IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH, NEW DELHI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

ITA No. 2492/DEL/2024 [A.Y 2018-19]

LinkedIn Technology Information Pvt Ltd 16A/20, WEA Main Ajmal Khan Road Anand Parbat, S.O. Central, Delhi	Vs.	The P.C.I.T Delhi - 4

PAN – AABCL 7284 P

(Applicant) (Respondent)

Assessee By : Shri Sriram Seshadri, CA
Ms. Riddhi Maru, CA

Department By : Shri Nethrapal, CIT-DR

Date of Hearing : 15.10.2025
Date of Pronouncement : 09.01.2026

ORDER

PER NAVEEN CHANDRA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the PCIT, Delhi – 4, dated 29.03.2024 pertaining to A.Y 2018-19.

2. The grounds of the assessee are:

Ground No. 1 - Order passed under section 263 of the Act is bad in law and liable to be quashed.
On the facts and in the circumstances of the case and in law, the Order passed by the Learned Principal Commissioner of Income-tax ('Ld. Pr. CIT") under section 263 of the Act is bad in law, void ab initio, without jurisdiction and hence, liable to be quashed.
The appellant submits that the main body of the impugned Order refers to the assessment order dated 7 April 2021 passed under section 143(3) of the Act as the order sought to be revised. However, para 5 and para 8 of the impugned Order refers to the reassessment order dated 28 March 2023 passed under section 147 read with section 144B of the Act as the order sought to be revised.
Without prejudice to the above, the appellant submits that reassessment order dated 28 March 2023 passed by the Assessment Unit, Income Tax Department ('AO') under section 147 read with section 144B of the Act, itself is bad in law and void ab initio. Therefore, the consequent revisionary proceedings and the impugned Order passed by the Pr. CIT under section 263 of the Act to revise such a non-est reassessment order is also bad in law and without jurisdiction.
The Appellant prays that the impugned Order, passed under section 263 of the Act be held as bad in law, void ab initio and hence, liable to be quashed.

2. Ground No. 2 - Incorrect assumption of jurisdiction under section 263 of the Act without satisfying the twin conditions of the order being erroneous and prejudicial to the interests of the revenue.
2.1. On the facts and in the circumstances of the case and in law, without prejudice to the legal position that the underlying payments are not subject to deduction of tax under section 195 of the Act and consequently, outside the scope of disallowance under section 40(a)(i) of the Act, assuming without admitting

that disallowance provision is applicable, the Ld. Pr. CIT has erred in invoking the revisionary jurisdiction under section 263 of the Act as the order sought to be revised is neither erroneous nor prejudicial to the interest of the revenue.

2.2. On the facts and in the circumstances of the case and in law, the Ld. Pr. CIT erred in directing the tax officer to disallow 100% instead of 30% of the payments made by the appellant to LinkedIn Corporation and HireRight LLC on account of non-deduction of tax, without considering the provisions of Article 26(3) of the India-USA tax treaty.

2.3. Without prejudice to ground no. 2.2 above, on the facts and in the circumstances of the case and in law, the Ld. Pr. CIT should not have exercised his jurisdiction under section 263 of the Act, as the reassessment order is in line with accepted legal position and reflects one of the possible views.

2.4. On the facts and in the circumstances of the case and in law, the Ld. Pr. CIT's direction to disallow 100% instead of 30% of the payments made by the appellant to LinkedIn Corporation and HireRight LLC are violative of the non-discrimination provisions under Article 26(3) of the India-USA tax treaty.

The Appellant prays that the impugned Order passed under section 263 of the Act, to revise the order, which is neither prejudicial nor erroneous, and being violative of the provisions of Article 26(3) of the India-USA tax treaty, should be treated as bad in law and is liable to be quashed.

The Appellant craves leave to add to, alter, amend, delete, modify or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.

The Appellant prays that appropriate relief be granted based on the above grounds of appeal and the facts and circumstances of the case.

3. The assessee has not pressed ground no 1, hence the same is dismissed as not pressed.

4. The sum and substance of the grievance of the assessee thus, is that the PCIT erred in assuming jurisdiction u/s 263 of the Act as the assessment order is neither erroneous nor prejudicial to the interest of the Revenue. Representatives of both the sides were heard at length. Case records carefully perused. Relevant documentary evidence brought on record duly considered in light of Rule 18(6) of the ITAT Rules.

4. Brief facts of the case are that the assessee is engaged in the business of providing marketing and customer support services to LinkedIn Singapore Pte Ltd., a subsidiary of the assessee. The assessee also provides contract research and development services to LinkedIn Ireland Unlimited Company. The said services are being provided to both the parties at a pre-determined mark-up.

5. The assessee filed its Return of Income on 30.11.2018 declaring a total income of Rs. 85,42,52,880/-. The case was selected for Complete Scrutiny under CASS and assessment was completed under section 143(3) r.w.s 143(3A) and 143(3B) of the Act on 07/04/2021, accepting the

returned income of Rs. 85,42,52,880/-. Subsequently, the assessment was reopened u/s 147 of the Act on the basis of information that the assessee company has made foreign remittances as FTS/FIS of the amount of Rs.8,61,10,484/- and foreign remittance as FTS of Rs.9,15,05,365/- without withholding tax. Thereafter, reassessment order was passed for A.Y. 2018-19 on 28.03.2023 under section 147 r.w.s 143(3A) & 143(3B) of the Income tax Act, 1961, adding an amount of Rs 5,32,84,755/- which is equal to 30% of total remittance of Rs 17,76,15,849/-.

6. In the proceeding u/s 263 before the PCIT, the assessee explained that during the impugned year, the assessee has made remittance to Linkedin Corporation of Rs 8,61,10,434/- and to HireRight LLC of Rs 53,94,881/- totaling to Rs 9,15,05,365/-. The assessee submitted that the Assessment Unit (AU) has considered disallowance of 30% of Rs. 17,76,15,849/- instead of Rs. 9,15,05,365/- in the reassessment order demonstrating that there was a double disallowance of Rs.8,61,10,434/.

7. The PCIT, Delhi-4, vide his order u/s 263 dated 29.03.2024, accepted that there is a double disallowance of Rs. 8,61,10,434/-. The PCIT however, held that in so far as remittance to Linkedin Corporation

of Rs 8,61,10,434/- and to HireRight LLC of Rs 53,94,881/- totaling to Rs 9,15,05,365/- is concerned, the same are FTS on which TDS should have been made @100% u/s 40(a)(i) instead of 30% u/s 40(a)(ia). The PCIT therefore held that the reassessment order u/s 147 dated 28.03.2023 is erroneous and prejudicial to the interest of the Revenue on the ground that the AO should have disallowed 100% of remittance of Rs 9,15,05,365/- u/s 40(a)(i) of the Act instead of 30% disallowance u/s 40(a)(ia) and set aside the reassessment order to the AO. Aggrieved the assessee is before us against the order of PCIT.

8. Before us, the ld AR of the assessee placed the order u/s 147 r.w. 263 r.w.s.144B of the Act dated 14.02.2025 to show that the AO did not consider the amount of Rs 8,61,10,434/- remitted to Linkedin Corporation for disallowance u/s 40(a)(i) on the ground that the DRP vide its order dated 19.01.2025 in the case of Linkedin Corporation for AY 2018-19, held the payment received from the assessee as non-taxable being cost-to cost reimbursement. The AO, however considered the amount remitted to HireRight LLC of Rs 53,94,881/- as FTS and disallowed 100% of the same u/s 40(a)(i) of the Act.

9. The issue before us for adjudication is therefore whether the PCIT was correct in law to set aside the reassessment order u/s 147 dated

28.03.2023 as erroneous and prejudicial to the interest of the Revenue on account of the fact that the AO should have disallowed 100% of Rs 9,15,05,365/- including remittance of Rs 53,94,881/- u/s 40(a)(i) of the Act instead of 30% disallowance.

10. The ld AR of the assessee further referred to the Article 26(3) of the India-USA DTAA and submitted that only 30% of disallowance can be made u/s 40(a)(i) and relied on the decision of Delhi High Court in the case of ***CIT Vs Herbalife India P Ltd*** (2016) 69 taxmann.com 205(Delhi) and ***Mitsubishi Corporation India Pvt. Ltd.*** [TS-106-HC-2024 (DEL)] for the proposition that provisions of 100% disallowance in section 40(a)(i) is violative of Article 26(3) of the DTAA.

11. Per contra, the ld DR vehemently argued that the remittance made by the assessee to Linkedin Corp and HireRight LLC was towards FTS and the AO's order u/s 147 was clearly erroneous and prejudicial to the interest of the revenue as he had made disallowance @30% instead of disallowance @100% u/s 40(a)(i). The ld DR submitted that discriminatory clause of DTAA should not apply to TDS.

12. We have heard the rival submissions and perused the materials on record. The issue now that is to be decided is whether the order under

section 263 of the PCIT is valid in law. We have seen as above that the AO under section 147 of the act has considered remittance of an amount of ₹17,76,15,849/- for disallowance. This aspect of the AO's order is clearly erroneous as accepted by the PCIT himself who held that there is a double disallowance and only remittance to Linkedin Corporation of Rs 8,61,10,434/- and to HireRight LLC of Rs 53,94,881/- totaling to Rs 9,15,05,365/-, qualifies for disallowance @ 100% u/s 40(a)(i) of the Act. For the PCIT however, to assume jurisdiction under section 263 of the Act, the PCIT has to show that the order of the AO is prejudicial to the interest of the revenue as well. Both the condition of AO's order being erroneous and the same being prejudicial to the interest of revenue has to be established cumulatively. We find that though the AO's order is erroneous as far as quantum for disallowance is concerned, we have to examine whether the rate of disallowance @30% taken by the AO is prejudicial to the interest of the revenue.

13. The issue of disallowance u/s 40(a)(i) @100% in juxtaposition to the non-discrimination clause under Article 26(3) of the India-USA DTAA, is dependent on the fact whether the conditions for disallowing an expense are applied similarly to both residents and non-residents and the judicial interpretation which holds that where the provisions of Income Tax Act are found to be discriminatory, it is the DTAA provision

which would prevail over the Income Tax Act. Historically, the original provisions of section 40(a)(i) provided for 100% disallowance of payment made to non-resident, without making TDS whereas no such disallowance was contemplated for payments made to a resident without TDS. The amendment vide Finance Act 2004, consequence of non-deduction of TDS on payment to resident, was bought at parity with payment made to a non-resident, with introduction of clause (ia) to section 40(a) of the Act. The subsequent amendment vide the Finance Act 2014, covered within the ambit of Section 40(a)(ia), all payments made to residents without deduction of applicable TDS, but the quantum of disallowance was restricted to 30% of the payment. As far as parity of disallowance for payments without TDS, remained the same for non-residents and residents, the difference in the *quantum* of disallowance persisted: 100% for non-residents under Section 40(a)(i) versus 30% for residents under Section 40(a)(ia). The question that arises now is whether this difference in quantum would still be considered differential tax treatment in transactions involving residents and non-residents, and whether the same falls within the ambit of the non-discrimination clause of Article 26(3). In our opinion, the disallowance on non-resident payments to 100% leads to less favorable treatment as compared to a similar payment to a resident under "same conditions", having 30%

disallowance. Thus such disparity, in our view, would trigger the non-discrimination clause in Article 26(3) of tax treaty as excess disallowance of 70%, in case of payment to non-residents, has to be considered as discriminatory as compared to allowability of similar payment made to residents.

14. In this context, we do not agree with the contention of Revenue that the scope of non-discrimination article is restricted to differential treatment of expenses incurred towards residents and non-residents and it does not refer to the quantum of expense which can be disallowed. We are of the considered view that Section 40(a)(i), in its present form, is violative of non-discrimination Article 26(3) of India-USA DTAA as far as quantum of disallowance is concerned. In the relevant assessment year of AY 2018-19, in the instant case, Section 40(a)(i) imposed a stringent condition of 100% disallowance for payments to non-residents as compared to disallowance of 30% for payments to residents for the same default of not deducting TDS. The substantive law laid down in the decision of the hon'ble Delhi High Court in ***Herbalife India P Ltd*** (supra),which pertained to AY 2001-02, holding that Section 40(a)(i) was discriminatory and violated the non-discrimination article 26(3) of DTAA, as there was no disallowance for similar payments to residents, and negating the Revenue action of disallowance u/s 40(a)(i) for payments

to non-resident without making TDS, still holds relevance. The hon'ble jurisdictional Delhi High Court in the case of ***Herbalife India P Ltd*** (supra) held in favour of the Assessee as under:

> ***46. Section 40 is in the nature of a non-obstante provision and therefore, it overrides the other provisions as contained in Sections 30 to 38 of the Act. This means that the expenditure which is allowable under Sections 30 to 38 of the Act in computing business income would be subject to deductibility condition in Section 40 of the Act. The payment of FTS to HIAI would be allowable in terms of Section 37 (1) of the Act but before such payment can be allowed the condition imposed in Section 40 (a) (i) of the Act regarding deduction of TDS has to be complied with. In other words if no TDS is deducted from the payment of FTS made to HIAI by the Assessee, then in terms of Section 40 (a) (i) of the Act, it will not be allowed as a deduction under Section 37 (1) of the Act for computing the Assessee's income chargeable under the head 'profits and gains of business'.***
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> ***47. Article 26(3) of the DTAA calls for an enquiry into whether the above condition imposed as far as the payment made to HIAI, i.e., payment made to a non-resident, is any different as far as allowability of such payment as a deduction when it is made to a resident.***
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> ***50. **** As far as payment to a non-resident is concerned, Section 40 (a) (i) of the Act as it stood at the relevant time mandated that if no TDS is deducted at the time of making such payment, it will not be allowed as deduction while computing the taxable profits of the payer. No such consequence was envisaged in terms of Section 40 (a) (i) of the Act as it stood as far as payment to a resident was concerned. This, therefore, attracts the non-discrimination rule under Article 26 (3) of the DTAA.***
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52. Section 40 (a) (i), in providing for disallowance of a payment made to a non-resident if TDS is not deducted, is no doubt meant to be a deterrent in order to compel the resident payer to deduct TDS while making the payment. However, that does not answer the requirement of Article 26 (3) of the DTAA that the payment to both residents and non-residents should be under the 'same conditions' not only as regards deduction of TDS but even as regards the allowability of such payment as deduction. It has to be seen that in those 'same conditions' whether the consequences are different for the failure to deduct TDS.

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54. In the first place it requires to be noticed that DTAA is as a result of the negotiations between the countries as to the extent to which special concessional tax provisions can be made notwithstanding that there might be a loss of revenue. In Union of India v. Azadi Bachao Andolan (supra) the Supreme Court noted that treaty negotiations are largely —a bargaining process with each side seeking concessions from the other, the final agreement will often represent a number of compromises, and it may be uncertain as to whether a full and sufficient quid pro quo is obtained by both sides.ll The Court acknowledged that developing countries allow 'treaty shopping' to encourage capital and technology inflows which developed countries are keen to provide to them. It was further noted that the corresponding loss of tax revenues could be insignificant compared to the other non-tax benefits to the economies of developing countries which need foreign investment. The Court felt that this was a matter best left to the discretion of the executive as it is "dependent upon several economic and political considerations".

55. Consequently, while deploying the _nexus' test to examine the justification of a classification under a treaty like the DTAA, the line of enquiry cannot possibly be whether the classification has nexus to the object of the _statute' for the purposes of Article 14 of the Constitution of India, but whether

the classification brought about by Section 40 (a) (i) of the Act defeats the object of the DTAA.

56. The argument of the Revenue also overlooks the fact that the condition under which deductibility is disallowed in respect of payments to non-residents, is plainly different from that when made to a resident. Under Section 40 (a) (i), as it then stood, the allowability of the deduction of the payment to a non-resident mandatorily required deduction of TDS at the time of payment. On the other hand, payments to residents were neither subject to the condition of deduction of TDS nor, naturally, to the further consequence of disallowance of the payment as deduction. The expression 'under the same conditions' in Article 26 (3) of the DTAA clarifies the nature of the receipt and conditions of its deductibility. It is relatable not merely to the compliance requirement of deduction of TDS. The lack of parity in the allowing of the payment as deduction is what brings about the discrimination. The tested party is another resident Indian who transacts with a resident making payment and does not deduct TDS and therefore in whose case there would be no disallowance of the payment as deduction because TDS was not deducted. Therefore, the consequence of non-deduction of TDS when the payment is to a non- resident has an adverse consequence to the payer. Since it is mandatory in terms of Section 40 (a) (i) for the payer to deduct TDS from the payment to the non-resident, the latter receives the payment net of TDS. The object of Article 26 (3) DTAA was to ensure non-discrimination in the condition of deductibility of the payment in the hands of the payer where the payee is either a resident or a non-resident. That object would get defeated as a result of the discrimination brought about qua non-resident by requiring the TDS to be deducted while making payment of FTS in terms of Section 40 (a) (i) of the Act.

57. A plain reading of Section 90 (2) of the Act, makes it clear that the provisions of the DTAA would prevail over the Act unless the Act is more beneficial to the Assessee. Therefore, except to the extent a provision of the Act is more beneficial to the Assessee, the DTAA will override the Act. This is

> ***irrespective of whether the Act contains a provision that corresponds to the treaty provision. In Union of India v. Azadi Bachao Andolan (supra) the Supreme Court took note of the Circular No. 333 dated 2nd April 1982 issued by the CBDT on the question as to what the assessing officers would have to do when they find that the provision of a DTAA treaty is not in conformity with the Act.:***
> ***—Thus, where a Double Taxation Avoidance Agreement provided for a particular mode of computation of income, the same should be followed, irrespective of the provision of the Income Tax Act. Where there is no specific provision in the Agreement, it is the basic law, i.e., Income Tax Act, that will govern the taxation of income."***
> ***61. In light of the above discussion, question (b) is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue by holding that Section 40(a)(i) of the Act is discriminatory and therefore, not applicable in terms of Article 26 (3) of the Indo-US DTAA.***

15. Though for AY 2018-19, the provision of law provides for disallowance of payments of FTS made to non-resident as well as resident, to that extent section 40(a)(i) is no longer discriminatory. In view of the hon'ble Delhi High Court in the ***Herbalife*** (supra) as above however, the application of disallowance @100% u/s 40(a)(i) is held as discriminatory in so far as quantum of disallowance is concerned. The quantum of disallowance for resident is restricted to 30% u/s 40(a)(ia), and therefore to meet the requirement of discriminatory clause of Article 26(3) of DTAA, the disallowance for payment made to non-resident, without deducting TDS, should as well be restricted to 30% u/s

40(a)(i) of the Act. We have seen that the AO has made a disallowance @ 30% of remittance which is similar to the rate of disallowance @30% under the non-discriminatory clause of Article 26(3) of the DTAA, therefore there is no occasion to say that the revenue is prejudiced as far as quantum of disallowance is concerned. We are therefore of the considered view that the second condition of action of the AO, being prejudicial to the interest of the Revenue, is not satisfied. Since both the ingredients of provisions of section 263 of the Act i.e., the order of the AO being erroneous and prejudicial to the interest of the Revenue, is not satisfied, the assumption of jurisdiction by the PCIT u/s 263 cannot be held as valid under the law. We accordingly quash the order of PCIT u/s 263 as being invalid in law. The ground 2.2 and 2.4 of the assessee is accordingly allowed.

16. In the result, the appeal of the assessee is partly allowed.

The order is pronounced in the open court on 09.01.2026.

Sd/-	**Sd/-**
[VIKAS AWASTHY] **JUDICIAL MEMBER**	**[NAVEEN CHANDRA]** **ACCOUNTANT MEMBER**

Dated: 09th January, 2026.

VL/

Copy forwarded to:

1. Assessee
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Sl No.	PARTICULARS	DATES
1.	*Date of dictation of Tribunal Order*	.
2.	*Date on which the typed draft Tribunal Order is placed before the Dictation Member*	
3.	*Date on which the typed draft Tribunal Order is placed before the other Member*	
4.	*Date on which the approved draft Tribunal Order comes to the Sr. P.S./P.S.*	
5.	*Date on which the fair Tribunal Order is placed before the Dictating Member for pronouncement*	
6.	*Date on which the signed order comes back to the Sr. P.S./P.S*	
7.	*Date on which the final Tribunal Order is uploaded by the Sr. P.S./P.S. on official website*	
8.	*Date on which the file goes to the Bench Clerk alongwith Tribunal Order*	
9.	*Date of killing off the disposed of files on the judiSIS portal of ITAT by the Bench Clerks*	
10.	*Date on which the file goes to the Supervisor (Judicial)*	
11.	*The date on which the file goes for xerox*	
12.	*The date on which the file goes for endorsement*	
13.	*The date on which the file goes to the Superintendent for checking*	
14.	*The date on which the file goes to the Assistant Registrar for signature on the Tribunal order*	
15.	*Date on which the file goes to the dispatch section*	
16.	*Date of Dispatch of the Order*	