



# SATURDAY INTERNATIONAL TAX GYAN !!!

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## SITG No. 301

LinkedIn Technology Information  
(P.) Ltd.  
v.  
PCIT

**Whether 100% Disallowance under Section 40(a)(i) violates the Non-Discrimination Clause of India-USA DTAA?**

14.03.2026



[2026] 182 taxmann.com 472 (Delhi - Trib.)

Jain Shrimal & Co.

## Facts of the Case

- ❖ The assessee, LinkedIn Technology Information (P.) Ltd., was engaged in providing marketing and customer support services to LinkedIn Singapore Pte. Ltd. and contract research and development services to LinkedIn Ireland. The services were rendered at a predetermined mark-up basis.
- ❖ The assessee filed its return of income declaring total income of Rs.85.42 crore. The case was selected for scrutiny and the assessment was completed under section 143(3) accepting the returned income.
- ❖ Subsequently, the assessment was reopened under section 147 based on information that the assessee had made foreign remittances towards FTS/FIS amounting to Rs.8.61 crore to LinkedIn Corporation and Rs.53.95 lakh to HireRight LLC without withholding tax.
- ❖ In the reassessment order, the Ld. AO disallowed **30% of the total remittances of Rs.17.76 crore** under section 40(a)(ia). Later, the Principal Commissioner of Income Tax invoked revision under section 263, holding that the AO should have disallowed **100% of the remittance of Rs.9.15 crore** under section 40(a)(i)

## Assessee's Contention

- ❖ The assessee contended that the reassessment order passed by the Ld. AO was neither erroneous nor prejudicial to the interests of the revenue, which are mandatory conditions for invoking section 263.
- ❖ It was submitted that the AO had already made a disallowance of 30% of the remittances for non-deduction of TDS. This rate of disallowance was consistent with the treatment applicable to similar payments made to residents under section 40(a)(ia).
- ❖ The assessee further argued that directing a 100% disallowance for payments to non-residents would result in discriminatory treatment compared to residents, contrary to Article 26(3) of the India-USA DTAA, which mandates non-discrimination.
- ❖ Reliance was placed on judicial precedents including the Delhi High Court ruling in CIT v. Herbalife International India (P.) Ltd [2016] 69 taxmann.com 205/240 Taxman 21/384 ITR 276 (Delhi), which held that discriminatory consequences in deductibility conditions violate the treaty's non-discrimination clause.

## Revenue's Contention

- ❖ The Revenue contended that the payments made by the assessee to LinkedIn Corporation and HireRight LLC constituted Fees for Technical Services and were made without deduction of tax at source.
- ❖ Accordingly, the provisions of section 40(a)(i) were applicable, which provide for 100% disallowance of such payments where TDS has not been deducted on payments made to non-residents.
- ❖ The Ld. DR argued that the AO had incorrectly restricted the disallowance to 30%, whereas the correct legal position required full disallowance of the relevant remittances.
- ❖ It was also contended that the non-discrimination clause under the DTAA should not be interpreted to restrict the statutory consequences under domestic TDS provisions.

# Legal provisions

## Article 26 of India-USA DTAA

### NON-DISCRIMINATION

3. Except where the provisions of paragraph 1 of article 9 (Associated Enterprises), paragraph 7 of article 11 (Interest), or paragraph 8 of article 12 (Royalties and Fees for Included Services) apply, interest, royalties, and other disbursements paid by a resident of a Contracting State to a resident of the other Contracting State shall, for the purposes of determining the taxable profits of the first-mentioned resident, **be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State.**

### Section 90(2) of the Act:

Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

# Legal provisions

## **Section 40(a)(i):**

**40(a)(i):** any interest, royalty, fees for technical services or other sum chargeable under this Act, which is payable **outside India** or in India to a **non-resident**, not being a company or to a **foreign company**, on which **tax is deductible at source under Chapter XVII-B** and such tax has **not been deducted** or, after deduction, **has not been paid** on or before the due date specified in sub-section (1) of section 139:

**Provided that** where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

## **Section 40(a)(ia):**

**40(a)(ia):** thirty per cent of any sum payable to a resident, on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139, shall not be allowed as a deduction in computing the income chargeable under the head 'Profits and gains of business or profession'.

**Provided that** where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, thirty per cent of such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."

## **Section 263:**

**263(1):** The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

# Ruling

## The Hon'ble ITAT has ruled in favour of the Assessee:-

- ❖ The Hon'ble Tribunal examined whether the order of the AO could be revised under section 263. It observed that invocation of section 263 requires satisfaction of two conditions: the order must be **erroneous** and also **prejudicial to the interests of the revenue**.
- ❖ The Tribunal noted that although the AO may have erred in computing the quantum of remittance considered for disallowance, the **rate of disallowance at 30%** was consistent with the treatment of payments to residents under section 40(a)(ia).
- ❖ It held that applying **100% disallowance under section 40(a)(i) for non-resident payments**, while only **30% disallowance applies to resident payments**, results in less favourable treatment and violates the **non-discrimination clause under Article 26(3) of the India-USA DTAA**.
- ❖ Since the AO had restricted the disallowance to 30%, the Tribunal held that the revenue had not suffered any prejudice. Therefore, the jurisdictional requirement for section 263 was not satisfied, and the **revision order of the PCIT was quashed**.

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## CASE SUMMARY: LINKEDIN TECHNOLOGY INFORMATION (P.) LTD. vs. PCIT (DELHI) | AY 2018-19



### ISSUE



WHETHER DISCRIMINATORY DISALLOWANCE FOR NON-RESIDENTS (100%) VS. RESIDENTS (30%) IS VALID, VIOLATING INDIA-USA DTAA

### KEY PROVISIONS

1.



**SECTION 40(A)(i) | 100% DISALLOWANCE FOR NON-RESIDENTS**

2.



**SECTION 40(A)(ia) | 30% DISALLOWANCE FOR RESIDENTS**

3.



**ARTICLE 26(3) INDIA-USA DTAA | NON-DISCRIMINATION CLAUSE**

### ANALYSIS



**Assessee** made foreign payments to non-residents (LinkedIn Corp & HireRight LLC) without TDS.



**AO's Original Order:** Disallowed 30% of remittances (applying resident-like rule for default).



**PCIT invoked Sec 263:** Claimed full 100% disallowance due for payments to non-residents.



**ITAT Finding:** Clear disparity between non-residents (100%) and residents (30%).



**Treaty Overrides Act:** DTAA Non-Discrimination Clause (Art 26(3)) must prevail over domestic tax law.



**Precedent Followed:** Relied on high court precedents (e.g., Herbalife casa) establishing treaty supremacy in non-discrimination.



**Result:** Discriminatory treatment of non-residents (higher disallowance) held invalid.

### VERDICT



**PCIT ORDER QUASHED. DISALLOWANCE RESTRICTED TO 30%. AO'S ACTION VALID.**



Tribunal finds AO's order not prejudicial to revenue

ITAT Delhi Bench D | Decided 09.11.2023 | Appeal Allowed

# Our Comments

- ❖ This ruling highlights the significance of the **non-discrimination clause under Article 26(3) of the India-USA DTAA**. Under the Income-tax Act, section 40(a)(i) provides for **100% disallowance** of payments made to non-residents where TDS is not deducted, whereas similar payments to residents attract **30% disallowance under section 40(a)(ia)**. Such a difference in the quantum of disallowance can lead to **unequal tax consequences for comparable transactions**.
- ❖ The Tribunal held that applying 100% disallowance in the case of payments to non-residents would result in **less favourable treatment**, thereby triggering the non-discrimination protection under the tax treaty. Accordingly, restricting the disallowance to **30% brings parity between payments made to residents and non-residents**.
- ❖ The decision also reiterates that **revision under section 263 can be exercised only when an order is both erroneous and prejudicial to the interests of the revenue**, which was not satisfied in the present case.

# Our Comments

- ❖ India has a **Non-Discrimination Clause** in its DTAA with the following countries, which provides similar protection against 100% disallowance under Section 40(a)(i) — **USA (Art. 26), Japan (Art. 24), Germany (Art. 24), France (Art. 24), Netherlands (Art. 24), Finland (Art. 24), Hungary (Art. 24), Luxembourg (Art. 24)** and **Switzerland (Art. 25)**. Accordingly, where payments are made to residents of these countries without deduction of TDS, the disallowance should be restricted to **30%** on par with Section 40(a)(ia), and a 100% disallowance would be discriminatory and violative of the respective treaty provisions.

<b>Section/Article</b>	Article 26(3) of DTAA Section 40(a)(i), Section 40(a)(ia), Section 263 of the Income Tax Act
<b>DTAA/Country</b>	India-USA DTAA
<b>Court</b>	ITAT Delhi
<b>Date of decision</b>	09-01-2026

**Note:** Case law name in **Red**- in favor of the revenue, **Green**-In favor of the Assessee,  
**Orange** = Partial



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