R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF JUNE 2022

BEFORE

THE HON'BLE MR.JUSTICE S. SUNIL DUTT YADAV

WRIT PETITION NO.3619/2021 (T-IT)

BETWEEN:

M/S. FLIPKART INTERNET PRIVATE LIMITED
ALYSSA, BEGONIA &
CLOVER EMBASSY TECH VILLAGE,
OUTER RING ROAD,
DEVARABEESANAHALLI VILLAGE,
BANGALORE - 560 103
THROUGH ITS AUTHORISED SIGNATORY
MS. NEHA AGARWAL.

... PETITIONER

(BY SRI TARUN GULATI, SENIOR ADVOCATE FOR
SRI KISHORE KUNAL, SRI PARTH,
MS.ANKITA PRAKASH & SRI PRADEEP NAYAK,
ADVOCATES)

AND:

1. THE DEPUTY COMMISSIONER OF INCOME TAX
(INTERNATIONAL TAXATION),
CIRCLE - 1(1)
ROOM NO.441, 4TH FLOOR,
BMTC BUILDING,
80TH ROAD,
KORAMANGALA,
BANGALORE - 560 095.

2. THE COMMISSIONER OF INCOME TAX-1,
(INTERNATIONAL TAXATION),
BMTC BUILDING,
KORAMANGALA,
BANGALORE - 560 095.

3. THE JOINT COMMISSIONER OF INCOME TAX-1,
C.R. BUILDING NO.1,
QUEENS ROAD,
BANGALORE - 560 001.

4. CENTRAL BOARD OF DIRECT TAXES
THROUGH THE SECRETARY
DEPARTMENT OF REVENUE,
MINISTRY OF FINANCE,
GOVERNMENT OF INDIA,
CENTRAL SECRETARIAT,
NORTH BLOCK,
NEW DELHI - 110 001.

... RESPONDENTS

(BY SRI K.V.ARAVIND, ADVOCATE)

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THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF CONSTITUTION OF INDIA, PRAYING TO QUASH THE IMPUGNED ORDER WITH DIN AND LETTER DATED 01.05.2020 ANNEXURE-A PASSED BY R-1 BEING ILLEGAL AND ARBITRARY AND ETC.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED ON 16.06.2022 AND COMING ON FOR PRONOUNCEMENT OF ORDERS, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

S. SUNIL DUTT YADAV. J

This order has been divided into the following Sections to facilitate analysis:

The petitioner has called in question the validity of the order dated 01.05.2020 passed by the first respondent at Annexure-'A' whereby the application for 'Nil TDS Certificate' has been rejected and the petitioner has been directed to deduct tax at source at the applicable rate. The conclusion arrived at, in the impugned order is as follows:-

> ***"<u>Conclusion:</u>***
>
> *49. In the preceding paragraphs, the need for secondment, nature of services provided by seconded employees, employer-employee relationship and the taxability of the payments have been discussed elaborately and the following has been established;*
>
> 1. *There is no employer-employee relationship between M/s Flipkart Internet Private limited India and secondees seconded by assessee.*
> 2. *The services rendered/provided by the seconded employees are in the nature of technical services, both under IT Act and under DTAA as well.*
> 3. *Deduction u/s 192 does not result in double deduction nor does it obviate the need to deduct u/s 195.*
> 4. *Once the income is in the nature of FTS/FIS, it is to be taxed on gross basis; there is no need to examine whether or not income element is embedded in the said payment."*

2. Consequent to the grant of relief at prayer (a), the petitioner has sought for issuance of writ of mandamus to direct the first respondent to issue 'Nil Tax Deduction at Source Certificate' to the petitioner under Section 195(2) of the Income Tax Act, 1961 ['I.T. Act' for brevity].

I. BRIEF FACTS:-

3. The petitioner is stated to be engaged in the business of providing Information Technology Solutions and Support Services for e-commerce industry. In the course of its business, the petitioner is stated to have made payments in the nature of "pure reimbursements" to M/s.Walmart Inc., Delaware, USA (hereinafter referred to as 'Walmart Inc.') for the Assessment Year 2020-2021 and in that regard had requested the Department for issuance of a 'Certificate of No Deduction of Tax at Source'. The payment of salaries to the deputed expatriate employees were stated to have been made by 'Walmart Inc.' for administrative convenience and the petitioner had made reimbursements to 'Walmart Inc.' With respect to such payments, the petitioner had sought for granting of Certificate under Section 195 of the I.T. Act.

4. 'Walmart Inc.' and Flipkart Singapore had entered into an Inter-Company Master Services Agreement (M.S.A.) dated 28.05.2019 for secondment of employees and provision of services. In terms of the M.S.A., either of the parties or its affiliates could use the seconded employees.

5. That *Clause 4.2* provides that the party placing the secondees will invoice the compensation and the wage cost of secondees incurred in the Home Country.

6. It is pointed out that the M.S.A. has two distinct parts - (i) relating to provision of services and (ii) secondment of employees. The present petition is concerned only with the secondment of employees.

7. It is the stand of the petitioner that in terms of the M.S.A., 'Walmart Inc.' had seconded four employees to the petitioner and had entered into a 'Global Assignment Arrangement' with the seconded employees, which provided that the seconded employees would work for the benefit of the petitioner.

8. The petitioner is stated to have issued the letters of appointment confirming the employment of seconded employees with the petitioner and in such letters of appointment, the details of responsibilities of the seconded employees has been detailed.

9. It is stated that the petitioner makes contribution to the Provident Fund Authorities as an 'employer of seconded employees' and that the said employees are working in India on 'Employment VISA' wherein, the petitioner is declared to be an 'employer'.

10. In response to the invoices raised by 'Walmart Inc.' as regards the payments made towards salaries of the seconded employees, the petitioner had intended to make payments to 'Walmart Inc.', and in that context, had made an application at Annexure-'G' under Section 195(2) of the I.T. Act requesting for allowing the remittance of cost-to-cost reimbursements to be made by the petitioner without deduction of tax at source.

11. It is also submitted that 'Indo-US Double Taxation Avoidance Agreement ('DTAA' for brevity) would be of relevance, as double taxation at source where a non-resident earns income in India and is liable for being taxed for such income in the Country of residence, is to be avoided.

12. However, the said application came to be rejected while directing the petitioner to deduct tax at source on the premise as found in the conclusion of the impugned order reproduced supra at para-1.

II. CONTENTIONS OF PETITIONER:-

13. The petitioner is not required to deduct tax under Section 195 on payments which are in the nature of reimbursement, as 'withholding obligations' under Section 195 arise only when the 'sum paid' to the non-resident is 'chargeable to tax' under the Act. Reliance is placed on the judgment in the case of **GE India Technology Centre Private Limited** v. **Commissioner of Income Tax and Another**[1].

[1] (2010) 10 SCC 29

14. As per Article 12 of the 'DTAA', the sums paid could not be regarded as Fee for Technical Services (hereinafter referred to as 'FTS') and accordingly, there will be no income of 'Walmart Inc.' chargeable to tax in India.

15. The 'Memorandum of Understanding' (MoU) dated 12.09.1989 entered into between the Government of India and U.S.A. which is stated to be forming part of the 'DTAA' provides that Fee for Included Services (hereinafter referred to as 'FIS'), which 'make available to the person acquiring the services', only would be amenable to tax.

Accordingly, it is submitted that any service that does not make technology available to the person acquiring the service would not fall in the category of 'make available' and accordingly, would stand excluded from the provision of Article -12 of 'DTAA.'

16. The payments in the nature of reimbursement cannot be charged as income under the Act. In the present case, the petitioner has paid only the actual cost of salaries of the seconded employees and there is no 'mark-up' which is

retained by 'Walmart Inc.' on such costs. Reliance is placed on the judgment of Hon'ble Supreme Court in **Director of Income Tax (IT)-I** v. **A.P. Moller Maersk A S**[2]**,** as also the judgment in **Commissioner of Income Tax** v. **Kalyani Steels Ltd.,**[3].

17. It is further contended that the payment made by the petitioner to 'Walmart Inc.' are mere reimbursement of salaries paid to the seconded employees and once such payments are salaries, the same falls outside the purview of 'FIS' in terms of Article 12 and 16 of DTAA. In light of the law laid down by the Apex Court in **Union of India and Another** v. **Azadi Bachao Andolan and Another**[4] and **Engineering Analysis Centre of Excellence Private Limited** v. **Commissioner of Income Tax & Another**[5] provisions of 'DTAA' insofar as it is more beneficial to the assessee would prevail over the domestic law and as payments in question being in the nature of salaries under Article 16 cannot be treated as

[2] (2017) 5 SCC 651
[3] (2018) 254 Taxmann 350 (Kar)
[4] (2003) 263 ITR 706 (SC)
[5] (2021) 432 ITR 471

'FIS' by the respondent Authorities by applying Section 9 of the I.T. Act.

18. It is submitted that the stand of Revenue that Certificate under Section 195 is only tentative and a non-conclusive opinion, is not a legally tenable stand. The *prima facie* deduction of tax and contingency of refund at a later stage cannot make original levy to be valid, when liability to deduct tax is in excess of jurisdiction.

19. It is submitted that as per *Clause 3.1* of M.S.A., the petitioner was granted unconditional right to terminate the employment of seconded employee and looking into the nature of control exercised by the petitioner over the employees, the petitioner would qualify to be the real and economic employer of the seconded employees.

20. 'Walmart Inc.' being a tax resident of U.S.A., the disputed transaction will be governed by the provisions of 'DTAA' in view of Section 90(2) and whether the payments made by the petitioner to 'Walmart Inc.' amounts to 'FTS' /

'FIS' will have to be determined as per the provisions of Article 12 of 'DTAA.'

While placing reliance on the judgment in **Commissioner of Income-Tax, Central Circle** v. **De beers India Minerals (P) Ltd[6],** it is contended that the terms of Article 12 is only to those payments which are made for rendering the technical or consultancy services and making the technical knowledge, experience available to the recipient which only are covered within the meaning of 'FIS'.

21. Once the transaction is admittedly in the nature of payment of salaries, same is excluded from purview of Section 195 and cannot be subjected to further deduction.

22. The reliance placed by the respondents in **Centrica India Offshore (P.) Ltd.** v. **Commissioner of Income Tax-I, New Delhi[7]** is misplaced and erroneous. The case is distinguishable insofar as in ***Centrica India Offshore (supra)***, the non-resident entity had seconded its employees to the new incorporated Indian subsidiary and the Indian

[6](2012) 346 ITR 467 (KAR)
[7] (2014) 227 Taxmann 368 (SC)

subsidiary was specifically incorporated to provide back office support services in relation to third party vendors in India. However, in the present case, the petitioner was incorporated on 01.10.2012 and had a well developed and established business model in India much before 'Walmart Inc.' became majority equity interest holder in Flipkart Singapore in August 2018.

III. CONTENTIONS OF RESPONDENTS:-

23. Section 195(2) of the I.T. Act provides for determination of appropriate portion of sum chargeable and does not contemplate 'Nil deduction of tax at source' and accordingly, Section 195(2) is not applicable.

24. The Assessing Officer has duly considered all the contentions including the relationship of seconded employee with 'Walmart Inc.' and has arrived at the conclusion that there is no 'employer-employee' relationship between M/s.Flipkart Internet Private Limited and the seconded employee. It has further held that the services rendered by the seconded employees are in the nature of technical services under the Income Tax Act and 'DTAA', which findings are well

considered and do not call for interference in exercise of limited power of judicial review.

25. The mere deduction of tax at source under Section 192 does not obviate the need to deduct tax at source under Section 195, as tax at source is to be deducted on the gross payment and the question of examining the income element embedded therein in the payment does not arise.

26. As the Agreement entered into is between two related parties, even if consideration is agreed on cost-to-cost basis, the character of payment would not be altered.

27. The terms of Agreement would reveal that the payment made is consideration for rendering of technical consultancy services.

28. The purpose of payment if looked into would fall within the ambit of 'FTS' in terms of Section 9 as well as in terms of 'DTAA'.

29. The contention that provision of services rendered by the seconded employees would not fall within the ambit of

'FTS' is to be rejected, as the services are provided by seconded employees, who were offered senior positions in the Management and such employees were assigned by 'Walmart Inc.' to the petitioner only because of their experience in managerial and consultancy skills required by the petitioner and accordingly, the payment made ought to be construed as 'FTS' as defined in Section 9(1)(vii) of the I.T. Act.

30. The examination of documents would reveal that the seconded employees remain the employees of 'Walmart Inc.' even during the period of secondment.

31. The deduction of tax at source under Section 192 will not take away the applicability of the appropriate Section.

IV. <u>ANALYSIS:-</u>

32. In light of the above factual matrix, the following points arise for consideration:-

(A) Whether the application of the petitioner dated 15.01.2020 filed under Section 195(2) of the Income Tax Act was not maintainable?

(i) It is the contention of Revenue that the application under Section 195(2) is maintainable only in the event of composite payment and that where a 'NIL Deduction Certificate' is sought for, recourse is to be made under Section 197.

(ii) It must be noted that the Deputy Commissioner of Income Tax (DCIT) while passing the impugned order has not dealt with such aspect and has rejected the application on its merits. In the present proceedings, wherein the petitioner has sought for setting aside of the impugned order, submission is made by the Revenue that Section 195(2) could not have been invoked.

(iii) If it were the stand that the application was not maintainable, the DCIT ought to have recorded such finding while rejecting the application. In the absence of any finding regarding the non-maintainability of the application, it is not open for the Revenue to canvass such point in the proceedings instituted by the petitioner. The judicial review of the order of DCIT cannot be enlarged by considering fresh contentions which would have the effect of altering the impugned order by

reading into its substantive aspects which were not considered by the DCIT.

(iv) As rightly pointed out by the petitioner, such a contention as raised finds a cursory and fleeting mention in the statement of objections filed by the Revenue and cannot be raised for the first time in the present proceedings. Even otherwise, the scope of Section 197 being distinct from that of Section 195(2), as Section 197 would come into operation on an application by the recipient of an income, which is not the factual scenario in the present case.

(v) As per Rule 29BA of Income Tax Rules, 1962, an application can be made by the payer in Form No.15E for grant of Certificate determining appropriate proportion of sum chargeable to tax in the case of payment made to non-resident recipient under Section 195 (2) of the Act.

The relevant extract of Rule 29BA and Form No.15E have been extracted hereinbelow :

"29BA. Application for grant of certificate for determination of appropriate proportion of sum

(other than Salary), payable to non-resident, chargeable in case of the recipients.

(1) An application by a person for determination of appropriate proportion of sum chargeable in the case of non-resident recipient under sub-section (2) or sub-section (7) of section 195 shall be made in Form 15E electronically,-

i) under digital signature; or

ii) through electronic verification code.

"[FORM No. 15E

[See rule 29BA]

[e-Form]

Application by a person for a certificate under section 195(2) and 195(7) of the Income-tax Act, 1961, for determination of appropriate proportion of sum (other than salary) payable to non-resident, chargeable to tax in case of the recipient.

To,

The Assessing Officer,

…… …… …… ……

I _____ being the person responsible for making payment to a non-resident or to a foreign company any sum (not being income chargeable under the head "Salaries") do, hereby, request that a certificate may be issued to me after determining the appropriate proportion of such sum chargeable to tax in the case of the recipient (if any) and authorise me to deduct income-tax on such appropriate proportion (if any). …"

(vi) As per Rule 28 of Income Tax Rules, 1962, a person can file an application in Form No.13 for grant of a Certificate for deduction of income tax at any lower rates or no deduction of income tax under Section 197(1). Form No.13 prescribes the format of application that is to be made by the recipient/payee for no deduction of tax at source or lower rate for deduction of tax at source and the relevant portion of the Form is extracted as follows :

"FORM No. 13
[See rules 28 and 37G]
[e-Form]

Application by a person for a certificate under section 197 and/or sub-section (9) of section 206C of the Income-tax Act, 1961, for no deduction of tax or deduction or collection of tax at a lower rate

To
The Assessing Officer,

1. I, ... of ..... do, hereby, request that a certificate may be issued to the person responsible for paying me the incomes/sum, authorising him, not to deduct/deduct income-tax at lower rate, at the time of payment of such income/sum to me. The details are specified in Annexure-I.

and/or

I, ... of ..... do, hereby, request that a certificate may be issued to me for receiving the incomes/sum:-

(i) after deduction of income-tax at lower rate as I do not have the details of the person making payments and their number is likely to exceed .....

(ii) without deduction of income-tax as this application is made for the person/entity specified in rule 28AB.

The details are specified in Annexure-II.

and/or

I, ... of ..... do, hereby request that a certificate may be issued to the Seller/Lessor/Licensor, authorising him to collect income-tax at lower rate at the time of debit of such amount to my account or receipt thereof from me, as the case may be. The details are specified in Annexure-III.

XXXXX "

Accordingly, the Income Tax Rules and the relevant Form makes it clear that the application under Section 195 is at the instance of the person making the payment, while the application under Section 197 is at the instance of the recipient.

(vii) This Court in **Commissioner Of Income-Tax, International Taxation** v. **Bovis Lend Lease (India) (P.) Ltd.**[8] has reiterated this position at Para 12, which is as follows:

"12. …….As is clear from Sub-Section (2) of Section 195 of the Act, if the person responsible for paying any amount chargeable under this Act to a non-resident, considers that the whole of such sum would not be income chargeable in the case of the recipient, he may

[8] [2012] 208 Taxmann 168 (Kar)

make an application to the assessing officer to determine the appropriate portion 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. However, if the assessing authority is of the view that no tax is chargeable, a certificate to that effect could be issued to the person responsible for making payment. Once a certificate is issued, the liability of the person responsible for paying under the aforesaid provision ceases and without any deduction he may make payment to the non-resident. Insofar as Section 197 is concerned it provides for a similar application being made by the recipient of the income. On such an application being made under Section 197(1), the assessing officer can give to him such certificate as may be appropriate. If such certificates states no tax is deductible, until such certificate is cancelled by the assessing officer, the person responsible for paying the income is under "No obligation" to deduct tax while making payment. In fact the language employed is "Shall". Therefore, it is mandatory in nature. What is the effect of such a certificate was the subject matter of interpretation."

Accordingly, it is clear that Section 197 can be invoked by the recipient and accordingly, the contention that present application under Section 195(2) is not maintainable, is liable to be rejected.

(viii) The Apex Court in **Transmission Corpn. of A.P. Ltd.** v. **Commissioner of Income-Tax**[9] at para 8 has held as follows:-

> *"8. ...Thereafter, section 195 deals with deduction of tax in cases where payment is to be made to a non-resident which inter alia provides:-*
>
> *(a) Any person responsible for paying to a non-resident, any interest, or any sum, chargeable under the provisions of this Act (other than interest on securities and salary), shall, at the time of payment, deduct income-tax thereon at the rates in force. Sub-section (1) of Section 195 excludes from its operation the sum which is to be paid as interest on securities or the sum which is chargeable under the head "Salaries" as the deduction on such sum would be governed by other sections, namely, sections 192 and 193.*

[9] [1999] 105 Taxmann 742 (SC)

(b) Where the person responsible for paying any sum chargeable under the Act to a non-resident considers that the whole or such sum would not be chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine "the appropriate proportion of such sums so chargeable"; upon such determination, tax shall be deducted under sub-section (1) only on that portion of the sum which is so chargeable.

(c) Not only this, but sub-section (3) provides that any person entitled to receive any interest or other sum on which income-tax is to be deducted under sub-section (1) may make an application in the prescribed form to the Assessing Officer for the grant of certificate authorising him to receive such interest or other sum without deduction of tax under the sub-section.

(d) Further, section 197 provides that recipient can file an application to the Assessing Officer for a certificate that the total income of the recipient justify the deduction of income-tax at any lower rates or no deduction of income tax and the Assessing Officer, if satisfied, can grant such certificate as may be appropriate."

(emphasis supplied)

(ix) It is the further contention of the respondent that, if the petitioner was of the view that the amount is not chargeable under the provisions of the Act, the question of obtaining certification under Section 195(2) or Section 197 does not arise.

(x) The object of Section 195(2) and Section 197 of the Act are in the nature of safeguards for the assessee and are to be invoked to avoid consequences of a finding eventually that the payer ought to have made deduction after assessment and in such case, it would be open to treat the assessee as "an assessee in default" in terms of Section 201 of the I.T. Act, leading to prosecution being initiated under Section 276B against the payer and disallowance of expenses under Section 40(a)(ia) of the I.T. Act.

(xi) Keeping in mind that the determination under Section 195(2) or under Section 197 by grant of Certificate being tentative in nature, the assessee must be permitted to invoke such provision and seek for certificate in order to avoid consequences of non-deduction as enumerated above. It cannot be stated that the assessee is debarred from invoking

such a provision if he were of the view that the payment being made was not chargeable under the provisions of the I.T. Act. To place such a heavy burden of adjudication upon the assessee before invoking the tentative determination under Section 195(2), considering the nature of proceedings, may not be called for. Accordingly, the recourse to Section 195(2) is perfectly in consonance with the object of Section 195 and cannot be faulted.

(B) Whether the petitioner is required to deduct TDS under Section 195(2) read with Article 12(4) of the convention between Government of United States of America and the Government of Republic of India for the avoidance of Double Taxation and the prevention of FISCAL evasion?

(i) At the outset, it ought to be noted that Section 90(2) of the I.T. Act provides that where the Central Government has entered into an agreement with a country outside India for the purpose of granting relief of tax or for avoidance of double taxation in relation to the assessee,

provisions of the Act would apply to the extent they are more beneficial to the assessee.

(ii) The Apex Court in **Engineering Analysis Centre of Excellence Private Limited** v. **Commissioner of Income Tax and Another**[10] has clarified that where the provisions of the 'DTAA' is more beneficial than the provisions of the I.T. Act, it is the 'DTAA' that should be treated as the law that requires to be followed and applied. The observations at Para-176 would be of relevance, which reads as follows:-

> *"176. The conclusions in the aforestated paragraph have no direct relevance to the facts on hand as the effect of Section 90 (2) of the Income Tax Act, read with Explanation IV thereof, is to treat the DTAA provision as the law that must be followed by Indian Courts, notwithstanding what may be contained in the Income Tax Act to the contrary, unless more beneficial to the Assessee. "*

(iii) Article 12(1) of 'DTAA' provides for taxation of Royalties and 'FIS' arising in a Contracting State and paid to a resident of other Contracting State. Further, Article 12(2)

[10] 2021 SCC OnLine SC 159

provides that Royalties and 'FIS' may also be taxed in the Contracting State in which they arise.

(iv) 'FIS' is defined in Article 12(4) as follows:-

"4) For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services:
(a) xxx
(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design."

(v) There must be a comparison between the provisions of the I.T. Act and the provisions of 'DTAA' and a finding that 'DTAA' is better in light of the provision under Article 12(4) for the purpose of determining whether the payment made by the petitioner to 'Walmart Inc.' would constitute 'FIS', requires determination.

(vi) Section 195(2) places an obligation on the petitioner to make deduction of tax under sub-section (1)

where payment of "any such sum chargeable under this Act" is being made to a non-resident.

(vii) The words chargeable under this Act if read in conjunction with provision of Article 12(4) of 'DTAA' and the obligation under Section 195(2) is looked at, it becomes clear that 'FIS' as defined under Article 12(4) are more beneficial to the assessee insofar as his obligation to deduct the tax. Accordingly, Article 12(4) requires to be applied to determine liability to deduct tax.

(viii) It is clear that 'FIS' under Article 12(4) would refer to payments of any kind to any person in consideration for rendering of technical or consultancy services (including through the provision of services of technical or other personnel) if such services make available technical knowledge, experience, skill, know-how or processes or consists of development or transfer of technical plan or technical design.

(ix) In terms of Article 12(4)(b) for the purpose of construing 'FIS', it is necessary that the rendering of technical

or consultancy services must make available technical knowledge, experience, skill, know-how or processes. Further, it may also consist of development and transfer of a technical plan or technical design.

(x) Accordingly, it is not a mere rendering of technical or consultancy services, but the requirement of make available in terms of Article 12(4)(b) requires to be fulfilled. In light of the above legal requirement whether the present payment would amount to 'FIS' requires to be determined.

(xi) The DCIT while passing the impugned order at Para-36 has concluded that payment made to 'Walmart Inc.' will fall in the category of payments made to any person in consideration for rendering technical, consultancy services through the provision of services of technical or other personnel. It is observed that 'Walmart Inc.' has through the seconded employees provided technical services to Flipkart Internet Private Limited (India), as technical services would also include provision of services of personnel. In the impugned order what has been lost sight of is the requirement

of "make available" in terms of Article 12(4)(b). A perusal of M.S.A. entered on 29.05.2019 would refer to:-

> *"(a) Clause 2.1.1 - The use of certain services described in Annexure-A are in the Scope of Work concluded between the parties or their Affiliates for the relevant Service;*
>
> *(b) Clause 2.1.2 - The use of certain Secondees on terms and conditions described in Annexure-B unless the parties agree to the contrary in respect of the particular secondment in the relevant Scope of Work."*

(xii) The M.S.A., if subjected to scrutiny as regards the aspect of secondment does not reveal the satisfaction of the requirement of 'make available' which is a *sine qua non* for being a 'FIS'.

(xiii) The DCIT has proceeded to pass the impugned order without examining this aspect. The fact that the employees seconded have "the requisite experience, skill or training capable of completing the services contemplated in Secondment" (*Clause 6.2.4* of M.S.A.) by itself is insufficient to treat it as 'FIS' as has been concluded, *de hors* the satisfaction of 'make available.'

(xiv) The proceeding under Section 195 results in a tentative finding more as a safeguard to the payee and if such determination exempts the payee from making a deduction at that stage, such tentative deduction, it must be emphasized is still subject to final determination of taxability *qua* the recipient.

(xv) Accordingly, the contention of respondents raised at the time of oral arguments that the enquiry regarding 'make available' still remains to be determined and is based on further material to be submitted regarding the requisition of the employees by the petitioner is an enquiry that is not called for. As the M.S.A. does not support 'make available', further enquiry beyond that may not be called for, considering the nature and scope of proceedings.

(C) Deduction under Section 195(2) of Income Tax Act on the 'sum chargeable under this Act':-

(i) As discussed above, it is the provision of 'DTAA' that would be of only relevance in determining the necessity of deducting tax. However, *de hors* the 'DTAA', the question of deduction would only arise where the payee is seeking to

make payment to the non-resident of a sum chargeable under the I.T. Act.

(ii) The DCIT has grossly erred while concluding that where the payment is made for the services rendered, then whether the charge for the services rendered is equivalent to the cost or not becomes irrelevant. The finding that the services rendered fall within the description of services as in Explanation-2 in Section 9(1)(vi) and that the element of profit is not an essential ingredient of receipt, to make it taxable is erroneous.

(iii) It must be noted that as observed above, the provisions of the I.T. Act, will have to give way to the provisions of 'DTAA' when 'DTAA' is more beneficial to the assessee. It is in this context that the reliance on Explanation-2 in Section 9(1)(vii) may not be of relevance. The aforesaid provision of the I.T. Act which deals with 'FTS' is different from the concept of 'FIS' under Article 12(4). The 'make available' requirement that is mandated under Article 12(4) grants benefit to the petitioner and accordingly, the question of falling back on the provisions of Section 9 of the

I.T. Act does not arise. On this score alone, the conclusion in the impugned order of the payment for the service falling within the description under Section 9 of the I.T. Act as 'deemed income', is to be rejected.

(D) Whether Deduction is on gross receipts?

(i) The contention of learned counsel Sri. K.V.Aravind is that normally the deduction is on gross receipts as in cases of Section 194J and Section 194C of the I.T. Act and in light of the principle laid down in **Associated Cement Co. Ltd.** v. **Commissioner of Income-Tax**[11]**,** in the present case also the deduction should be on the gross remittance.

(ii) Section 194C provides for deductions "at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash….". Similarly, Section 194J provides for deduction "at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash….."

[11] (1993) 67 Taxmann 346 (SC)

(iii) In the case of ***Associated Cement Company Ltd. (supra),*** the question was as regards deduction of tax under Section 194C(1) and as to whether deduction was to be confined to the income component of that sum was under consideration. The Apex Court has observed that it was neither possible nor permissible to the payer to determine what part of the amount paid by him to the contractor constitutes income of the latter. It was further observed that permitting such ascertainment of income component would result in placing an impossible burden upon the payer and would result in 'an impractical and unworkable provision'. This would not further the case of the Revenue as Section 194C(1) refers to deduction at the time of credit of 'such sum', which is in contradistinction to Section 195 where the deduction is on 'any other sum chargeable under the provisions of the I.T. Act'

(iv) What needs to be noticed is that the logic of deduction of tax on the gross amount as has been held in respect to Section 194C and Section 194J cannot be extended to Section 195 which specifically uses the term "any other sum chargeable under the provisions of this Act." Such terminology

is absent in Section 194C and Section 194J of the I.T. Act. The difficulty of ascertainment of income component as being an impossible burden on the payer in the context of Section 194C as observed by Apex Court is obviated in the present case, as Section 195(2) provides for a mechanism whereby the Assessing Officer may be called upon to determine "proportion of the sum which is so chargeable." In fact, in **GE India Technology Centre (P) Ltd.** ***(supra)***, the Apex Court at para-14 has specifically recorded the distinction abovementioned as follows:-

> *"14. One more aspect needs to be highlighted. Section 195 falls in Chapter XVII which deals with collection and recovery. Chapter XVII-B deals with deduction at source by the payer. On analysis of various provisions of Chapter XVII one finds the use of different expressions, however, the expression "sum chargeable under the provisions of the Act" is used only in Section 195. For example, Section 194-C casts an obligation to deduct TAS in respect of "any sum paid to any resident". Similarly, Sections 194-EE and 194-F inter alia provide for deduction of tax in respect of "any amount" referred to in the specified provisions. In none of the provisions we find the expression "sum chargeable under the provisions of the Act", which*

as stated above, is an expression used only in Section 195(1). Therefore, this Court is required to give meaning and effect to the said expression. It follows, therefore, that the obligation to deduct TAS arises only when there is a sum chargeable under the Act."

Accordingly, the contention of learned counsel for the Revenue regarding deduction on gross amount deserves to be rejected.

(E) Secondment and reimbursement of costs:

(i) In the impugned order, the DCIT has construed the secondment where services are provided and payment made thereon as being within the ambit of tax liability.

As discussed supra, the 'FIS' in terms of the 'DTAA' would not include any payment towards provision of mere rendering of service and there must be a *sine qua non* of 'make available.' Further, the payment must be one chargeable under the provisions of I.T. Act.

(ii) The payment is pursuant to M.S.A. and the payment in the present case relates to the secondment of

employees. The following clauses of the M.S.A. would be of relevance:-

(a) *Clause 1.7* defines secondment as the relationship of assigning a secondee by a party to the other party as contemplated under the Agreement. The payment under the Agreement is also only in respect of the secondment.

(b) *Clause 1.5* defines the scope of work relating to the secondment.

(c) *Clause 3.1* which provides that Flipkart may terminate the services of the secondees.

(d) *Clause 4.2* provides that the party placing the secondees can invoice the party receiving the service, the secondment costs, expenses and incidental costs borne by the Home Country.

(iii) While passing the impugned order, the DCIT has concluded that there is no employer-employee relationship between the petitioner and the seconded employees. Such a conclusion is arrived at while noticing that.-

(a) 'Walmart Inc.' has the power to decide on continuance of the services with 'Walmart Inc.' in

U.S.A. after termination of their secondment in India. (see para 11.1 of the impugned order).

(b) 'Walmart Inc.' raises invoice after incurring the secondment costs (as per *Clause 4.2* of M.S.A.),

(c) The equity eligibility of the seconded employee continues to be tied to 'Walmart Inc.'.

(iv) However, what would be of significance is the relationship between the petitioner and the seconded employees during the period of secondment that has been lost sight of while passing the impugned order. Accordingly, after the period of secondment or its termination, the fact that 'Walmart Inc.' has the power to decide on the employees' continuance with 'Walmart Inc.' would not make any difference, as it would relate to a service condition post the period of secondment. That the equity eligibility of the seconded employee which was a pre-existing benefit (even prior to the secondment) ought not to alter the relationship of employer and employee between the petitioner and the employee. Further, the mere payment by 'Walmart Inc.' to

the seconded employees would not alter the relationship between the petitioner and the seconded employees, as the petitioner only seeks to make payment to 'Walmart Inc.' of its payment to the seconded employee which is stated to be by way of reimbursement.

(v) It ought to be noted that the petitioner as an entity was incorporated on 01.10.2012 and had established an online market place for consumer goods. Only subsequently in 2018 'Walmart Inc.' acquired majority shareholding in the petitioner Company.

(vi) It is not a case where the petitioner is merely acting as a back office for providing support service to the overseas entity, whereby the overseas entity could be treated as an employer.

(vii) The petitioner issues the appointment letter, the employee reports to the petitioner, the petitioner has the power to terminate the services of the employee. For the purpose of a limited finding under Section 195 on the basis of

the available material, it could be concluded that the petitioner is the employer.

(viii) The Revenue has relied upon the judgment of the Apex Court in **C.C., C.E. & S.T.–Bangalore (Adjudication) etc.** v. **M/s.Northern Operating Systems Pvt. Ltd.**[12] where the Apex Court has interpreted the concept of a secondment agreement taking note of the contemporary business practice and has indicated that the traditional control test to indicate who the employer is may not be the sole test to be applied. The Apex Court while construing a contract whereby employees were seconded to the assessee by foreign group of Companies, had upheld the demand for service tax holding that in a secondment arrangement, a secondee would continue to be employed by the original employer.

(ix) The Apex Court in the particular facts of the case had held that the Overseas Co., had a pool of highly skilled employees and having regard to their expertise were seconded to the assessee and upon cessation of the term of secondment would return to their overseas employees, while returning

[12] Civil Appeal Nos.2289-2293/2021

such finding on facts, the assessee was held liable to pay service tax for the period as mentioned in the show cause notice.

(x) It needs to be noted that the judgment rendered was in the context of service tax and the only question for determination was as to whether supply of man power was covered under the taxable service and was to be treated as a service provided by a Foreign Company to an Indian Company. But in the present case, the legal requirement requires a finding to be recorded to treat a service as 'FIS' which is "make available" to the Indian Company.

(xi) Accordingly, any conclusion on an interpretation of secondment as contained in the M.S.A. to determine who the employer is and determining the nature of payment by itself would have no conclusive bearing on whether the payment made is for 'FIS' in light of the further requirement of "make available."

(F) Distinguishing the Judgment in *Centrica India Offshore (P.) Ltd.* v. *Commissioner of Income Tax-I, New Delhi*[13]

(i) The petitioner had challenged the order of the 'Authority for Advance Ruling' dated 14.03.2012 by virtue of which the Authority had held that the income accruing to the Overseas Entities in view of the existence of a Service Permanent Establishment (Service PE) in India and that tax was liable to be deducted under Section 195.

(ii) The question referred for advance ruling was as to whether the reimbursements made by the petitioner to the Overseas Entities of the actual costs of expenses incurred under the Secondment Agreement is in the nature of income accruing to the Overseas Entities.

(iii) In the challenge before the High Court, the High Court had framed the issue for consideration as to whether the secondment of employees falls within provision of 'DTAA' which embodies the concept of 'Service PE' (see para-29).

[13] (2014) 227 Taxmann 368 (SC)

(iv) The Delhi High Court has recorded a finding which however is a finding on facts:

(a) That the rendition of service constituted "included service" that made available skill behind that service to the other party.

(b) That the control over the employment by the Overseas Entity was overriding and has approved broadly regarding the existence of Service PE in India.

(c) That the reimbursement is a matter to be demonstrated and the nomenclature cannot be determinative and mere payment of costs where the Entities are related would not take such payment out of the consideration of necessity to deduct.

(v) It must be noted that the conclusion in ***Centrica (supra)*** does not further the case of Revenue, as the decision was rendered in the context of facts and on the basis of the material available.

(vi) It must be noted that there was a reiteration of the necessity of demonstration of 'make available' apart from rendering of the requisite service for satisfaction of 'FIS'.

(vii) As regards reimbursement is concerned, the Court has merely reiterated that it is not the nomenclature that it is indeed an actual reimbursement that is required. Further, the Court, in light of the material has recorded a finding of the existence of Service PE by implication.

(viii) All such findings do not take away from the requirement of establishing that:

(a) The Domestic Entity was the real employer, that there was no Service PE in the local Country.

(b) That there was indeed a reimbursement in the true sense and that cost payment among related Entities was to be ignored.

(c) That 'FIS' satisfied the 'make available' test.

Finally, the judgment in ***Centrica*** is on the facts and material on record.

V. CONCLUSION:-

33. In the present case, the stand taken on the material available is on the construction of legal position. As pointed out in the discussion earlier that the understanding of the legal position being erroneous, the only conclusion that could be arrived at is to allow the application.

34. Though the Revenue has raised numerous contentions that further information is required to record a detailed finding, such stand is taken up for the first time in the present proceedings. A perusal of the file of the Department does not make out any instance where the Department had sought for further information which was not furnished. On the contrary, the petitioner has made out detailed representation on the legal position and record does not reflect any requisition for further information remaining unanswered. In fact, the Apex Court in ***'GE India Technology Centre Private Limited' (supra)*** has rightly observed at para-16 as follows:-

> *"**16.** The fact that the Revenue has not obtained any information per se cannot be a ground to construe Section 195 widely so as to require deduction of TAS even in a case where an amount paid is not chargeable to tax in India at all..."*

35. Further, it must be noticed that the finding as regards deduction of tax at source under Section 195 of the I.T. Act is tentative insofar as the Revenue is concerned. Even if the Revenue orders that there was no obligation to make deduction under Section 195, the question of liability of the recipient still remains to be decided subsequently. Accordingly, the question of prejudice to the Revenue at the stage of Section 195 order is unavailable to it.

36. Curiously, the file contains a note by the same DCIT who has eventually passed the impugned order, which note dated 10.03.2020 addressed to the C.I.T. seeks for granting approval for granting deduction of TDS at the rate of zero per cent on cost-to-cost reimbursement. However, the opinion was directed to be reconsidered as per the endorsement found in the file and eventually an order was

passed by DCIT contrary to the earlier view and has rejected the application.

37. Accordingly, the findings in the impugned order and the conclusion regarding the employer-employee relationship is based on a wrong premise and is liable to be set aside. As observed by this Court in **Director of Income Tax (International Taxation)** v. **Abbey Business Services India (P.) Ltd.**[14], "it is also pertinent to note that the Secondment Agreement constitutes an independent contract of services in respect of employment with assessee." Hence, the DCIT in the impugned order has missed this aspect of the matter and has proceeded to consider the aspect of rendering of service as to whether it was 'FIS'.

38. In light of setting aside of the impugned order in the context of legal position as noticed, the only order that can now be passed is of one granting 'nil tax deduction at source.'

39. Accordingly, in light of the above discussion, the impugned order at Annexure-A dated 01.05.2020 is set aside

[14] (2020) 122 Taxmann.Com 174 (Kar)

and the respondent No.1 is directed to issue a Certificate under Section 195(2) of I.T. Act to the effect of 'Nil Tax Deduction at Source' as regards the petitioner's application dated 15.01.2020.

Sd/-
JUDGE

VGR/NP