IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 12TH DAY OF FEBRUARY, 2025

PRESENT

THE HON'BLE MR JUSTICE KRISHNA S DIXIT

AND

THE HON'BLE MR JUSTICE G BASAVARAJA

WRIT APPEAL NO. 992 OF 2023 (T-IT)

BETWEEN:

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

2. THE COMMISSIONER OF INCOME TAX-1
(INTERNATIONAL TAXATION)
4TH FLOOR, BMTC BUILDING,
80 FEET ROAD, KORAMANGALA,
BENGALURU-560 095.

3. THE JOINT COMMISSIONER OF INCOME TAX-1
C.R. BUILDING NO. 1, QUEEN'S ROAD,
BENGALURU-560 001.

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

...APPELLANTS

(BY SRI. RAVI RAJ Y V., ADVOCATE AND
SRI. M DILIP.,ADVOCATE)

AND:

M/S FLIPKART INTERNET PVT LTD.,
ALYASSA, BEGONIA AND CLOVER
EMBASSY TECH VILLAGE,
OUTER RING ROAD,
DEVARABEESANAHALLI VILLAGE,
BANGALORE-560 103.
THROUGH ITS AUTHORISED SIGNATORY
MS. NEHA AGARWAL.

…RESPONDENT

(BY SRI.TARUN GULATI., SENIOR COUNSEL A/W
SRI.KISHORE KUNAL.,ADVOCATE AND
SRI.PRADEEP NAYAK., ADVOCATE)

THIS WRIT APPEAL FILED U/S 4 OF THE KARNATAKA HIGH COURT ACT PRAYING TO A) SET ASIDE THE ORDER PASSED BY THE LEARNED SINGLE JUDGE IN WP NO.3619/2021 DATED 24/06/2022 AND B) PASS SUCH OTHER SUITABLE ORDERS.

THIS WRIT APPEAL, COMING ON FOR ORDERS THIS DAY, JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MR JUSTICE KRISHNA S DIXIT
AND
HON'BLE MR JUSTICE G BASAVARAJA

ORAL JUDGEMENT

(PER: HON'BLE MR JUSTICE KRISHNA S DIXIT)

In this Intra Court Appeal, Revenue seeks to lay a challenge to a learned Single Judge's order dated 24.06.2022 whereby Respondent – Asseessee's W.P.No.3619/2021 (T-IT) having been favoured, the following relief has been granted:

> *"39. Accordingly, in light of the above discussion, the impugned order at Annexure-A dated 01.05.2020 is set aside and the respondent No.1 is directed to issue a Certificate under Section195(2) of I.T.Act to the effect of 'Nil Tax Deduction at Source' as regards the petitioner's application dated 15.01.2020."*

2. FACTS IN BRIEF:

2.1 Assessee, an Indian Company is a subsidiary of a foreign entity in Singapore. The said foreign entity had entered into Inter Company Master Service Agreement with Holding Company Walmart Inc, Delaware, which is a USA entity. This US entity provides services to various affiliates across the globe pursuant to Master Service Agreement and accordingly the Walmart seconded its employees to the Assessee Company. For the seconded service, the Assessee – company having deducted the TDS remitted the salary amount to the US entity by way of reimbursement.

2.2 The Assessing Officer having examined the nature of services rendered by the seconded employees to the Assessee-Company in the light of Double Taxation

Avoiding Agreement under the shadow of Income Tax Act, 1961 concluded that the employer-employee relationship between the seconded employees and the US entity continued and therefore, the amount earned as income by the foreign entity in India is liable for levy of tax under Section 195 of the 1961 Act, the said income not being the salary reimbursement of the employees concerned.

2.3 The Assessing Officer recorded the finding that the services rendered by the seconded employees would fall within the precincts of Section 9(1)(vii) of the 1961 Act and that the payment made by the Assessee-Company is towards consideration for the technical services rendered by the foreign entity. The said amount being income earned in India was held liable to be taxed and consequently, Assessee-Company's application filed u/s 195(2) of the Act came to be negatived by the Assessing Officer vide order dated 01.05.2020. This being challenged in the subject WP, the Assessee-Company has earned the impugned order, now put at our hand for examination.

3. Learned Sr. Panel Counsel appearing for the Appellant submits that the rejection of Assessee-Company's application u/s 195(2) could not have been faltered by the learned Single Judge; the Rulings relied upon by the Assessee-Company before the learned Single Judge were not applicable to his case; the very Form N.15E & Form No.13 reproduced by the learned Single Judge would demonstrate that application u/s 195 was for determination for appropriate proportion of sum payable to non-resident, chargeable to tax in the case of recipient; it was a plain case of payment made by the Assessee-Company to the non-resident was for availing the services of technical or other personnel and that the same would fall within the ambit of fee for such technical services in terms of Section 9(1)(vii) of the 1961 Act and Article 12(4) of DTAA.

4. Learned Sr. Advocate Mr. Tarun Gulati appearing for the Assessee-Company resisted the Appeal by making submission in justification of the impugned

order and the reasoning of the learned Single Judge. He contends that his client was not required to deduct tax u/s 195 of the 1961 Act on payments made to a foreign entity towards reimbursement of salaries paid to the seconded employees; Article 12 of DTAA sums paid from being regarded as fee for Technical Services and thus, there was no income earned by Walmart Inc., from taxing in India; whatever payment the Assessee-Company has made to the foreign entity is only the actual cost of salaries of seconded employees and there is no "mark-up" retained by foreign entity namely Walmart Inc., on such costs; once such payments are demonstrably salaries, the same would fall outside the purview of FIS-fees for included service or FTS – fees for technical service. He draws our attention to certain terms of DTAA and Clause 3.1 of MSA.

5. Having heard the learned counsel for the parties and having perused the Appeal papers, we decline indulgence in the matter for the following reasons:

5.1 This being an Intra-Court Appeal, it has its own conventional constraints. The Appellant has to show not only that the impugned judgement is wrong but it is unsustainable. One of the main grounds urged in the Appeal is as to a Coordinate Bench decision in ***DIRECTOR OF INCOME TAX (INTERNATIONAL TAXATION) v. ABBEY BUSINESS SERVICES INDIA (P) LTD.,***[1] which the learned Single Judge has heavily banked upon, in holding that the Secondment Agreement constitutes an independent contract of service *qua* the Assessee; it is also stated that the review was filed against the same before the said Bench. Now we are told that the contention of the Revenue having been rejected, the review has been negatived by the Coordinate Bench. As a consequence, law has to be treated as having been rightly declared in ***ABBEY*** *supra* and therefore, the reasoning of the learned Single Judge founded on that basis cannot be faltered on the grounds urged in the Appeal, in that regard.

[1] [2020] 122 Taxmann.com 174 (Kar)

5.2 The vehement submission of learned Sr. Panel Counsel that there is absolutely no material evidence to demonstrate that their existed a *vinculum juris* of employer-employee between the Assessee-Company and the seconded employees and therefore, whatever payment made to their employer namely, Walmart Inc., cannot be treated as reimbursement of salary, is bit difficult to countenance and reasons for this are not far to seek. The Assessee – company had entered into a MSA with Walmart Inc., for secondment of employees, in terms of which either of the parties thereto could use the services of seconded employees. Clause (2) of MSA provides that the Company placing the secondees will *inter alia* invoice the compensation and the wage cost of secondees incurred in the Home Country. Out of the two distinct parts in the MSA, one relates to secondment of employees. Accordingly, the Wallmart Inc., had seconded four employees to the Assessee – Company by virtual of Global Work Assignment with those very employees who would work for the Assessee-Company. Even the appointment

letters have been issued to these seconded employees with material particulars of Job Chart & other details such as, contribution to Provident Fund, procurement of Employment Visa. There are all indicia of employer-employee relationship between the Assessee-Company and the seconded employees.

5.3 The next contention of the learned Sr. Panel Counsel that the payments made by the Assessee-Company directly to the Walmart Inc., in USA is not towards reimbursement of the salary & emoluments of seconded employees again is difficult to countenance. The Assessee-Company had made an application at Annexure-G to the WP u/s 195(2) of the 1961 Act requesting for allowing the remittance to the Walmart Inc., on cost to cost reimbursement, without deduction of tax at source, specifically mentioning DTAA whereunder the income earned by a non-resident in India which otherwise is taxable can be exempted from levy, inasmuch as levy would amount to double taxation. However, the said

application came to be rejected directing TDS. This, learned Single Judge has faltered inasmuch as, in the light of ***GE INDIA TECHNOLOGY CENTRE PREIVATE LIMITED v. CIT***[2]*,* Section 195(1) & 195(2) have to be read together and that the payer who considers that no withholding obligations do arise in this case u/s 195(1) as to apply u/s 195(2) of the 1961 Act seeking determination of his tax liability. Therefore, the application could not have been negatived *inter alia* on the ground of maintainability, even if the entire sum so paid was not taxable vide ***TRANSMISSION CORPORATION OF A.P. LTD., v CIT***[3]***.*** Learned Single Judge has rightly observed that application u/s 197(2) has to be made by the recipient whereas, the application u/s 195(2) has to be by the payer. A Coordinate Bench of this Court in ***CIT v. BOVIS LEND LEASE (INDIA) (P.) LTD.***[4], has held that Section 195(2) application is maintainable even if the entire sum is

[2] (2010) 10 SCC 29

[3] (1999) 239 ITR 587 (SC)

[4] (2012) 208 Taxman 168 (Kar)

not taxable and that Section 195 is not applicable to gross receipts inasmuch as, it employs the term "any other sum chargeable under the provisions of this Act" which aspect has been discussed by ***GE INDIA*** *supra*. Therefore, the direction issue the Certificate perfectly accords with the law.

5.4 The contention of the Revenue that the payments made by the Assessee-Company to Walmart Inc., do qualify as FTS and therefore would be chargeable to tax as FTS or FIS rendered by Walmart Inc., to Assessee-Company, is liable to be rejected since Walmart Inc., is a tax resident of USA and therefore, the disputed transaction shall be governed by the provisions of India-US DTAA which has legal cognition u/s 90(2); Explanation 2 to Section 9(1)(vii) of the 1961 Act is not attracted. Learned Sr. Advocate Mr.Gulati appearing for the Assessee is right in contending that in terms of Article 12 of India-US DTAA, only those payments which are made for (a) rendering technical or consultancy services and (b) making the

technical knowledge, experience, skill, know-how etc., available to the recipient, are covered within the meaning of FIS. An income can be charged to tax as FIS only if it is a service of technical or managerial nature and the service provider makes the services available to the Recipient. The expression 'make available' as employed in DTAA has been construed in a particular way. In ***CIT v. DE BEERS INDIA PVT. LTD.***[5], a Coordinate Bench has held that a technology will be considered to be "made available" only when the person requiring the service is enabled to apply for the same on his own resulting in some enduring benefit and that mere existence of the provision of the service by technical expert, would not mean that the same has been "made available" to the recipient.

5.5 Learned counsel for the Assessee is justified in telling us that in the light of Protocol to the India-US DTAA, what payment would constitute FIS i.e., "fee for included service", has been illustrated as under:

[5] (2012) 346 ITR 467 (Kar)

> *"a. It is made for rendering technical or consultancy services;*
>
> *b. Said services must make available any technical knowledge, know-how, plan, training, skill, design or process to the recipient;*
>
> *c. The recipient is enabled to use the aforementioned knowledge, know-how, plan, etc., in future independently, without support from the service provider. This means that the knowledge gained must be enduring in nature;*
>
> *d. There should be an actual transfer of technical knowledge, plan, know-how, etc., from the service provider to the recipient. Mere technical nature of the services rendered would not qualify the "make available" clause of the India-US DTAA;*
>
> *e. Day-to-day functions of the employees, not qualifying the above conditions, cannot be considered as "making available" of technical knowledge."*

The contention of the Revenue that the Assessee had failed to place all the material to demonstrate the kind of services rendered by the seconded employees were not made available and that they were not requisitioned for the purpose of training the regular employees of the Assessee, is too farfetched to gain acceptance. So is the submission that in the course of training, there would be transmission of technical knowledge, experience, skill, know-how and that would satisfy the requirement of

"make available". If that idea was lurking in the mind of the Assessing Officer, he could have called for such information from the sources that be.

5.6 The last contention of the Revenue that as to absence of power to terminate the services of the seconded employees, falsifies the existence of employer-employee relationship between the Assessee and the seconded employees, is liable to be rejected in view of what emerges from the perusal of MSA obtaining between the Assessee-Company and Walmart Inc. The terms are as under:

> *"a. the seconded employees, while on secondment, work for and on behalf and for the benefits of the Respondent;*
>
> *b. in terms of Clause 3.1 of the MSA, the Respondent is authorized to terminate the services of seconded employees in India whereas, Walmart may decide to continue their services with Walmart in US after the termination of their secondment in India;*
>
> *c. the seconded employees do not report to Walmart Inc. for their work but undertake the work on behalf of the Respondent and are answerable to the employees of the Respondent who supervise and instruct them on the work performed during the secondment period;*

d. the Respondent has the authority to take disciplinary actions against the seconded employees;

e. the seconded employees have the right to legal recourse against the Respondent in relation to payment of their salaries, terms of employment, etc., during the secondment period;

f. the seconded employees are also subject to the same working rules, labour regulations and other internal policies of the responsible as is applicable to the domestic employees;

g. the seconded employees will also be subject to deduction under Section 192 of the Act and provident fund on the salaries and benefits of such seconded employees are paid by the Respondent."

5.7 We have to keep in mind that arrangements of the kind do obtain in a *shrunk globe* and that all indicia of employer-employee relationship, which ordinarily obtain in the native Service/Industrial Jurisprudence cannot be expected in the realm of international business of the kind. If Triple Test namely (i) Direct Control, (ii) Supervision & (iii) Direction, is satisfied vide *ABBEY BUSINESS supra,* a strong case is made out as to the existence of employer-employee relationship, the absence of a few indicia notwithstanding. An argument to the contrary would

offend the stark truths of business world. Added, the assertion of the Assessee-Company that the amount is reimbursed to the Walmart after deducting the TDS from the salaries earned by the seconded employees in India, is not disputed by the Revenue. We hasten to clarify that in saying this, we are not invoking the doctrine of estoppel.

In the above circumstances, this appeal being devoid of merits, is liable to be and accordingly, dismissed, costs having been made easy.

Sd/-
(KRISHNA S DIXIT)
JUDGE

Sd/-
(G BASAVARAJA)
JUDGE

Bsv/cbc
List No.: 1 Sl No.: 7