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INTERNATIONAL TAXATION
Case Law Update

A. AUTHORITY FOR ADVANCE RULINGS ('AAR')

1) Settlement amount received by FIIs in lieu of right to sue was a capital receipt and in the absence of the cost of acquisition of the said right the computation mechanism failed and accordingly, the applicant was not subject to tax in India

Aberdeen Claims Administration Inc In re – [2016] 65 taxmann.com 246 (AAR – New Delhi)

Facts

1. The applicants, 19 mutual funds under the Aberdeen Group held American Depository shares and equity shares of Satyam Computer Services. During 2009, the CEO of Satyam confessed that the financial results had been manipulated and inflated as a result of which the value of the shares dropped drastically forcing the applicant to sell their entire shareholding. The applicants initiated legal claims against Satyam and its auditors. The applicants established two trusts and assigned the aforesaid Legal claims to the trusts, retaining all beneficial interest. After prolonged proceedings, Satyam and its auditors entered into a settlement agreement with the applicants in lieu of the waiver of legal claims. Accordingly, the applicants filed an application for advance ruling with the following questions:

- Whether the settlement amount to be received by the applicants was chargeable to tax under the provisions of the Act.
- If the answer to the first question was in the affirmative, what would be the basis and method of determination of taxable income, applicable tax rate, applicable rate of deduction of tax at source and at what stage was such tax required to be deducted and whether the settlement amount would attract Indian taxes at the time of deposit of the same in the escrow account.

Ruling

1. The AAR held that the settlement amount was received as per a Court order and was not a periodical monetary return. It observed that the claim was against the right to sue and was not linked with income generating apparatus and that it could not be said to relate to any sort of business activity carried on by the applicants. It held that the said sum was capital in nature and could be taxed only if specifically provided for in the Act. Though the right to sue constituted a capital asset, it was neither transferable nor could its cost of acquisition be determined as a result of which the computation mechanism in

section 45 of the Act failed and therefore there was no income chargeable under the Act.

2. It also observed that the applicants were not doing any activity constituting business to earn such income as it was not in the business of suing and seeking settlement amounts. It held that the theory of loss of future income could not apply to the applicants.

3. In regard to the contention of the Revenue that the settlement received was part of business receipts as per the surrogatum principle i.e. that the character of receipt of an award of damages/claim as capital or revenue depends on what such amount was intended to replace, the AAR held that the said principle was not applicable to amounts received pursuant to a fraud and that the applicants were FIIs and as per the SEBI regulations FIIs do not carry out trading in securities but hold the securities as investments.

4. Accordingly it held that the settlement claim received did not constitute income chargeable under the Act.

2) Supply management services, being in the nature of procurement services could not be taxed as technical or consultancy services under the India – UK DTAA. Since managerial services were excluded from the ambit of Fees for technical services – payment not subject to tax. Further, in the absence of PE in India, amount receivable were not taxable in India

Cummins Ltd. In re – [2016] 65 taxmann.com 247 (AAR – New Delhi)

Facts

1. The applicant, a company incorporated in the UK, provided supply management services *vide* a Material Supplies Management Service Agreement to Cummins Technologies India Ltd. ('Cummins India') in relation to purchases made by Cummins India from third parties in the UK and US. The applicant raised the following questions before the AAR:

- Whether the supply management service fee received by it from Cummins India was in the nature of Fees for technical services or Royalty under Article 13 of the India-UK Double Tax Avoidance Agreement.
- In view of the fact that the applicant does not have a Permanent Establishment in India in terms of Article 5 of the DTAA, whether the payments received by it were chargeable to tax in India.
- Whether transfer pricing provisions would be applicable in respect of supply of management service fees
- Based on the answers to the Questions 1 and 2, whether Cummins India was required to withhold tax in India under Section 195 of the Act.

Ruling

1. The AAR dismissed the contention of the Revenue that the intention of the contract entered into between the applicant and Cummins India was to obtain tax benefit under the DTAA as the DTAA did not tax managerial services under Fees for technical services and required technical knowledge to be made available to the recipient of services for it to be classified as technical services.

2. It held that as per Article 13 of the DTAA, payment for technical services would be taxable only if it made available the technical knowledge to the payer and since the applicant merely ensured market competitive pricing and did not impart technical knowledge to Cummins India based on which Cummins India could acquire such skills and use it in the future, the said payments could not be taxable as technical services. It also held that procurement services could never be classified as technical or consulting in nature. Further, it noted that

the services were in the nature of managerial services and that managerial services were excluded from the ambit of Fees for technical services under the DTAA. Accordingly, it held that the payment did not constitute Fees for technical services under Article 13.

3. As regards Royalty, it held that services related to identification of products and competitive pricing could not qualify as royalty under the DTAA as it was not related with the use of or the right to use any copyright, patent, trademark, design or modal, plan, secret formula or process.

4. Further it held that since the applicant had no PE in India, the fees receivable were not taxable in India.

5. The AAR held that the transfer pricing provisions were not applicable to the current case and that Cummins India was not required to withhold tax under section 195 of the Act.

3) Where a Mauritius company proposed to transfer shares held by it in an Indian company in favour of a company proposed to be incorporated in Singapore pursuant to a group reorganization initiated 20 years back, it could not be said to be a tax avoidance scheme because treaty benefits were available. Applicant was not liable to capital gains tax as per Article 13 of the DTAA. Further, in the absence of PE in India, no MAT was applicable. Transfer Pricing provisions were not applicable absent income chargeable under the Act

Dow Agro Sciences Agricultural Products Ltd. In re – [2015] 65 taxmann.com 245 (AAR- New Delhi)

Facts

1. The applicant, a company incorporated in Mauritius, was a part of the Dow Group of companies and held 99 per cent of the share capital of Dow Agrosciences India Pvt. Ltd. ('DAS India'). Pursuant to restructuring of the Group's overall holding structure, the applicant proposed to transfer the shares held by it in DAS India to a holding company in Singapore, thereby shifting the holding company to the Asia Pacific region for better control and increased focus on operations. Based on the aforesaid proposed transaction, the applicant raised the following questions before the AAR:

- Whether the investment held by the Applicant in DAS India would be considered as a capital asset under section 2(14) of the Act.
- Whether capital gains arising from the transfer of shares would be subject to tax in India
- If the shares were not classified as capital assets, whether the gains from the transfer of shares would be taxable in India in the absence of a Permanent Establishment in India.
- Whether the applicant would be liable to pay Minimum Alternate Tax under the provisions of section 115JB of the Act.
- Whether the proposed transfer of shares attracted the Transfer Pricing provisions.
- Whether the sale consideration receivable would be subject to deduction of tax at source if the proposed transaction was not taxable in India
- Whether the applicant was required to file any return of income under section 139 of the Act if the proposed transfer was not taxable in India.

Ruling

1. The AAR held that the equity shares held by the Applicant in DAS India was to be considered as capital assets and not stock-in-trade considering Instruction No 1827 and

Supplementary Circular No 4 / 2007 issued by the Central Board of Direct Taxes as well as the accounting, intention and quantum test relied on by the applicant. Considering Article 13 of the DTAA, it held that there was no capital gains tax arising from the proposed transfer of shares of DAS India by the applicant.

2. The AAR dismissed the allegations made by the Revenue that the transaction was a scheme for avoidance of payment of tax in India and that the applicant was a shell company not entitled to the benefits of the DTAA. It noted that the transaction began almost 20 years back and that DAS India was incorporated in 1994 pursuant to which the applicant had invested in various tranches during the period ranging from 1995 to 2005 after prior approval of the DIPP and RBI. It held that a transaction beginning almost 20 years ago could not have been a scheme to avoid payment of taxes. Further, it appreciated the business considerations underlying the proposed restructuring.

3. Additionally, the revenue contended that the applicant had a Permanent Establishment in India as huge royalty and service charges were paid by DAS India to the US parent, DAS India was a trading company, exports by DAS India were on behalf of the US Parent company and that DAS India's employees were offered ESOPs by the US Parent. Considering that the applicant did not carry on any business activity in India nor had any office, employees or agents in India it held that there was no PE. It held that the contentions of the tax department were irrelevant. Since there was no PE, the AAR held that there was no tax liability under Article 13(2) of the DTAA.

4. The AAR dismissed the contention of the Revenue that the capital gains should be assessed in the hands of the US company since it was the beneficial shareholder of DAS India.

5. Further, it rejected the contention of the Revenue that sale proceeds should be treated as dividends in India to the extent of accumulated profits since DAS India had not declared dividends since 2004.

6. As regards the applicability of MAT to the applicant on the gains arising pursuant to the transaction, the AAR held that since the applicant did not have a permanent establishment in India, MAT was not applicable in light of the decision of the Apex Court in Castleton Investment Ltd. and the circular issued by the Government stating that no MAT would be levied on foreign companies not having a place of business / PE in India.

7. As regards the applicability of transfer pricing provisions, it held that since there was no income chargeable to tax in India, the transfer pricing provisions would not apply.

8. Further, it was held that since the gains were not taxable in India, the provisions of section 195 of the Act would not apply.

9. The AAR held that the Applicant did not have to file a return of income under section 139 of the Act as the transfer of shares was not subject to tax in India.

B. HIGH COURT JUDGMENTS

4) Advertisement, Marketing & Sales Promotion expenses could not be considered as an international transaction in the absence of any agreement, arrangement etc., merely on the basis of the Bright Line Test

Maruti Suzuki India Ltd. vs. CIT – [2015] 64 taxmann.com 150 (Del.)

Facts

1. The assessee, a subsidiary of Suzuki Motor Corporation ('SMC'), was engaged in the manufacture of passenger cars in India. As per a licence agreement between the assessee and SMC, the assessee was permitted to use the co-branded trademark of Maruti Suzuki on its vehicles. During the relevant year, the

assessee had entered into various international transactions with its AE which were referred to the TPO for determination of ALP. It had also incurred Advertisement, Marketing and Promotion expenses towards the promotion of its brand.

2. The TPO made a TP adjustment of ` 252.26 crore – ` 98.14 crore as regards royalty paid by the assessee to SMC on the ground that the foreign trademark for which royalty was being paid had no brand value and ` 154.12 crore towards the AMP expenses incurred by the assessee. The addition on account of AMP expenses was arrived at by applying the Bright Line Test. Since the ratio of selling and distribution expenses as a percentage of sales of the assessee was higher than that incurred by comparable companies, the TPO concluded that the excess was on account of promotion the Suzuki Brand.

3. The DRP and ITAT upheld the order of the AO / TPO.

4. Aggrieved, the assessee filed an appeal before the Hon'ble High Court and contended that the application of the Bright Line Test was rejected by the Court in the case of *Sony Ericsson Mobile Communications India Pvt. Ltd. vs. CIT [2015] 374 ITR 118* and that in the absence of an agreement, arrangement or understanding between the assessee and SMC, mere incurring of AMP expenditure could not be considered as an international transaction.

Judgment

1. As regards the issue of whether the AMP transaction constituted an international transaction, the Revenue contended that in light of Sony Ericsson (supra), the AMP expenditure constituted an international transaction. The Hon'ble High Court noted that in the aforesaid decision, none of the assessees questioned the existence of an international transaction and therefore it could not be squarely applied to the instant case.

2. The Court noted that the Revenue authorities failed to show the existence of any agreement, understanding or arrangement between the assessee and SMC regarding the AMP expenditure and that the Bright Line Test was applied to the AMP expenditure of the assessee to deduce the existence of an international transaction and to make a quantitative adjustment to the ALP to the extent the expenditure incurred by the assessee exceeded that of the comparable companies.

3. It held that the Court in Sony Ericsson (supra), had negated the use of the Bright Line Test for the purpose of determining the existence of an international transaction as well as for benchmarking international transactions. It also noted that the Revenue was not able to counter the submissions of the assessee that it had substantially benefited from the AMP expenses as it held the highest market share of automobiles manufactured in India and that the AMP expense of SMC worldwide was 7.5 per cent of its sales whereas that of the assessee was 1.87 per cent.

4. Examining the definition of international transaction under section 92B of the Act, the Court held that the existence of an agreement, arrangement or understanding was a *sine qua non* and that the onus to prove the same was on the Revenue, which was not fulfilled in the case of the assessee. It held that Chapter X envisaged the adjustment in the price of the international transaction and that the very existence of an international transaction could not be presumed by assigning a price to it and then deducing that since it is not at ALP, an adjustment was to be made. It noted that the revenue sought to resort to a quantitative adjustment by first determining whether the AMP expenditure of the assessee on application of the Bright Line Test was excessive, thereby alleging the existence of an international transaction involving the AE. This approach was held to be contrary to the provisions of the Act.

5. It also held that as per the decision of Sony Ericsson, AMP adjustments could not be made in respect of a full risk manufacturer.

6. Accordingly, the Court set aside the orders of the AO, TPO and DRP.

Note: The Court has come to the same finding as above in the cases of *CIT vs. Whirpool of India Ltd – [2015] 64 taxmann.com 324 (Del), Honda Siel Power Products Ltd. vs. DCIT – [2015] 64 taxmann.com 328 (Del) and Bausch & Lomb Eyecare (India) Pvt. Ltd. vs. ACIT – TS-626-HC-2015 (Del.) - TP.*

5) Where the value of international transactions exceeded ` 5 crore reference to TPO was mandatory. Final assessment order without the passing of a draft assessment order was in violation of section 144C of the Act and therefore invalid

Carrier Race Technologies Pvt. Ltd. vs. ITO (WP No 13442 of 2015)

Facts

1. The assessee had entered into international transactions during the relevant year. During assessment proceedings, the AO did not make a reference to the TPO and proceeded to make a TP adjustment himself. The AO did not pass a draft assessment order under section 144C of the Act against which the assessee could file its objections with the DRP. Instead a final assessment order was passed and the AO subsequently issued a corrigendum stating that the final assessment order should be treated as the draft assessment order.

2. Aggrieved, the assessee filed a writ petition before the Hon'ble High Court against the assessment order and corrigendum. The assessee contended that the assessment order should be quashed as neither did the AO follow the procedure laid down under section 144C of the Act nor did he follow CBDT Instructions providing mandatory reference to a TPO for determination of ALP of transactions exceeding ` 5 crore.

Judgment

1. The Hon'ble High Court held that where the final assessment order was passed without issuing a draft assessment order it was not in accordance with section 144C and therefore invalid. Further, since the corrigendum issued by the AO was passed in the subsequent month the Court held that it was invalid since it was beyond the time limit provided under law.

2. It further held that the provisions of the Act clearly provided that reference was to be mandatorily made to the TPO where the value of international transactions exceeded ` 5 crore.

3. Accordingly, the order of the AO was set aside.

6) Comparable Uncontrolled Price Method was the most appropriate method where the assessee profit sharing ratio with its AE was the standard practice adopted by third parties as well

Pr CIT vs. Toll Global Forwarding India Pvt. Ltd. (ITA No 374 / 2015 & ITA 396 / 2015)

Facts

1. The assessee was a logistics service provider, offering international and domestic freight handling services including defined air and ocean transport and freight forwarding services. The residual profits earned by the assessee were split between the assessee and its AEs in the ratio of 50:50. It used the Comparable Uncontrolled Price Method for benchmarking its international transactions.

2. The international transactions undertaken by the assessee were referred to the TPO for determination of ALP. The TPO rejected the application of the CUP method since the assessee had not furnished third party documents / vouchers etc. to benchmark the international transactions. Accordingly, the TPO adopted TNMM and made an upward addition to the

income of the assessee. The DRP upheld the order of the TPO.

3. Aggrieved, the assessee filed an appeal before the ITAT. The ITAT observed that the business model of sharing residual profits in the ratio of 50:50 was a standard practice in the assessee's business. It acknowledged that where a standard formula was adopted, the data regarding the precise amount charged / received may not be available. In spite of the assessee not providing adequate comparable data, the ITAT held that the transactions were at arm's length price since the profit sharing ratio between the assessee and the AE was no different from that adopted by unrelated parties.

4. Accordingly, the Revenue filed an appeal before the Hon'ble High Court.

Judgment

1. The Hon'ble High Court held that the order of the ITAT was well-reasoned as it expounded the legal principles governing the determination of ALP. Accordingly it upheld the order of the ITAT and ruled in favour of the assessee.

7) Journey of vessels from Singapore to Dubai consisting of a journey between two ports in India would fall within the definition of term 'international traffic' in terms of Article 3(h) of the DTAA and consequently the assessee was eligible for the benefits under Article 8 of the DTAA

CIT vs. Taurus Shipping Services – [2015] 64 taxmann.com 64 (Guj.)

Facts

1. The assessee acted as an agent of three vessels on behalf of a company incorporated in Singapore viz. Jaldhi Overseas Pte. Ltd. ('the freight beneficiary') and had transported goods from Kandla Port to Visag as a part of a larger journey of the vessels from Singapore to Dubai. The freight beneficiary claimed benefit of Article 8 of the Double Tax Avoidance Agreement ('DTAA') between India and Singapore.

2. The Assessing Officer held that the transportation between Kandla and Visag could not be considered as international traffic as defined in the DTAA and therefore denied the assessee benefit under Article 8 of the DTAA.

3. The assessee preferred an appeal before the Income Tax Appellate Tribunal ('ITAT'), wherein the ITAT ruled in favour of the assessee.

4. Aggrieved, the Revenue filed an appeal before the Hon'ble High Court

Judgment

1. The Honourable High Court held that the term 'international traffic' was defined in Clause 3(h) of the DTAA to mean any transport by a ship or aircraft operated by an enterprise of a contracting state, except when the ship or aircraft is operated solely between places in the other Contracting State. Placing emphasis on the word 'solely', the Court held that since the transportation between Kandla and Visag was undertaken during a larger journey of vessels from Singapore to Dubai it did not satisfy the requirement of being solely between two ports in India and therefore the exclusion prescribed in the definition of international traffic did not apply to the assessee and that the transport undertaken by the assessee would be treated as international traffic and consequently the assessee was eligible for the benefits under Article 8 of the DTAA, which provides that profits derived by an enterprise of a contracting state from the ships or aircrafts in international traffic would be taxable only in that State.

8) Commission earned by a non-resident agent who carried on business of selling Indian goods outside India could not be said to have deemed to accrue or arise in India. Further,

withdrawal of a Circular cannot have retrospective operation

CIT vs. Gujarat Reclaim & Rubber Products Ltd. (ITA No. 2116 of 2013 and 169 of 2014) – TS-732-HC-2015 (Bom.)

Facts

1. During AYs 2007-08 and 2008-09, the assessee had made payments on account of commission to its non-resident agent in respect of sales made outside India. The AO disallowed the payment of commission under section 40(a)(i) for failure to deduct tax at source in view of the fact that Circulars No. 23 of 1969 and 786 of 2000 issued by the Central Board of Direct Taxes stating that commission paid to non-resident agents for sales outside India did not give it rise to income, had been withdrawn by Circular No. 7 dated 22nd October, 2009.

2. On appeal, for AY 2007-08, the CIT(A) upheld the order of the AO whereas for AY 2008-09, the CIT(A), relying on the ruling in Ardeshi B Cursetjee & Sons (115 TTJ 916) allowed the assessee's appeal by holding that the commission agent did not have any business connection or permanent establishment in India and that no income arose or accrued to the non-resident agent in India. Additionally, the CIT(A) held that Circular No. 7 of 2009, withdrawing the earlier circulars would not have retrospective effect so as to render the earlier Circulars as inoperative for the relevant assessment years.

3. Aggrieved, the assessee and the Revenue preferred an appeal to the ITAT, wherein the ITAT ruled in favour of the assessee for both assessment years.

4. Accordingly, the Revenue filed an appeal before the Hon'ble High Court.

Judgment

1. The Hon'ble High Court relying on the decision of the Apex Court in *CIT vs. Toshuku Ltd. (125 ITR 525)* having almost identical facts, held that the commission earned by the non-resident agent carrying on business of selling Indian goods outside India could not have deemed to be income accruing or arising in India. Accordingly it upheld the decision of the Tribunal.

2. Further it also noted that Circular No. 23 of 1969 was admittedly in force during the two Assessment Years and that it was only subsequently i.e. on 22nd October, 2009 that the earlier Circular of 1969 and its reiteration as found in Circular No. 786 of 2000 were withdrawn. Relying on *UTI vs. P. K. Unny 249 ITR 612,* it held that such subsequent withdrawal of an earlier Circular could not have retrospective operation.

C) TRIBUNAL DECISIONS

9) India – Netherlands DTAA – Article 13(5) – Whether Capital gains arising to a foreign company on transfer of shares held in an Indian company under the court approved buy-back scheme is taxable in India under India-Netherlands tax treaty – Held : Yes

Accordis Beheer B. V. vs. DIT 2016-TII-12-ITAT-MUM-INTL – Assessment Year : 2006-07

Facts of the case

1. The assessee is a resident of Netherlands. It held 38.24 per cent of shares comprising of 1,09,52,280 shares in the paid-up capital of Century Enka Ltd, an Indian public listed company.

2. During the year under consideration, the assessee tendered 85,93,109 equity shares having a face value of INR 10 each to Century Enka Ltd. at INR 122 per shares under a scheme of arrangement, by way of buy-back of own shares, as per the approval given by the Calcutta High Court under Section 391 of the Companies Act, 1956. The said tendering of shares resulted in a capital gain of INR 58.64 crore.

3. The assessee, relying on Article 13(5) of the tax treaty, claimed that the capital gain referred above is not taxable in India. The Article 13(5) of the tax treaty provides that gains shall be taxable in Netherlands if such gains are realised in the course of corporate organisation, reorganisation, amalgamation, division or similar transaction.

4. The Assessing Officer (AO) observed that the assessee did not pay tax on the impugned capital gains in Netherlands since the same was exempt under the tax provisions of that country. The basic purpose of the tax treaty, as well as Section 90 of the Income-tax Act, 1961 (the Act), is that the assessee should not be liable for double taxation, whereas, in the present case, the assessee is trying to claim double benefit by taking recourse to the tax treaty. Accordingly, the AO held that the aforesaid capital gains are taxable in India under Article 13(5) of the tax treaty.

5. With regard to the rate at which the capital gain is taxable, the AO held that the concessional rate of taxation at 10%, provided in the second proviso to Section 112 of the Act, is not applicable to the assessee. Accordingly, the AO levied tax at 20%.

6. The Commissioner of Income Tax (Appeals) CIT(A) upheld the action of the AO in taxing the capital gain arising on account of buy-back of shares of CE Group. However, the CIT(A) held that the assessee is eligible for concessional rate of tax at 10% on capital gains.

Decision

The Tribunal held as under :

i) In view of decisions – *DIT vs. ICICI Bank Ltd. [2015] 370 ITR 17 (Bom.), DIT vs. Green Emirate Shipping & Travels [2006] 100 ITD 203 (Mum.)* relied on by the assessee, it has been observed that payment of tax on capital gains in Netherlands may not be a condition for availing tax treaty benefits in India.

ii) The CIT(A) relying on the decision of *McDowell & Co. vs. CTO [1985] 154 ITR 148 (SC)* observed that colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid payment of tax by resorting to dubious methods. In the present case, the assessee is pleading for relief on the basis of its own interpretation of Article 13(5) of the tax treaty. The fact that it has tendered the shares to Century Enka Ltd. under a scheme of arrangement approved by the Calcutta High Court is not disputed. Therefore, there is no colourable device in the claim made by the assessee.

iii) The assessee contended that it has transferred the shares under a scheme of arrangement approved by the High Court, and the same falls in the category of 'reorganisation' specified in Article 13(5) of the tax treaty. The Tribunal observed, upon perusal of the Given in the Dictionary titled as 'Dictionary for Accountants' by Eric L Kohler meaning of reorganisation, it indicates that there should be a major change in the financial structure and the same should result in alteration in the rights and interest of security holders. However, in the present case, there is a reduction in the share capital and the same cannot be considered as a major change in financial structure.

iv) Further, the security holders continue to enjoy the same type of rights and interests even after the reduction of share capital and, hence, there is no alteration in the rights and interests of security holders. Accordingly, the arrangement entered by the assessee in selling part of its share holding to the company in the scheme of buy-back does not fall under the definition of 'reorganisation'.

v) The assessee relied on a study material titled as 'Strategic Financial Management' issued by the Institute of Chartered Accountants of India (ICAI). However, these discussions made by the ICAI only explain various forms of financial management.

vi) There is no change in the rights and interests of the shareholders. Only change that occurred on reduction of share capital through writing-off of the shares purchased from the assessee is in the shareholding pattern of the promoter groups. The same cannot be considered as change in the rights and interests of shareholders. Before and even after the reduction of share capital, the promoter groups continue to remain as promoter groups with the same rights and interests.

vii) On reference to the definition of the term 'arrangement' given under Section 390 of the Companies Act, 1956, it is observed that it consists of either consolidation of shares of different classes or division of the shares into different classes or both.

viii) The decision in the case of relied on by the assessee, is distinguishable on the facts of the present case and may not help the assessee.

ix) The CIT(A) observed that the scheme of arrangement framed by Century Enka Ltd. was only with the purpose of providing an exit route to the non-resident shareholders. Thus, the objective of the scheme was to enable the assessee to transfer its shareholding. It was observed that the subsequent cancellation or writing off the shares has nothing to do with the transfer made by the assessee, even though the same has resulted in reduction of paid-up share capital of the company. The Tribunal agreed with the observations made by the CIT(A).

x) The view taken by the CIT(A) is agreed upon that they are two different actions and both should not be clubbed together, even though Century Enka Ltd. has combined the same, for the sake of its convenience, in the scheme of arrangement. The assessee should in no way concerned by the action of cancellation of share resulting in reduction of share capital.

xi) Accordingly, the attempt of the assessee to bring the transferring of shares within the ambit of the term 'reorganisation' may not be correct, since the object of the arrangement was not financial restructuring, but to provide an exit route to the non-resident shareholders. In view of the above, the CIT(A) was justified in upholding the view taken by the AO on this issue.

xii) Regarding the rate for the purpose of payment of tax, the assessee contended that this issue is covered in favour of the assessee by the decision of the Delhi High Court in the case of *Cairn U.K. Holdings Ltd. 6 [2013] 359 ITR 268 (Del.)*, which was followed by the Tribunal in the case of *ADIT vs. Abbott Capital India Ltd [2014] 65 SOT 121 (Mum.)*. Accordingly, it has been held that the assessee is entitled to concessional rate of tax at 10 per cent on the impugned capital gains.

10) Sections 44BB & 44DA – Whether revenue received for providing services of geophysical and geological interpretation of 3D and 2D seismic data, cannot be considered as FTS and the same is chargeable to tax under the provisions of Section 44BB – Held : Yes

Addl DIT vs. Landmark Graphics Malasia SDN BHD 2016-TII-09-ITAT-DEL-INTL – Assessment Year: 2004-05

Facts of the case

The assessee is in the business of providing services for geophysical and geological interpretation of 3D and 20 seismic data. The assessee had filed return and thereafter a refund was issued. Consequently, a notice u/s. 148 was issued. During assessment, the AO held that the revenue received for providing services for geophysical and geological interpretation of 3D and 20 seismic data are Fees for Technical Services and also that the income of the assessee was not taxable under the presumptive provisions of section 44BB as the nature of services rendered by the assessee were technical in nature and not for a project undertaken by the recipient which was taxable u/s. 44BB.

Decision

On appeal, the CIT(A) partly allowed the claim.

The Tribunal held that,

i) In the light of settled principle of law in the case cited as ONGC, the issue in controversy has become apparently clear that "mining project" or "like projects" occurring in Explanation 2 to Section 9(1) would cover rendering of service like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas and hence, payments made under such agreement to a non-resident/ foreign company would be chargeable to tax under the provisions of Section 44BB and CIT(A) has rightly decided the issue in favour of assessee.

ii) The ratio of judgment in cases cited as B J Services Company Middle East Limited and *Baker Hughes Asia Pacific Limited vs. ADIT* is, 'Section 44DA inserted in Finance Act 2010 w.e.f. 1-4-2011 in Section 44BB are prospective in nature', would only apply to the Assessment Year 2011-12 and onwards and not in the case of the assessee *qua* the Assessment Year 2004-05.

iii) The aforesaid issue i.e. 'as to whether FTS is not eligible for 44BB came up for adjudication before Supreme Court in the case of ONGC 2015-TII-03-SC-INTL and the same has been decided in favour of the assessee as per findings returned by Supreme Court. So, by following the judgment in case of ONGC delivered by the Supreme Court, we hereby affirm the findings of CIT(A) that FTS is not eligible for section 44BB.

Cases followed

i) *ONGC - 2015-TII-03-SC-INTL,*

ii) *B. J. Services Company Middle East Limited vs. DCIT - 2011-TII-31-HC-UKHAND-INTL,*

iii) *Baker Hughes Asia Pacific Limited vs. ADIT - 2014-TII-104-ITAT-DEL-INTL.*

11) Transfer Pricing – Foreign Exchange Fluctuation – Whether the profit or loss arising out foreign exchange fluctuation has to be taken into consideration while arriving at the operating cost in transfer pricing matters – Held : Yes; – Whether the assessee needs to submit categorical workings on record and substantiated with material evidence to establish that 30% portion of the foreign exchange fluctuation was abnormal – Held : Yes.

Dong A India Automotive Pvt. Ltd. vs. ACIT 2016-TII-51-ITAT-MAD-TP – Assessment Year: 2009-10

Facts

The assesee is a private limited. It had filed the present petition for rectification order passed by the Tribunal. The assessee had claimed for exclusion of foreign exchange loss from computation of operating margin, as such loss was abnormal loss on account of huge fluctuations in exchange rates and had claimed that 30% portion of the foreign exchange fluctuation was abnormal, whereas the Tribunal had held that the profit or loss arising due to forex fluctuations cannot be ignored while arriving at the operating cost for deriving the PU in Transfer pricing matters.

Decision

The Tribunal held as under :

i) On the issue whether loss arising out of foreign exchange fluctuation should be excluded from the computation of the operating cost of the assessee the Bench has discussed the issue in detail and held following the decision rendered in the case *M/s. Infac India (P) Ltd - 2015-TII-314-ITAT-MAD-TP* and the decision rendered in the case *M/s. SAP Labs India Pvt. Ltd. vs. ACIT - 2010-TII-44-ITAT-BANG-TP*, that the profit or loss arising out foreign exchange fluctuation has to be taken into consideration while arriving at the operating cost in transfer pricing matters;

ii) Futher the definition of operating expenses mentioned in Rule 10TA(j)(iv), has come into effect from 4-2-2015 and that too in regard to the Safe Harbour Rules for international taxation and therefore not applicable to the relevant case before us. Moreover no categorical workings were brought on record before us substantiated with material evidence to establish that 30% portion of the foreign exchange fluctuation was abnormal. For the above stated reasons we are of the considered view that there is no mistake apparent on record in the order of the Tribunal which is required to be rectified. Therefore, the Miscellaneous Petition filed by the assessee is devoid of merits.

12) Transfer Pricing – Whether if there is no bifurcation available in respect of the revenues of a company from Transaction processing and Technical services, is it possible to separately consider its profitability from rendering of 'Transaction processing services' – Held : No; Whether when a certain company is following different year ending from that of the assessee company, can it still be considered as a valid comparable for the purpose of determination of ALP – Held : Yes; Whether while selecting comparables for ALP determination, the quantum of turnover can be a reason for the exclusion of a company which is otherwise a valid comparable – Held : No; Whether the amount of foreign exchange gain or loss arising out of revenue transactions is required to be considered as an item of operating revenue or cost, both of the assessee as well as comparables – Held : Yes; Whether when normal business practice requires payment of dues beyond a reasonable period, the TPO can charge interest only if the payment was made beyond the arm's length period – Held : Yes

Ameriprise India Pvt Ltd. vs. DCIT 2016-TII-52-ITAT-DEL-TP – Assessment Year: 2010-11

Facts

1. The assessee is a wholly owned subsidiary of Ameriprise, US, which parent company was engaged in the business of insurance, annuities, asset management and brokerage. Assessee was incorporated in August, 2005 and started operations in October, 2005.

2. It was engaged in providing Information Technology (IT) enabled services to Ameriprise US. The assessee reported two international transactions, including remuneration from the 'Provision of IT-enabled back office services' with transacted value of ` 60,57,56,819/-. The assessee

applied TNMM as the most appropriate method for benchmarking the international transaction of provision of IT enabled back office support services.

3. Profit level indicator (PLI) of Operating Profit/Operating Cost (OP/OC) was computed by the assessee at 15.66%. Eleven companies were considered as comparable. It was shown that their arithmetic mean of operating profits compared favourably with assessee's profit rate and, hence, the international transaction of 'Provision of IT enabled back office services' was at ALP.

4. On a reference made by the AO for determining the ALP of the international transactions, the TPO treated only five companies as comparable from the assessee's list. He added eight new companies, thereby making a total of thirteen companies, considered as comparable.

5. Next issue taken up before us is against treating foreign exchange difference as non-operating as against the assessee's treatment of operating cost.

6. Assessee had shown certain receivables from its AE. On examination of the assessee's balance sheet, it was noticed by the TPO that payments against the invoices raised by the assessee were not received within the stipulated time as provided in the Agreement. On being called upon to furnish the time period for payment as per Service agreement and why the delayed payments be not treated as unsecured loans advanced to the AEs, the assessee submitted 'receivables was not an international transaction which warranted benchmarking.' The TPO rejected this contention and held that interest at the rate of 14.74% was chargeable at arm's length level in respect of delayed receipt of invoice values. The DRP held that since, normal business practice requires payment of dues beyond a reasonable period, the TPO was justified to charge interest beyond the arm's length period. Any delay beyond a period of 30 days, in an arm's length situation would have warranted a return base on opportunity cost of the money. Accordingly, DRP upheld that any delay beyond the arm's length period should be subject matter of adjustment.

Decision

The Tribunal held in favour of the assessee as under :

A) Consideration of comparables

i) Re: TCS E-Serve International Ltd.

This company is engaged in rendering BPO services to the banking and financial services industry (BFSI) and Travel, Tourism and Hospitality (TTH). It is providing services to BFSI and TTH and such services include 'Transaction processing' and 'Technical services'. In other words, the remuneration of this company from the above referred two segments includes compensation for rendering 'Technical services' and 'Transaction processing'. Insofar as the 'Transaction processing' services are concerned, these are ITES, which are broadly similar to those rendered by the assessee, though not specifically similar. However, the 'Technical services' involve software testing, verification and validation of software item, implementation and data centre management activities. The 'Technical services' rendered by this company are in the nature of servicing and maintenance of software. We find that the assessee is a company providing non-development software services, in the nature of conversion of data from hard copy or files into electronic format. The assessee is not providing any software development services to its AE. On the other hand, this company is also providing 'Technical services' to its AE involving software testing, verification and validation of software, which are akin to software maintenance services falling, within the overall category of software development services. The TPO has taken entity level figures of TCS E-Serve International Ltd. for comparison. We note that, there is no bifurcation available in respect of the revenues of this company from Transaction processing (which are in the nature of ITES, the same as provided by the assessee) and Technical services (which are in the nature of software development, absent in the assessee's case). In the absence of the availability of any such segregation of the total revenue of this company, it is not possible to separately consider its profitability from rendering of 'Transaction processing services'. As such, the entity level figures render this company as unfit for comparison. Therefore, we order for the removal of this company from the final set of comparables;

ii) Re: R. Systems (Seg)

It is noticed that the assessee company is having financial year ending covering the period 1-4-2009 to 31-3-2010. In that view of the matter, a valid comparison can be made only if the comparable companies too have the same financial year. If the tested party has March year ending, then, the comparables must also have the data relating to the financial year ending 31st March itself. If such a data is not available, then, a company albeit comparable, also disqualifies. Espousing the facts of the instant case, we find that insofar as the functional comparability of this company is concerned, the TPO has not disputed the same. The only reason given for its exclusion is the non-availability of data for the relevant financial year. The AR contended that though the year ending of the above referred company is different, yet, the data for the relevant period is available from Annual report itself. It was so stated on the basis of the availability of the quarterly data from the Annual reports of the company, which could be adjusted for the FY ending 31-3-2010. We note that in the immediately preceding year, this company was considered by Coordinate Bench of Tribunal. It was directed that if the contention of the assessee is correct, that the relevant data for the concerned financial year can be deduced from the information available from their annual reports, then, there can be no objection to the inclusion of these companies in the list of comparables with the adjusted data for the relevant financial year itself. Respectfully following the reasoning of Co-ordinate Bench in immediately preceding year, we set aside the impugned order and remit the matter to the file of TPO/AO for examining this aspect of the matter;

iii) CG-VAK Software and Exports Ltd. (Seg.)

The assessee included the segmental figures of this company in the list of comparables. The TPO eliminated this company on the ground that it was providing software services and ITES and its turnover from ITES was only 0.83 crore, which was less than the requisite turnover. We find that the TPO has accepted the functional comparability of this company on segmental level. The DR was also fair enough to candidly accept the functional similarity of the relevant segment of this company. In such circumstances, the question arises as to whether the relevant segment of this company can be excluded from the list of comparables merely on the ground that the revenue from this segment is only Rs.83 lakhs. In our considered opinion, the quantum of turnover can be no reason for the exclusion of a company which is otherwise comparable. We find that jurisdictional HC in the case of Chrys *Capital Investment Advisors (India) P. Ltd. vs. DCIT 2015-TII-13-HC-DEL-TP* has held, that high turnover or high profit can be no reason to eliminate an otherwise comparable company. The same applies with full force in the converse manner as well to a low turnover/low profit company. We, therefore, hold that a company cannot be excluded from the list of comparables on the ground of its low turnover. In principle, we direct the inclusion of the relevant segment of this company in the list of comparables. The TPO is directed to include the operating profit/operating costs of the ITES segment of this company in the list of comparables, after due verification of the necessary figures for determination of the operating profit margin etc.

B) Treatment of Foreign Exchange Fluctuation

The Special Bench of the Tribunal in *ACIT vs. Prakash L. Shah 2008-TIOL-429-ITAT-MUM-SB* has held that the gain due to fluctuations in the foreign exchange rate emanating from export is its integral part and cannot be differentiated from the export proceeds simply on the ground that the foreign currency rate has increased subsequent to sale but prior to realization. It went on to add that when goods are exported and invoice is raised in currency of the country where such goods are sold and subsequently when the amount is realized in that foreign currency and then converted into Indian rupees, the entire amount is relatable to the exports. In fact, it is only the translation of invoice value from the foreign currency to the Indian rupees. The Special Bench held that the exchange rate gain or loss cannot have a different character from the transaction to which it pertains. The Bench found fallacy in the submission made on behalf of the Revenue that the exchange rate difference should be detached from the exports and be considered as an independent transaction. Eventually, the Special Bench held that such exchange rate fluctuation gain/loss arising from exports cannot be viewed differently from sale proceeds. In view of the foregoing discussion and respectfully following the view taken by Co-ordinate Bench in immediately preceding year, we are of the considered opinion that the amount of foreign exchange gain/loss arising out of revenue transactions is required to be considered as an item of operating revenue/cost, both of the assessee as well as comparables. We, therefore, hold that the AO was not justified in considering forex loss as non-operating cost as against the assessee's claim of operating cost. With the above remarks, we set aside the impugned order and send the matter back to the file of TPO/AO for determining the ALP of the international transaction afresh in conformity with our above observations.

C) Inter-company Receivables

We note that there is no change in the terms and conditions of the Agreement between Ameriprise USA and assessee. Clause 6.5 of the agreement provides that the payment shall be cleared within thirty days from the date of invoice, however, under no circumstance shall the payment be delayed for more than 60 days. In the instant case, the payment was realized in days, which is well within the outer time limit of 60 days. In the instant facts, we don't feel necessary to get into the issue of whether the instant transaction is an international transaction or not. Respectfully following the decision of Co-ordinate Bench in preceding year, we direct that there can be no question of charging any interest as a separate TP adjustment.

> "Education is the manifestation of the perfection already in man. Religion is the manifestation of the Divinity already in man. Therefore the only duty of the teacher in both cases is to remove all obstructions from the way. Hands off! as I always say, and everything will be right. That is, our duty is to clear the way. The Lord does the rest."
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> — *Swami Vivekananda*