

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.08.2016

C O R A M

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

Tax Case Appeal Nos.654, 453, 498 & 499 of 2016
and C.M.P.Nos.9389, 13455 and 10066 of 2016

M/s. Cognizant Technology Solutions
India Private Limited,
165/110 Menon Eternity, 6th Floor,
St. Mary's Road, Alwarpet,
Chennai - 600 018 ... Appellant in all TCAs

Vs

The Income-Tax Officer (TDS),
Deputy Commissioner of Income-Tax,
Large Tax Payer Unit,
Chennai - 600 101 ... Respondent in all TCAs

Common Prayer:- Appeals filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras 'C' Bench, Chennai, in C.O.No.27/Mds/2010 in I.T.A.No.460/Mds/2010, dated 09.06.2014; M.P.No.150/Mds/2014 in C.O.No.27/Mds/2010 in I.T.A.No.460/Mds/2010, dated 17.11.2014; M.P.No.148/Mds/2014 in I.T.A.No.1536/Mds/2009, dated 17.11.2014 and M.P.No.149/Mds/2014 I.T.A.No.1535/Mds/2009, dated 17.11.2014, respectively.

TCA.No.495 of 2016: Appeal against the order of the MP.No.148/14 in ITA NO.1536 of 2009 on the file of the Income Tax Appellate Tribunal 'C' Bench against the order of Commissioner of Income Tax (appeals) X for the Assessment year 2003-04 on the file of Commissioner of Income Tax Appeal XI Chennai 34 made in ITA.No.263/05-06 against the order of the Income Tax Officer, International Taxation II made in PAN AAA CD 331 2M dated 20.02.2006 for the Assessment year 2003-04.

TCA.NO.499 of 2016: Appeal against the order of the MP.No.149 of 2014 in ITA.NO.1535 of 2009 on the file of Income Tax Appellate Tribunal 'C' Bench against the order of Commissioner of Income Tax (Appeals) for the Assessment year 2002-03 on the file of Commissioner of Income Tax Appeal XI Chennai 34 made in

ITA.262/05-06 against the order of the Income Tax Officer, International Taxation II made in PAN AAA CD 331 M dated 20.02.2006 for the Assessment year 2002-03.

TCA.No.453 of 2016: Appeal against the order of MP.NO.150/14 in Co.No.27/MDS/10 for the year 20.2.03 on the file of Income Tax appellate Tribunal Madras 'C' Bench against the order on the file of Commissioner of Income Tax (Appeals) Assessment year 2002-03 made in ITA No.23/2007-08/LTSA/1 dated 29/1/2010 against the proceedings of Commissioner of Income Tax, Chennai-1, made in PAN.No.AAA CD 3312M date 26.3.2007 for the Assessment 2002-03.

TCA.654 of 2016: Appeal against the order dated 09.06.2014 made in CO.NO.27/MDS/2010 in ITA NO.460 of MDS/10 for the Assessment year 2002-03 on the file of Income Tax Appellate Tribunal Madras 'C' Bench.

For Appellant in all T.C.As.: Mr. Vijaya Raghavan,
for, Mr. Subbaraya Aiyar

For Respondent in all TCAs : Mr. T.Ravikumar,
Sr. Standing Counsel

C O M M O N J U D G M E N T

(Judgment of the Court was made by S.Manikumar, J.,)

Seven Tax Appeals, viz., TCA Nos.651 to 654 of 2016 and 453, 498 and 499 of 2016, have been filed challenging the orders, dated 09.06.2014, passed by the Tribunal, in I.T.A.No.1535/Mds/2009; I.T.A.No.1536/Mds/2009; I.T.A.No.460/Mds.2010; C.O.No.27/Mds/2010; 150/Mds/2014 in C.O.No.27/Mds/2010 in I.T.A.No.460/Mds/2010; 148/Mds/2014 in I.T.A.No.1536/Mds/2009; and M.P.No.149/Mds/2014 in I.T.A.No.1535/Mds/2009, respectively.

2. T.C.A.Nos.651 to 653 of 2016 have been admitted.

3. T.C.A.No.654 of 2016 is filed against the order, dated 09.06.2014, made in C.O.No.27/Mds/2010 in ITA No.460/Mds/2010, for the assessment year 2002-03. Subject-matter of this Appeal relates to an order of assessment under Section 201 of the Income Tax Act, 1961.

4. The common substantial questions of law framed in TCA Nos.651 to 654 of 2016, by the appellant, are as follows:-

"1. Whether on the facts and circumstances of the case the Tribunal was right in law in holding that the payment to

the non-resident company towards International Private Leased Circuit (IPLC) for providing bandwidth services constitutes "Royalty" under Explanations 5 and 6 to Section 9 (1) (vi) of the Act, introduced by the Finance Act, 2012 w.e.f. 01.06.1976 and hence, taxable under the Act?

2. Whether on the facts and circumstances of the case the Tribunal was right in law in holding that International Private Leased Circuit (IPLC) is an equipment and the consideration paid for provision of bandwidth services is for the 'use of', or 'right to use' the equipment is 'royalty'?

3. Whether on the facts and circumstances of the case the Tribunal ought to have held that the payment to Sprint does not constitute Royalty under Article 12 (3) of the DTAA between India and USA and hence not taxable in India as per the provisions of the said DTAA?

4. Whether on the facts and circumstances of the case the Hon 'ble Tribunal erred in not appreciating that in the absence of permanent establishment as contemplated under Article 5 of the DTAA between India and USA, the business profits of Sprint are not chargeable to tax in India under Article 7?

5. Whether on the facts and circumstances of the case the Tribunal was right in law in holding that failure on the part of the assessee to deduct tax at source under Section 195 of the Act in respect of bandwidth charges would attract the provisions of Sections 201 (1) and 201 (1A) of the Act?

6. Whether the Tribunal erred in relying on the decision of the Hon 'ble Jurisdictional High Court in the case of M/s. Verizon Communications Singapore PTE Ltd v. ITO, 361 ITR 575, which was rendered in the context of tax liability of non-resident and not on the withholding tax provisions?

7. Whether on the facts and circumstances of the case the Tribunal was right in law in confirming the disallowance under Section 40 (a) (i) of the Act, on the basis of retrospective amendments without appreciating that the Assessee at the time of remittance could not have anticipated such subsequent amendments and hence, the impossibility of performance at the time of making such payments?

8. Whether on the facts and circumstances of the case the Tribunal was right in not considering the applicability of Article 26 (3) of the India-USA DTAA which provides for non-discrimination in allowance of expenditure in the nature of interest, royalties and other disbursement, whereby for the purpose of determining the taxable profits, these amounts will be deductible under the same conditions had they been paid to the residents?

9. Whether on the facts and circumstances of the case the Tribunal ought to have held that provisions of Section 40 (a) (i) of the Act are applicable only on amounts outstanding and payable to the Non-resident as at the close of the previous year and not to the amounts which have already been paid and are not payable as at the close of the previous year?"

5. T.C.A.No.453 of 2016 is against the order, dated 09.06.2014, made in Miscellaneous Petition No.150/Mds/2014 in C.O.No.27/Mds/2010 in I.T.A.No.460/Mds.2010, for the assessment year 2002-03. Subject-matter of this Appeal relates to an order of assessment under Section 143 (3) read with Section 63 of the Income Tax Act, 1961.

6. T.C.A.No.498 of 2016 is against the order, dated 09.06.2014, made in Miscellaneous Petition No.148/Mds/2014 in I.T.A.No.1536/Mds.2009, for the assessment year 2003-04. Subject-matter of this Appeal relates to an order of assessment under Section 143 (3) read with Section 63 of the Income Tax Act, 1961.

7. T.C.A.No.499 of 2016 is against the order, dated 09.06.2014 made in Miscellaneous Petition No.149/Mds/2014 in I.T.A.No.1535/Mds.2009, for the assessment year 2002-03.

Subject-matter of this Appeal relates to an order of assessment under Section 143 (3) read with Section 63 of the Income Tax Act, 1961.

8. The common questions of law framed in T.C.A.Nos.453, 498 and 499 of 2016, by the appellant, are as follows:-

"1. Whether on the facts and circumstances of the case the Tribunal was right in law in holding that the Assessee in its Miscellaneous Application is trying to undertake a 'review' of its own order under the grab of 'rectification' which is not permissible since the issues raised in the Miscellaneous Application has already been dealt in paragraph 3.6 of the order dated 09.06.2014?

2. Whether on the facts and circumstances of the case the Tribunal was right in law in holding that the payment to the non-resident company M/s. Sprint Inc., USA towards International Private Leased Circuit (IPLC) for providing bandwidth services constitutes "Royalty" under Explanations 5 and 6 to Section 9 (1) (vi) of the Act, introduced by the Finance Act, 2012 w.e.f. 01.06.1976 and hence, taxable under the Act?

3. Whether on the facts and circumstances of the case the Tribunal was right in law in holding that International Private Leased Circuit (IPLC) is an equipment and the consideration paid for provision of bandwidth services is for the 'use of', or 'right to use' the equipment is 'royalty'?

4. Whether on the facts and circumstances of the case the Tribunal ought to have held that the payment to M/s. Sprint Inc., USA does not constitute Royalty under Article 12 (3) of the DTAA between India and USA and hence not taxable in India as per the provisions of the said DTAA?

5. Whether on the facts and circumstances of the case the Hon 'ble Tribunal erred in not appreciating that in the absence of permanent establishment as contemplated under Article 5 of the DTAA between India and USA, the business profits of M/s. Sprint Inc., USA are not chargeable to tax in India under Article 7?

6. Whether on the facts and circumstances of the case the Tribunal was right in law in

holding that failure on the part of the assessee to deduct tax at source under Section 195 of the Act in respect of bandwidth charges would attract the provisions of Sections 201 (1) and 201 (1A) of the Act?

7. Whether the Tribunal erred in relying on the decision of the Hon 'ble Jurisdictional High Court in the case of M/s. Verizon Communications Singapore PTE Ltd v. ITO, 361 ITR 575, which was rendered in the context of tax liability of non-resident and not on the withholding tax provisions?

8. Whether on the facts and circumstances of the case the Tribunal was right in law in confirming the disallowance under Section 40 (a) (i) of the Act, on the basis of retrospective amendments without appreciating that the Assessee at the time of remittance could not have anticipated such subsequent amendments and hence, the impossibility of performance at the time of making such payments?

9. Whether on the facts and circumstances of the case the Tribunal was right in not considering the applicability of Article 26 (3) of the India-USA DTAA which provides for non-discrimination in allowance of expenditure in the nature of interest, royalties and other disbursement, whereby for the purpose of determining the taxable profits, these amounts will be deductible under the same conditions had they been paid to the residents?

10. Whether on the facts and circumstances of the case the Tribunal was right in holding that the ground raised by the Assessee in relation to the applicability of the non-discrimination clause of the India - USA DTAA was already addressed by it and hence, no mistake or error is apparent from the record which requires rectification?

11. Whether on facts and circumstances of the case the Tribunal ought to have held that provisions of Section 40 (a) (i) of the Act are applicable only on amounts outstanding and payable to the Non-resident as at the close of the previous year and not to the amounts which have already been paid and are not payable as at the close of the previous year?"

9. A comparative study of the substantial questions of law raised in the two sets of Tax Appeal Nos.651 to 654 of 2016 and TCA Nos.453, 498 and 499 of 2016, respectively, shows that the same substantial questions of law have been raised.

10. TCA Nos.651 to 653 of 2016 are against the orders of the Tribunal in the main appeals, whereas, TCA Nos.453, 498 and 499 of 2016 are against the orders passed by the Tribunal in the Miscellaneous Petitions filed under Section 143 (3) read with Section 263 of the Income Tax Act, 1961 and TCA No.654 of 2016 is filed against the order passed by the Tribunal in Cross Objections.

11. When this Court has already admitted Tax Case Appeal Nos.651 to 653 of 2014 (challenging the final orders of the Tribunal) on the questions of law, (stated thereunder), we are of the view that there is no need to entertain the appeals filed against the orders passed in the Miscellaneous Petitions, and the Cross Objection, on the very same substantial questions of law.

12. Therefore, while declining to entertain TCA Nos.453, 498, 499 and 654 of 2016, we also make it clear that it would not be open to the Revenue at a later point of time to contend or raise, any technical issue, while T.C.A.Nos.651 to 653 of 2016 are taken up for final hearing with reference to the disposal of TCA Nos.453, 498, 499 and 654 of 2016.

13. In the light of the above, we dismiss TCA Nos.453, 498, 499 and 654 of 2016, leaving the issues and substantial questions of law raised in TCA Nos.651 to 653 of 2016 for adjudication. Consequently, the connected CMPs are closed.

Sd/-
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Assistant Registrar(CS V)

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Sub Assistant Registrar

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To

1. The Registrar Income Tax Appellate Tribunal 'C' Bench, Madras.

2. The Deputy Commissioner of Income Tax (Large Tax Payer Unit, Chennai 600 101.

3. The Commissioner of Income Tax Appeals-XI, 121, Mahatma Gandhi Road, Chennai-34.

4. The Income Tax Officer (International) Taxation J-II, VII Floor, Annexe Building, 121, Nungambakkam High Road, Chennai-34.

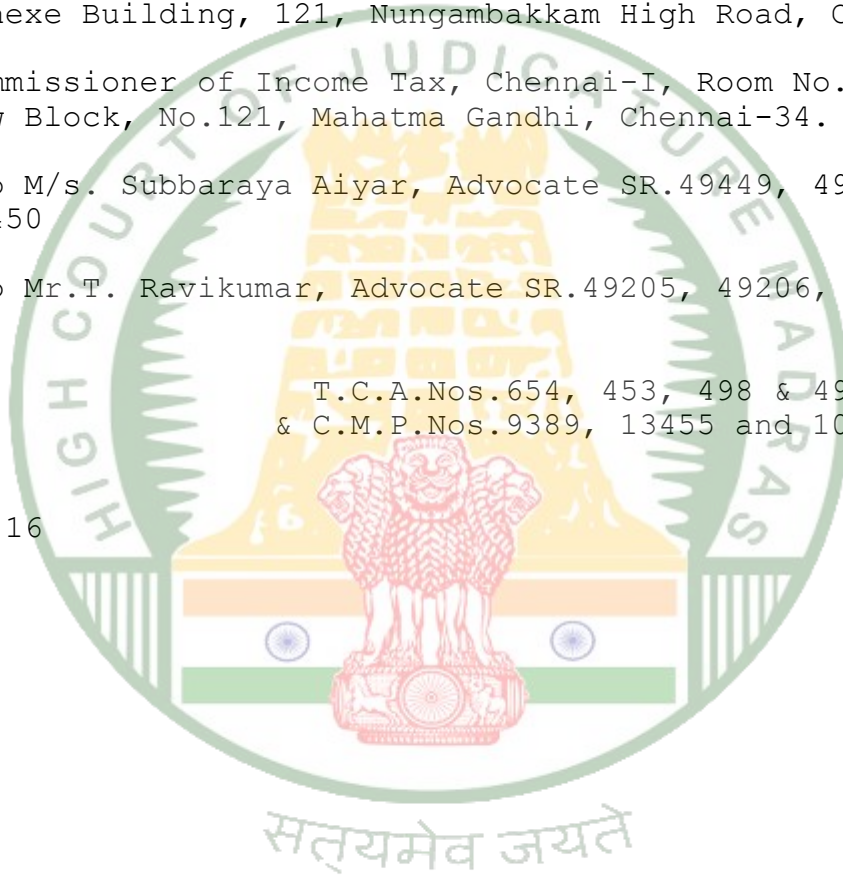
5. The Commissioner of Income Tax, Chennai-I, Room No.701, VIII, Floor, New Block, No.121, Mahatma Gandhi, Chennai-34.

+ 4 ccs to M/s. Subbaraya Aiyar, Advocate SR.49449, 49448, 49445, 49450

+ 4 ccs to Mr.T. Ravikumar, Advocate SR.49205, 49206, 49207, 49208

T.C.A.Nos.654, 453, 498 & 499 of 2016
& C.M.P.Nos.9389, 13455 and 10066 of 2016

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