INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1152/Del/2016
(Assessment Year: 2010-11)

DCIT, Circle-17(2), New Delhi	Vs.	Narmil Infosolutions Pvt. Ltd, C/o AAR & Associates, CA 701-702, RG Trade Tower, Netaji Subash Place, Pitampur, New Delhi PAN : AABCN9307R
(Appellant)		(Respondent)

Revenue by :	Shri J. K. Mishra, CIT DR
Assessee by:	Shri Gagan Kumar, Adv
Date of Hearing	29/01//2020
Date of pronouncement	29/05/2020

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This appeal is filed by the ld. Dy. Commissioner of Income Tax, Circle 17(2) New Delhi (the LD AO , Assessing Officer) against the order of the ld CIT (Appeals)-42, New Delhi [The LD CIT (A)] dated 17.12.2015 for the Assessment Year 2010-11, wherein the addition made by the ld AO of Rs. 70,99,99,609/- on account of capital gain, arising in the hands of the Cyprus company, on purchase of shares from it by the assessee, without deduction of tax at source, holding assessee as the Representative assessee of the Cyprus company under Section 163(1) of the Income Tax Act, 1961 (the Act), was deleted.

2. Facts of the case show that assessee is an Indian company engaged in the business of providing information technology enabled services. It filed its return of income on 15.10.2010 of loss of Rs. 25,45,732/-. During the year Vectex Limited , Cyprus company has sold 416686 shares of Unitech Info Park Ltd to Narrmil Info solutions private limited (assessee) for ₹ 7 09999609/–. Unitech Info Park Ltd was incorporated on 17 October 2005 with the main objects of real estate development. It is the developer of an

information technology software-exporting zone proposed to be developed on a parcel of land admeasuring 25.66 acres situated in Chennai. Vectex Ltd is holding more than 95% shares in that company.

3. The learned AO is of the opinion that

   a. Unitech Park Ltd owns the land admeasuring 25.66 acres in Chennai; the Cyprus Company is holding more than 95% shares in the Unitech Ltd. The value of the shares of Unitech was arrived solely based on value of land owned by Unitech Ltd. Therefore, transfer of shares of Unitech Ltd from the Cyprus Company to the Indian company resulted into effective transfer of the rights over the land. Therefore, the capital gain derived by Cyprus Company is from the alienation of an immovable property of land situated in the India and thus it is chargeable to tax in India according to article 14 of Indo Cyprus DTAA.
   b. Capital gain arising in the hands of Cyprus Company was liable to be taxed in India according to the provisions of section 5 (2) and section 9 (1) of the act.
   c. Assessee Company was required to deduct tax at source while making payments to vectex Limited under section 195 of the income tax act as according to her the transaction was chargeable to tax in India under section 4, 5 and 9 of The Income Tax Act.
   d. Therefore, Assessee Company was required to deduct tax at source while making payment of sales consideration of shares to Cyprus Company.
   e. As the assessee company has entered into a transaction by making payment of sale consideration of those shares, assessee is an agent of the Cyprus company under section 163 (1) of the act.

4. Before AO, assessee submitted that

   a. Seller of the shares is a company Incorporated in Cyprus and a tax resident of the said country.
   b. It did not have any permanent establishment or fixed place of business in India.
   c. It is merely holding shares in the Indian company that were purchased and acquired by the assessee.

d. No tax is required to be deducted u/s 195 in view of Article 14 (4) of the DTAA
e. As per that Article, capital gain on transfer/alienation of any other property other than mentioned in Article 14 (1) (2) and (3) would be taxable in Cyprus.
f. Transaction is covered u/A 14 (4) of DTAA, so it would be taxed in Cyprus, where the alienator is a resident.
g. Aassessee submitted the tax residency certificate of the seller, declaration filed by foreign company before the bank for transfer of shares to the assessee and a certificate of chartered accountant certifying that no tax is required to be deducted on payment of consideration to foreign company under section 195 of the act.

5. With respect to the valuation of the shares assessee submitted valuation reports of different chartered accountants one valuing the fair value of the shares at ₹ 1 705.37 per share and other valuable valuing 1703.92 per share. In both the valuation of the shares, the value to the fair market value of land owned by that company at Rs 1 847520000/– based on the valuation report of 25.66 acres prepared by valuer DK Nagpal and associates on 22/1/2009. In both the valuation reports, certain current assets, loans, and advances were added and current liabilities and provisions were reduced. Therefore, precisely in the valuation report the value of the land was substituted by the fair market value of the land as on the date the shares were transferred and adjusted by the book assets and liabilities. Assessee submitted that there is nothing wrong in it. That does not mean that immovable property is purchased by assessee.

6. The learned assessing officer noted that on the perusal of the above valuation of shares it is apparent that the value of the shares has been solely calculated based on the land admeasuring 25.66 acres in Chennai and therefore by transfer of shares, it resulted in effective change in controlling interest in ownership of the land. Therefore as per article 14 of the DTAA between India and Cyprus the capital gain are liable to taxed in India. Admittedly assessee did not deduct tax at any source and, therefore, he held that assessee company is clearly in default for non-deduction of tax under Section 195 of the Act. He further held that assessee has stepped

into the shoes of the Cyprus Company, therefore, assessee is held in default under Section 201(1) of the Act and as an agent under Section 163(1) of the Act. Accordingly the total income of the assessee was determined at Rs. 7,07,453/- , assessment was framed on 22.03.2013 under Section 143(3) of the Act.

7. The assessee preferred an appeal before the learned CIT (Appeals). He held that capital gain on sale of shares in the light of provision of Double Taxation Avoidance Agreement [DTAA] between India and Cyprus as per Article 14(4) could be taxed in Cyprus only and not in India. He held that appellant is a tax resident of Cyprus and, therefore, the capital gain is not chargeable to tax in India and assessee is not supposed to deduct the tax at source. Therefore, he deleted the addition. The Assessing Officer also raised an issue that the impugned shares of that company derived their value from immovable property situated in India, therefore, the sale has resulted in effective change in controlling interest and ownership of the land, therefore, also as per Article 14 such capital gain is liable to tax in India. On this issue, the ld. CIT (Appeals) held that such finding of the Assessing Officer is not supported by the Indian Income Tax Act as well as the DTAA. Assessee also contested before him that provisions of section 163 (1) of the act provides that before the person is treated as the representative assessee, a separate order under section 163 (2) of the act is mandatory. He submitted that no such order has been passed by the assessing officer and therefore the proceedings are void ab initio. The assessee relied upon the decision of the honourable Punjab and Haryana High Court in 311 ITR 266 and 87 ITR 476, wherein it has been held that the provisions of section 163 (2) are mandatory in character , therefore an order was required to be passed by the ITO declaring assessee as an 'agent' of the recipient of income. It was further stated that the order passed under section 163 of the act is also appealable under section 246A of the act and assessee has been deprived of the right to file an appeal, which is a substantive right, therefore also, the order passed by the learned assessing officer is void. Accordingly, he allowed the appeal of the assessee.

8. Thus, aggrieved by the order of the learned CIT – A, the learned assessing officer has preferred this appeal raising following grounds of appeal:-

"*1. Whether on facts and circumstances of the case and in law, the Ld. CIT (A) was justified in holding that income/gain of Rs. 70,99,99,609/- paid by the assessee to a non-resident for acquisition of shares which derive its value from 25.66 acre of land located in India was not covered u/s 195(1) of the Income Tax Act 1961 (the Act)?*

2. Whether on facts and circumstances of the case and in law, the Ld. CIT (A) was justified in holding that income/gain Rs. 70,99,99,609/- derived by the non-resident directly from the land located in India was not taxable in India ignoring Explanation 4 and 5 to section 9(1)(i) of the Act read with Article 6(1) and 1491) of the agreement between the Republic of India and the Republic of Cyprus for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on Income and on capital (the DTAA)?

3. Whether on facts and circumstances of the case and in law, the Ld. CIT (A) was justified in holding that payment made by the assessee to the non-resident in violation to the provisions of section 195 of the Act would require order u/s 163(2) of the Act even when the payer was resident in India?

4 That the order of the Ld.CIT (Appeals) is erroneous and is not tenable on facts and in law."

9. The learned Departmental Representative vehemently supported the order of the learned Assessing Officer submitting that the article 14 (4) of the DTAA does not apply to the facts of the case but article 14 (1) applies in the particular case as the gain are from the alienation of immovable property. It was further submitted that what has been transferred by the foreign company is not the shares of an Indian company but the underlying immovable property, which is situated in India. He therefore submitted that assessee should have deducted tax at source under the provisions of section 195 of the income tax act as the profit or gain arising from such alienation of immovable property is chargeable to tax in India.

10. The learned authorized representative referred to the provisions of the Double Taxation Avoidance Agreement. He submitted that that there is a change in the double taxation avoidance agreement between India and Cyprus. He submitted that in the earlier DTAA, which was in force when the transaction took place, did not provide for the chargeability of capital gain on sale of shares of a company whose underlying asset is an immovable property. He referred to the subsequent agreement and submitted that therein the above provision has been inserted in article 13 of the DTAA. He

referred to both the agreements. Therefore, according to him, there is no income chargeable to tax in India of the Cyprus Company and that particular point of time, on sale of shares by that company to the assessee, capital gain was chargeable to tax in the country of Resident of the alienator, i.e. in Cyprus. Therefore, as there is no income accruing or arising to the Cyprus Company taxable in India, as per the provisions of DTAA, there was no liability on the assessee to withhold any tax on remittance of sale consideration to Cyprus Company. Therefore, the order passed by the assessing officer was not sustainable and rightly quashed by the learned and CIT – A on this count. He further submitted the copy of the letter dated 8 March 2013 of the assessee before the Assessing Officer.

11. He further stated that in the present case an order under Section 163 of the Act holding the assessee to be an agent of a non-resident is necessary before making the assessment in the hands of the assessee. He further referred to the provisions of Section 163 of the Act and relied upon the decision of Hon'ble Bombay High Court in 141 ITR 404 (Bom.) and of Hon'ble Punjab and Haryana High Court in 311 ITR 266 (P&H). He submitted that no such orders have been passed by the Assessing Officer and for reason alone the order of the ld. AO does not stand. He therefore submitted that, the learned and CIT – A has also rightly quashed the order of the assessing officer that before making the assessee as the representative assessee under the provisions of section 163 of the income tax act, he should have passed an order holding the assessee so, after granting proper opportunity of hearing. Thus, according to him the order passed by the learned assessing officer under section 143 (3) of the act without passing such an order under section 163 of the income tax act is not sustainable.

12. He further resident the new dimension to the argument and submitted that in the present case the assessment has been made by the learned assessing officer on the assessee by making the addition of the above sum. He submitted that such addition is not warranted because it is not the income of the assessee and therefore the order passed in the name of the assessee is not valid. He submitted that the AO should have passed a separate order assessing the income of the non-resident treating the assessee as a representative assessee after crossing the threshold provided under section

163 of the act. He submitted that there is a basic difference between the income of the assessee as a company and the income being assessed in the hands of the assessee as a "representative assessee" of a non-resident. Therefore, he also submitted that the order as such is invalid on that count also.

13. We have carefully considered the rival contention and perused the orders of the lower authorities. The brief facts of the case have already been succinctly mentioned herein above. The only issue before us is whether the sale of shares by a Cyprus company to the assessee of an Indian company, who was holding a technology Park [immovable property] as only asset, is taxable in India in view of the Double Taxation Avoidance Agreement between India and Cyprus.

14. There is no dispute that the seller of the share is a resident of Cyprus, holding necessary tax residency certificate, therefore, the recipient of the income is entitled to take the benefit of the Double Taxation Avoidance Agreement between India and Cyprus. The AO and the assessee both agree that under the Indian income tax act, the transaction is taxable in India by virtue of the provisions of section 5 (2) and 9, but taxability is to be determined as per DTAA.

15. As the relevant assessment year involved is AY 2010 – 11, India Cyprus DTAA vide *Notification No. G. S. R. 805(E), dated December 26, 1995* (1996) [218 ITR (st) 0070] having entry in to force 21st December 1994 is applicable which provides as under :-

Article 14
Capital gains

1. Gains derived by a resident of a Contracting State from the alienation of immovable property, referred to in Article 6, and situated in the other Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other

Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base, may be taxed in that other State.

3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. Gains from the alienation of any property other than that mentioned in paragraphs 1, 2 and 3 shall be taxable only in the Contracting State of which the alienator is a resident.

16. The Cyprus Company has sold the shares of an Indian company. The impugned asset sold by the assessee does not fall under the article 6 (2) of the Double Taxation Avoidance Agreement as 'immovable property', therefore article 14 (1) does not apply to the transaction. Further, as the Cyprus entity does not have any permanent establishment or fixed base, the provisions of article 14 (2) does not apply. Further it is not the alienation of any ship or aircraft or movable property pertaining to that, therefore article 14 (3) also do not apply. For this reason that the transaction falls under article 14 (4) of the double taxation avoidance agreement as the impugned property from which the capital gain has arose is shares of an Indian company. Therefore any gain arising from the alienation of property i.e. shares of an Indian company, shall be chargeable to tax only in the contracting state in which the alienator is resident. Here the alienator is a Cyprus resident. Therefore such gain is chargeable to tax only in Cyprus.

17. Subsequently new double taxation avoidance agreement between India and Cyprus has been entered into as per *NO. SO 64(E) [NO.3/2017 (F.NO.504/05/2003-FTD-I)], DATED 10-1-2017 where in article 14 provides as under*

ARTICLE 13

CAPITAL GAINS

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and

situated in the other Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.

3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State of which the alienator is a resident.

4. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State.

5. Gains from the alienation of shares other than those mentioned in paragraph 4 in a company which is a resident of a Contracting State may be taxed in that State.

6. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4 and 5, shall be taxable only in the Contracting State of which the alienator is a resident.

18. Thus, the new double taxation avoidance agreement has come into force much letter then the transaction took the place. In the new double taxation, avoidance agreement there is a provision as per article 13 (4) wherein now such transaction, probably is chargeable to tax in India. However, as the amended double taxation avoidance agreement is subsequent to the date of transaction it does not apply.

19. In view of above facts, we find no infirmity in the order of the learned that CIT – A in holding that the income of the Cyprus resident seller is not chargeable to tax in India, as per the double taxation avoidance agreement prevailing at that time, no tax was required to be withheld by the assessee. In view of this, we dismiss ground number [1] & [2] of the appeal of the AO.

20. As we have already held that the income of the Cyprus entity is not chargeable to tax in India, applicability of the provisions of section 163 of the income tax act becomes merely academic in nature. Therefore, it is dismissed. Accordingly, ground number [3] of the appeal is dismissed.

21. This order is pronounced beyond the period of 90 days from the date of hearing because of “abnormal “ and not ordinary situations.

Order pronounced in the open court on 29/05/2020.

Sd/-	Sd/-
(H.S.SIDHU)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 29/05/2020
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	29.05.2020.
Date on which the typed draft is placed before the dictating member	29.05.2020.
Date on which the typed draft is placed before the other member	29.05.2020.
Date on which the approved draft comes to the Sr. PS/ PS	29.05.2020.
Date on which the fair order is placed before the dictating member for pronouncement	29.05.2020.
Date on which the fair order comes back to the Sr. PS/ PS	29.05.2020.
Date on which the final order is uploaded on the website of ITAT	03.06.2020.
date on which the file goes to the Bench Clerk	03.06.2020.
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	