Ld. counsel, connectivity charges are in the nature of Co location services provided by the TATA Communications, UK and TATA Communications, USA for the purpose of connecting the assessee with the various customers in UK towards making the voice and data connectivity. We noted that similar argument was placed before Hon'ble Madras High Court in the case of Verizon Communications Singapore Pte Ltd. Vs. ITO, supra, wherein Hon'ble Madras High Court has finally discussed this issue and finally held that in Para 101 and 102 as under:

> " 101. Although the assessee has submitted a voluminous paper book on case law, except for those that are discussed above, others were not touched by the assessee and hence we have not considered it :- 11 -: ITA Nos.1985 to 1987/Chny/2019 & ITA No.04/Chny/2020 necessary to discuss these decisions. We may also note that except for making the submission on the question that the transaction is only a service and hence the consideration is not royalty, no arguments are made on permanent establishment or on the effect of the amendments. The assessee had submitted a detailed written submission on the clauses in the agreement and on the legal submissions. After considering the same, with reference to the arguments made by the learned senior counsel on the issue of royalty, vis-a-vis the agreement terms, we hold that the order of the Tribunal does not call for any interference. Although in his reply, learned senior counsel appearing for the assessee pointed out to Article 5 on permanent establishment to contend that VSNL is not an agent and hence cannot be construed as a permanent establishment of the assessee, no arguments are advanced on this account. In any event, in a virtual world, the physical presence of an entity has today become an insignifcant one; the presence of the equipment of the assessee, its rights and the responsibilities of the assessee, vis-a-vis the customer and the customers' responsibilities clearly show the extent of the virtual presence of the assessee which operates through its equipment placed in the customer's premises through which the customer has access to data on the speed and delivery of the data and voice sent from one end to the other. The Explanations inserted thus clearly point out that the traditional concepts relating to control, possession, location on economic activities and geographic rules of source of income recede to the background and are not of any relevance in considering the question under Section 9(1)(vi) read with Explanation 2. Thus, more so when it

comes to the question of dealing with issues arising on account of more complex situations brought in by technological development by the use of and role of digital information, goods etc., the foreign enterprise does not need physical presence at all in a country for carrying on business. Hence, we do not think that we need to go in depth in this regard for the reason that we have already given herein before.

102. In the circumstances, we reject the case of the assessee holding that the receipts are liable to be treated as 'royalty' for the use of IPLC under Section 9(1)(vi) read with Explanation 2(iva) and correspondingly Article 12(3) of DTAA between India and Singapore. We also agree with the Tribunal that even if the payment is not treated as one for the use of the equipment, the use of the process was provided by the assessee, whereby through the assured bandwidth the customer is guaranteed the transmission of the data and voice. The fact that the bandwidth is shared with others, however, has to be seen in the light of the technology governing the operation of the process and this by itself does not take the assessee out of the scope of royalty. Thus the consideration being for the use and the right to use of the process, it is 'royalty' within the meaning of Clause (iii) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act."

10. We noted that from the above decision of Hon'ble High Court, which is a Jurisdictional High Court has clearly held that the use of the process was provided by the assessee whereby through assured bandwidth the customer is guaranteed the transmission of the data and voice. In such circumstances, it is held that the bandwidth is shared with others, however, has to be seen in the light of the technology governing the operation of the process and this by itself does not take the assessee out of the scope of the royalty as per Clause (iii) of Explanation 2 to s. 9(1)(vii) of the Act. The case law relied on by Ld. counsel of Co-ordinate Bench of Mumbai in the case of Reckspace, US Inc. Vs. Dy. CIT, supra, is clearly distinguishable from the decision of Hon'ble Jurisdictional High Court in the case of Verizon Communications Singapore Pte Ltd. Vs. ITO, supra, as Hon'ble Jurisdictional High Court has clearly held on similar facts as in the present case before us i.e., Co-location services and connectivity services provided for the process of connecting by the assessee with the various customers towards making voice and data connectivity. Hence, respectfully following the decision of Hon'ble Madras High Court in the case of Verizon Communications Singapore Pte Ltd. Vs. ITO, supra, we confirm the action of the lower authorities and dismiss this issue of assessee's appeal.

11. Similar of the facts and the issue is also same in other three appeals, taking a consistent view, we dismiss these three appeals also.

12. In the result, all the four appeals of the assessee are dismissed.

Though Ld. AR has referred to various subsequent favorable decisions on the issue (copies placed on record), we find that this issue stood covered against the assessee by the earlier decision of this Tribunal which has followed binding judicial precedent of Hon'ble High Court of Madras in **Verizon Communications Singapore Pte Ltd. Vs. ITO (39 Taxmann.com 70).** Therefore, following consistent view of the Tribunal,

this issue is decided against the assessee. Nothing has been shown to us that the aforesaid order of the Tribunal has subsequently been reversed in any manner. Therefore, the stand taken by Ld. AO stand restored. The corresponding grounds as raised by the revenue stand allowed.

5. Disallowance of Selling Commission

5.1 The assessee paid selling commission of Rs.197.18 Lacs and deducted TDS on payment of Rs.99.55 Lacs but did not deduct TDS on the remaining amount on the ground that the recipient did not have any business connection or PE in India and therefore, not covered by Sec. 195. However, Ld. AO referred to Explanation to Sec. 9 as introduced by Finance Act, 2010 w.r.e.f. 01-04-1976 to make this disallowance. The Ld. AO also referred to CBDT Circular No.7/2009 dated 22-10-2009. The Ld. AO also referred to Explaantion-2 to Sec. 195(1) as inserted with retrospective effect from 01-04-1062 by Finance Act 2012. Finally, the amount of Rs.97.62 Lacs was disallowed u/s 40(a)(i) for want of TDS on these payments.

5.2 The Ld. CIT(A) noted that the selling commission was paid to M/s Allsechtech, USA. The Ld. AO observed that the assessee did not obtain any NIL deduction certificates before remitting the said amounts to Non-Resident. The Ld. AO further referred to the amendment made to Sec. 9 by amending the Explanation under the said section by Finance Act 2010 and the withdrawal of CBDT Circular 23 dated 23-07-1969 through Circular No.7 of 2009 dated 22-10-2009. The A.O also referred to the Explanation to Sec. 195(1) to make this disallowance. As against this, the assessee stated that the payee was subsidiary of the assessee which was engaged in marketing and business development of the call

centre services being provided by the assessee. The payee would identify customers for the services being provided by the assessee to its USA based customers. The assessee was required to pay commission of 5% on business obtained by the payee. Thus, the payee performed marketing activity outside India and it did not have any business connection or PE in India. In such a case, no TDS would be required on these payments. Reference was made to the decision of Hon'ble Supreme Court in the case of **CIT vs. Toshoku Limited Ltd (125 TR 525)** as well as the decision of Hon'ble Delhi High Court in the case of **CIT vs Eon Technology P. Ltd 343 ITR 366**. The assessee also obtained nil deduction certificates for similar payments in subsequent year. The attention was drawn to the terms of agreement dated 18-04-2009. The assessee paid selling commission of Rs.197.18 Lacs and deducted TDS of 10% post withdrawal of Circular No.23 dated 23-07-1969 on 22-10-2009. The Tax was deducted thereafter. Nevertheless, the question of TDS u/s 195 would arise only when the said payments were chargeable to tax in India. In the present case, no income could be said to have accrued or arisen or deemed to have accrued or arisen in India as per Section 9(1)(i) of the Act.

5.3 The Ld. CIT(A), upon perusal of the terms of the agreement, concurred that such services were generally not treated as technical services. The payments to agents for procuring export orders was an incident of export and the nature of service was not technical and it was rendered abroad. The Hon'ble High Court of Madras in the case of **CIT vs. Farida Leather Company [2016] 66 taxmann.com 321 (Madras)** ruled that the commission paid outside India to a non-resident for services rendered outside India was not chargeable to tax in India and it

was not liable for TDS. Also, in **Faizan Shoes Pvt. Ltd. (48 Taxmann.com 48),** it was held that where foreign agents had no PE in India, no part of their services would be rendered in India and therefore, there would be no obligation to deduct TDS u/s 195. Following this decision, Chennai Tribunal in **India Shoes Exports Pvt. Ltd. (57 Taxmann.com 303)** held that the commission paid to foreign agents for procuring export orders could not be considered as fees for technical services. Finally, the impugned disallowance was deleted against which the revenue is in further appeal before us.

5.4 We are of the considered opinion that this issue has been clinched in right perspective by Ld. CIT(A). The findings of Ld. CIT(A) are based on the terms of the agreement. It transpires that the payments are in the nature of selling commission for procuring orders in foreign territories. There is nothing on record to show that the payee has business connection or PE in India. In such a case the ratio of decision of Hon'ble High Court of Madras in the cited case law of **Faizan Shoes Pvt. Ltd. (48 Taxmann.com 48)** would squarely apply to the facts of the case. Therefore, no interference is required in the impugned order, on this issue. The corresponding ground raised by the revenue stand dismissed.

6. The appeal stand partly allowed in terms of our above order.

7. Assessment Year 2011-12

7.1 Two issues have been raised by the revenue i.e., disallowance of connectivity charges u/s 40(a)(i) and disallowance u/s 43B r.w.s. 36(1)(va). The same are adjudicated as under.

7.2 The Ld. AO disallowed connectivity charges for Rs.157.33 Lacs as paid to three entities for want of TDS. The Ld. CIT(A), as in AY 2010-11, allowed the issue in favor of assessee. Aggrieved, the revenue is in

further appeal before us. Facts and issue being *pari-materia* the same, taking the same view, the disallowance as made by Ld. AO stand restored. The corresponding grounds as raised by the revenue stand allowed.

7.3 The Ld. AO noted that the assessee delayed the deposit of employees' contribution of PF/ESI for Rs.32.44 Lacs. The Ld. AO, invoking the provisions of Sec. 36(1)(va) disallowed the same. The Ld. CIT(A) deleted the same against which the revenue is in further appeal before us. We find that this issue has now been settled in revenue's favour by Hon'ble Apex Court in **Checkmate Services P. Ltd Vs. CIT (2022) 143 Taxmann.com 178 (SC).** Respectfully following the same, the disallowance as made by Ld. AO stand restored. The corresponding grounds as raised by the revenue stand allowed. The appeal stand allowed.

Conclusion

8. ITA No.1255/Chny/2019 stand partly allowed. ITA No.1662/Chny/2019 stands allowed.

Order pronounced on 3rd December, 2024

Sd/-	**Sd/-**
(MANU KUMAR GIRI)	**(MANOJ KUMAR AGGARWAL)**
न्याय□यिक सदस्य / JUDICIAL MEMBER	**लेख□सदस्य / ACCOUNTANT MEMBER**

चेन्नई Chennai; दिनांक Dated :03-12-2024
DS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :
1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai.

4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF