IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.974 OF 2014

Ingram Micro Inc.)
1600 E. St. Andrew Place,)
P.O. Box 25125,)
Santa Ana CA 92799-5125, USA) ….Petitioner

V/s.

1. The Income Tax Officer,)
(International Taxation) – TDS – 3)
R.No.137, 1st Floor, Scindia House,)
Ballard Pier, N.M. Marg,)
Mumbai – 400 038)

2. The Union of India)
Through the Secretary, Department of)
Revenue, Ministry of Finance, North Block,)
New Delhi – 110 001) ….Respondents

Mr. J.D. Mistri, Senior Advocate a/w. Mr. Madhur Agrawal i/b. Mr. Atul K. Jasani for petitioner.
Mr. Suresh Kumar for respondents.

CORAM : K.R. SHRIRAM &
N.J. JAMADAR, JJ.
DATED : 26th FEBRUARY 2022

ORAL JUDGMENT : (PER K.R. SHRIRAM, J.)

1 By this petition, that came to be admitted on 28th July 2014, petitioner is challenging the jurisdiction of respondent no.1 to issue notice under Section 201 of the Income Tax Act, 1961 (the Act) purporting to treat petitioner as an assessee in default and the order dated 10th December 2013 passed by respondent no.1 (the impugned order) holding that respondent no.1 has valid jurisdiction to issue notice under Section 201 and Section

201(1A) of the Act for the alleged non deduction of tax at source on alleged purchase of shares of a company incorporated in Bermuda.

2 Though the notice dated 25th March 2010 and order dated 10th December 2013 impugned in this petition have been challenged on various grounds, the primary ground (even for a moment other grounds are not pressed) is that petitioner was not liable to deduct any tax because petitioner did not make any payment to anybody and, therefore, petitioner cannot be considered to be in breach of the obligation under Section 195 of the Act and consequently, the notice under Section 201 and Section 201(1A) of the Act is not maintainable.

3 Section 195 of the Act says

> ***Other sums.***
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> ***195.*** *(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) 92[or section 194LD] or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :*
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Therefore, Section 195 mandates “any person responsible for paying to a non-resident” any sum chargeable under the provisions of this Act shall, at the time of credit of such income to the account of the payee or at the time of payment thereof, whichever is earlier, to deduct income tax thereon at the rates in force.

It is petitioner's case that it has not paid any amount to any party under this transaction and therefore, there was no occasion to deduct any income tax. Was petitioner liable to deduct tax is the moot question. For this we need to consider the facts of the case.

4 The facts in brief are as under :

Petitioner is a company incorporated in the United States of America and is engaged in the business of distribution of technology products. Petitioner had worldwide operations. Petitioner, which is referred to as Ingram Group, consists of several companies throughout North America, Europe, Middle East, Africa, Latin America and Asia Pacific regions, which supported global operations through an extensive sales and distribution network. Ingram Micro Asia Holdings Inc. (IMAHI), a company incorporated in the United States of America, and a subsidiary of petitioner, held indirectly a fully owned subsidiary in India by the name Ingram Micro India Private Ltd. (IMIPL).

5 The Techpac Group was a technology distributor and a leading technology sales, marketing and logistics group in the Asia Pacific region and had an extensive spread over countries such as Australia, New Zealand, Singapore, Malaysia, Thailand, India and Hong Kong.

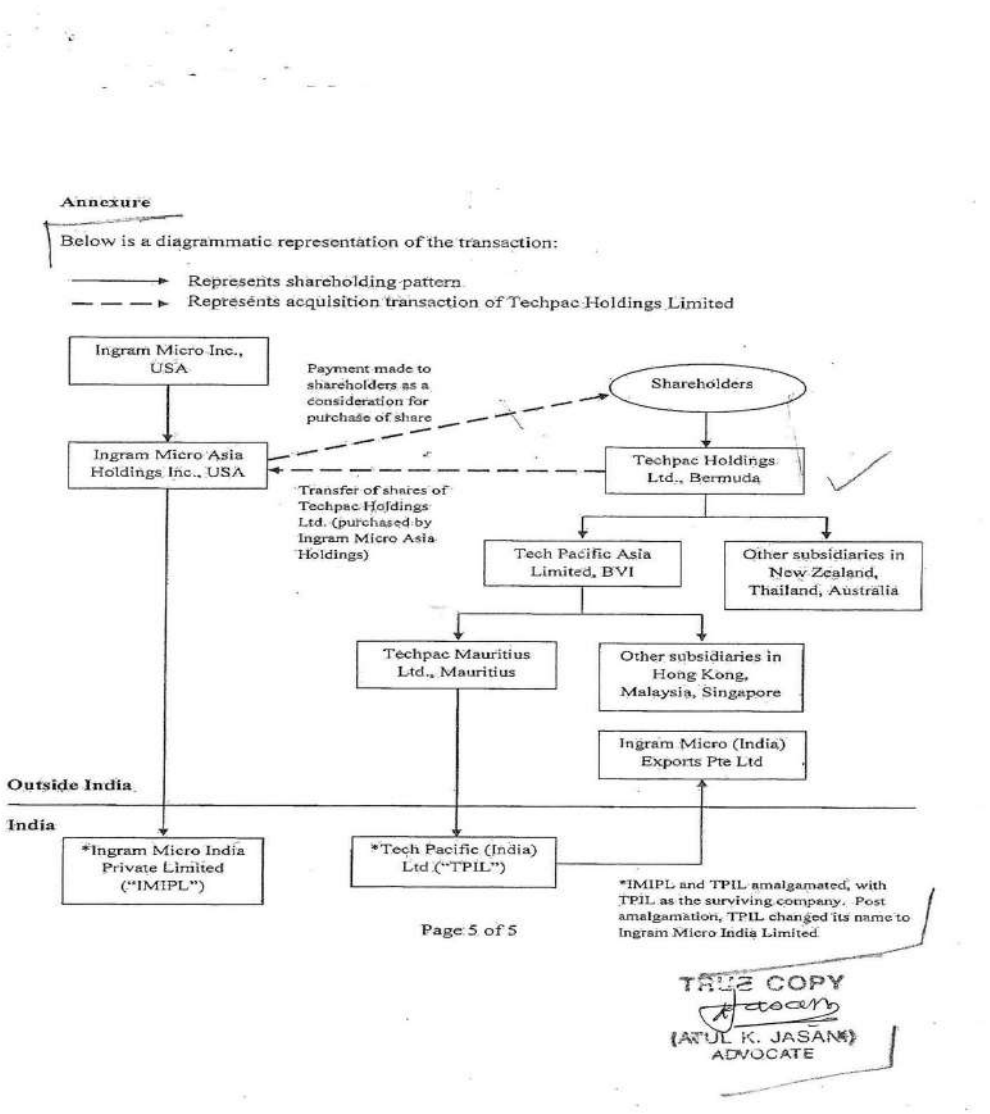
Various non resident shareholders that included private equity funds, viz., CVC Capital Partners Asia Pacific LP, Asia Investors LLC,

Hagemeyer Caribbean Holding NV, held shares in a company Techpac Holdings Ltd. (THL), registered in Bermudas. There were a few resident shareholders as well. THL, under its fold, held several operating and non operating companies in Australia, New Zealand and Thailand and a holding company named Tech Pacific Asia Ltd. (TPAL), a company incorporated in the British Virgin Islands. TPAL, in turn, held operating and non operating companies in Mauritius, Hong Kong, Malaysia and Singapore. The holding subsidiary of TPAL in Mauritius was called Techpac Mauritius Ltd. (TML). TML had a fully owned operating subsidiary in India by the name Tech Pacific (India) Ltd. (TPIL). TPIL had a fully owned subsidiary in Singapore called Tech Pacific India Exports Pte. Ltd. (TPIEPL). All these companies, which were about 20, spread over 13 countries, are collectively referred to as Techpac Group.

6 Circa 2004, IMAHI acquired the shares of THL, the company incorporated in Bermudas, from its existing shareholders. Petitioner's role in this transaction was that it guaranteed the payment of the sale consideration by IMAHI under the Share Purchase Agreement (SPA) to the sellers, i.e., the existing shareholders of THL. The guarantee never came to be invoked because IMAHI discharged its obligation under the SPA to the sellers and accordingly, petitioner stood discharged of its obligations as a guarantor under the said SPA.

7 Pursuant to the acquisition, the Indian entity of Ingram Group, i.e., IMIPL, was merged into the Indian entity of the Techpac Group, viz., TPIL. Subsequent to merger, the name of TPIL was changed to its present name, viz., Ingram Micro India Ltd. (IMIL).

8 Before we proceed further, it will be useful to scan and reproduce a diagrammatic representation of the transaction to understand the matter easily :



9 On or about 17th September 2007, during the course of search and seizure proceedings at the premises of IMIL, the annual report of petitioner for the year 2005, among other things, was found. The annual report referred to the acquisition of shares of THL. Seized with this information, respondent no.1 issued a notice dated 25th March 2010 under Section 201 of the Act to petitioner calling upon petitioner to show cause why it should not be treated as an assessee in default of its obligation to deduct tax from the payments made for the purchase of shares during the financial year 2004-2005. The notice was followed by a letter dated 28th June 2010 by which respondent no.1 clarified that the transaction being looked into was the foreign remittance to petitioner.

10 In response, by its letter dated 8th July 2010, petitioner explained the transaction of purchase of shares of THL by IMAHI and the role of petitioner being only a guarantor in the transaction. Therefore, petitioner requested respondent no.1 to discharge the impugned notice. Subsequently, based on discussions with respondent no.1 in his office, where respondent no.1 raised certain further queries, petitioner submitted a further letter dated 29th July 2010 answering those queries. Thereafter, as there was not much heard from respondent no.1, petitioner fearing an adverse order from respondent no.1, filed a Writ Petition No.411 of 2011 in this Court challenging the impugned notice and the jurisdiction of

respondent no.1 to initiate proceedings under Section 201(1) and 201(1A) of the Act. This Court by an order dated 30th November 2011 in Writ Petition No.411 of 2011, relying on the decision dated 23rd January 2009 of the Apex Court in the case of *Vodafone International Holdings B.V. V/s. Union of India* [petition for Special Leave to Appeal (Civil) 464 of 2009], directed respondent no.1 to determine the jurisdictional issue as a preliminary issue keeping all rights and contentions of parties open and disposed the petition.

11 Thereafter, petitioner received notices from respondent no.1 asking petitioner to show cause as to why an order should not be passed holding that respondent no.1 has jurisdiction to initiate proceedings under Section 201 of the Act against petitioner. Respondent no.1 also asked for further information and details during the course of the proceedings to determine whether respondent no.1 had jurisdiction to initiate proceedings under Section 201 of the Act. Various submissions were made before respondent no.1 giving details called for by respondent no.1 and explaining why provision of Section 201 is not attracted in the case of petitioner and why respondent no.1 had no jurisdiction to pass any order under Section 201 of the Act. Respondent no.1, by an order dated 10th December 2013, rejected the contention of petitioner and held that he had jurisdiction to initiate proceedings under Section 201 of the Act to treat petitioner as an

assessee in default for alleged non-deduction of tax on the purchase of shares of THL. It is against this order that petitioner has approached this Court by way of this petition.

12 From the facts narrated above, there is nothing to indicate that petitioner made any payment to anyone. The entire approach in the impugned order is that petitioner made the payment through IMAHI. There is no evidence to that effect. The Assessing Officer is relying on the annual reports of petitioner group where there is a mention that the group has acquired Techpac Group. The Assessing Officer's reliance on the Ingram Group's annual report of 2005 to conclude that it was petitioner who acquired THL is misplaced. A copy of the annual report for 2005 has been placed before us during the hearing. It only indicates what the group has achieved during the relevant period and it cannot, by any stretch of imagination, be held that it was petitioner who had purchased and paid for the shares of THL. If Assessing Officer's logic has to be applied, then the ultimate beneficiary are the shareholders of petitioner and not petitioner and hence, no liability can be fastened on petitioner. Respondent no.1 has totally failed to appreciate that the comments on the annual accounts are with respect to the Ingram Group and not restricted to the activity of petitioner and we say this having perused a copy of the annual report of Ingram Group for the relevant year.

13 The undisputed fact is that petitioner is not the purchaser of shares of THL. Respondent no.1 has failed to appreciate that the shares have been purchased by IMAHI, a wholly owned subsidiary of petitioner and not by petitioner and, therefore, the question of Section 195 of the Act being applicable to petitioner would not arise. Respondent no.1 has proceeded on an erroneous basis that petitioner had acquired the shares of THL through its subsidiary IMAHI without even giving any reason for such a finding. Respondent no.1 has not appreciated or understood that a subsidiary company is an independent entity different from the parent company and actions and transactions of the subsidiary are not transactions of the holding company through the subsidiary.

The fact is the shares have been acquired by IMAHI and not by petitioner through its subsidiary. The SPA has been entered into by IMAHI as the purchaser and not on behalf of petitioner. A copy of the SPA has been provided to respondent no.1 and also annexed to the petition. SPA shows petitioner is the guarantor of the payment to be made by IMAHI and not the purchaser. Respondent no.1 has failed to appreciate that purchaser himself cannot be a guarantor also and that itself indicates that petitioner is not the purchaser of the shares of THL. Respondent no.1 has also not produced any evidence or referred to any document to even indicate that petitioner has paid any amount or can be even regarded as person responsible for paying

any sum to a non resident (or a foreign company) chargeable under the provisions of the Act. Respondent no.1 has failed to appreciate that tax is required to be deducted by the person paying any sum or a person responsible for paying any sum to a non resident which is chargeable to tax under the Act and, therefore, there is no question of applicability of Section 195 of the Act to petitioner.

14 Respondent no.1 has gone on an erroneous presumption that petitioner was required to deduct tax at source while making payment under Section 195 of the Act and since petitioner has filed to deduct tax, it is deemed to be assessee in default as per Section 201(1) of the Act and liable to pay tax it had defaulted to deduct while making payment. The fact is petitioner has not made any payment. The obligation under Section 195 of the Act is on a person responsible for paying to a non-resident any sum chargeable under the provisions of this Act and the said person, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, shall deduct income tax thereon at the rates in force. When petitioner has not made any payment and it is not respondent's case that petitioner had directly made any payment, petitioner cannot be the person responsible for deduction of tax. Respondent's assumption that petitioner being the ultimate beneficiary of the acquisition of the shares

ought to have deducted the tax at source on the payments made for the acquisition of shares of THL is not correct. If we apply the logic of respondent no.1, as stated earlier also, then the ultimate beneficiary are the shareholders of petitioner and not petitioner and hence, the liability can never be fastened on petitioner. This is *dehors* the fact that even if petitioner is ultimate beneficiary of the transaction, then also it does not follow that petitioner was required to deduct tax at the time of acquisition of shares of THL by IMAHI.

15 At the cost of repetition, as Section 195 is applicable only to a person who is responsible for paying to deduct tax at the time of credit to the account of the payee or at the time of payment and petitioner did not make any payment to THL, there is no obligation on petitioner to deduct tax at source. Respondent's arguments that petitioner had made payment through IMAHI is also not acceptable because there is no evidence that petitioner made any payment through IMAHI. The Section is applicable to a person who is responsible for paying.

16 In these facts and circumstances, show cause notice dated 25th March 2010 as well as order dated 10th December 2013 have to be quashed and set aside.

17 In view of this conclusion on the non-applicability of Section 195 of the Act to petitioner, we do not see any reason why we should deal

with the other grounds.

18 Petition is allowed and accordingly disposed in terms of prayer clause – (a), which reads as under:

> *(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of petitioner's case and after examining the legality and validity thereof to quash and set aside the Impugned Notice dated 25th March 2010 being Exhibit "C" hereto and the Impugned Order dated 10th December 2013 being Exhibit "L" hereto.*

(N.J. JAMADAR, J.) (K.R. SHRIRAM, J.)