


CA Tarunkumar Singhal & Sunil Moti Lala, *Advocate*

INTERNATIONAL TAXATION
Case Law Update

Tribunal Decisions

India-UK DTAA – Taxability of revenue earned from distribution of news & financial information products – Whether taxable in India – Held : Not taxable in India in the absence of a dependent agent PE & service PE – In favour of the assessee

Reuters Limited vs. DCIT – [TS-511-ITAT-2015(Mum.)]

Facts

i) The assessee is a resident of the U.K. It is engaged in the business of providing worldwide news and financial information products. The assessee produces, compiles and distributes news and financial information products through the 'Reuters Global Network' with a vast global communication network. Such network consist of data storage facilities situated in three locations i.e. London, New York and Singapore, which are linked by satellite and terrestrial lines.

ii) The assessee uses the network to receive and transmit information and provide access to the compiled news and edited financial information to distributors in various countries. In India, the assessee provides Reuters products to its Indian subsidiary named as Reuters India Private Limited (RIPL) under certain specified agreements. In turn, the RIPL distributes Reuters products to the Indian subscribers independently in its own name.

iii) The assessee entered into three kinds of contractual agreements with RIPL i.e. licence agreement, product distribution agreement and distributor agreement. Under the distributor agreement, RIPL has been appointed as the distributor to sell designated Reuter products to subscribers in India using the Reuters Global Network.

iv) Under the aforesaid agreement, the assessee provides RIPL, connection to the Reuters Global Network whereby products are made available to the RIPL, which are then distributed by RIPL to various subscribers in India independently.

v) During the relevant year the assessee had deputed Mr. Simon Cameron Moore, as the NBC of Mumbai for gathering, writing and distributing the news and overall coverage of news.

vi) In terms of the distributor agreement, the assessee had received distribution fees which were claimed to be not taxable in India in the absence of a PE.

vii) The Assessing Officer (AO) held that the revenue earned by the assessee was taxable as Fees for Technical Services (FTS) under Article

13 of the tax treaty. It was further held that RIPL constituted to be a dependent agent PE in India under Article 5(5) of the tax treaty and therefore, income was taxable under section 44D of the Income-tax Act, 1961 (the Act) on gross basis.

viii) The Dispute Resolution Panel (DRP) held that the assessee had a PE in India in the form of RIPL, as it was dedicated for the business of the assessee. Further, Mr. Simon Moore was deployed in India as NBC during the relevant period, for rendering service to RIPL on the assessee's behalf and such services will constitute a service PE in India.

ix) Accordingly, the AO passed the order in pursuance of the directors of the DRP. The AO taxed the entire distribution fee on a gross basis at 20% under section 44D read with section 115A of the Act.

Decision

On appeal, the Tribunal held in favour of the assessee as under:

A) Re: Agency PE

i) On referring to Articles 5(4) and 5(5) of the tax treaty, it indicates that an agent is deemed to be a PE, if he is not independent and habitually exercises an authority to conclude contracts on behalf of the enterprise or if he has no such authority, but habitually maintains a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise or he habitually secures orders solely or almost wholly for the enterprise. If any of these conditions mentioned in Article 5(4) of the tax treaty is not fulfilled, the agent cannot constitute a PE for the foreign enterprise.

ii) On referring to the relevant terms of the distribution agreement, it indicates that nowhere has it been specified or that there is any mandate that RIPL was habitually exercising its authority to negotiate and to conclude the contracts on behalf of the assessee in the territory of India, which is binding or can bind the assessee. It envisages simply delivering of assessee's services for a price which can be further distributed by RIPL for earning of its own revenue.

iii) There was no clause in the agreement that RIPL would act as an agent on behalf of the assessee *qua* the distribution to subscribers. In fact, RIPL has an independent contract with the subscribers, which was evident from the contract agreement between RIPL and third party subscribers in India.

iv) Similarly, when RIPL was supplying news and material to the assessee, the same is again on a principal to principal basis. The second condition as mentioned in Article 5(4) of the tax treaty, also was not fulfilled, because RIPL was not habitually maintaining stock of any goods and merchandise for which it can be held that it was regularly delivering goods on behalf of assessee. Lastly, it was not habitually securing the orders wholly and almost wholly for assessee.

v) RIPL was earning substantial income from its own dealing with third party customers which was evident from the contract entered into by the third parties and also from the income shown from 'subscription fee' by RIPL from third party customers.

vi) Nothing was evident from the distribution agreement or financial accounts that RIPL was acting as an agent of the assessee. The character of an agent under Article 5(4) of the tax treaty which can be said to be dependent is that the commercial activities of the agent for the enterprise are subject to instructions or comprehensive control and it does not bear the entrepreneur risk

vii) The main thrust of an agent being a PE under the tax treaty is whether the agent has an authority to conclude contracts in the name of the enterprise. Thus, the qualified character of the agency is the authorisation to act on behalf of somebody else so much so as to conclude the contracts. In the present case, there were no such terms which were borne out from the distribution agreement that RIPL was only

acting on behalf of assessee or is any kind of a dependent agent. RIPL was a completely an independent entity and the relationship between the assessee and RIPL was on a principal-to-principal basis

viii) Even under Article 5(5) of the tax treaty, the foremost condition is that the activities of such an agent are devoted wholly or almost wholly on behalf of the enterprise. In the present case, the activities of RIPL cannot be said to be devoted wholly or almost wholly on behalf of the assessee as it had entered into contracts with subscribers in India on an independent and a principal-to-principal basis for earning and generating its revenues.

ix) In fact revenue from third party subscribers was far excess than the transaction with the assessee. In the present case, it was not the case that RIPL was completely or wholly doing an activity for assessee and earning income wholly from assessee only. Thus, the conditions laid down in Article 5(5) of the tax treaty were not fulfilled.

B) Re: Service PE

i) On reference to provisions of Article 5(2)(k) of the tax treaty, it is clear that an enterprise shall be deemed to have a PE in India of it furnishes managerial or other services except services which are taxable as 'royalty' or 'fees for technical services', through employees or other personnel, provided the duration of activities within the contracting state exceeds the prescribed period. The main thrust of Article 5(2)(k) of the tax treaty is furnishing of services through employees or other personnel in another contracting state.

ii) The NBC was a very senior and experienced reporter or correspondent who was responsible for collecting and analysing the news and holds a room. He was mainly responsible for co-ordinating the efforts of the reporting staff to investigate and cover stories for dissemination of news to print and media outlets. He has been assigned to India by the assessee as a 'Text Correspondent' to perform functions of a Bureau Chief. In this case, his functions and duties had nothing to do with, in so far as the distribution agreement is concerned.

iii) There was no furnishing of services by the NBC to the RIPL which had lead to earning of a distribution fees to the assessee. The NBC has nothing to do for providing of assessee's services to the distributor Thus, it cannot be held that the NBC constitutes a service PE in India for the assessee under Article 5(2)(k) of the tax treaty as he had not furnished any services in India on which the assessee had earned the distribution fee.

Accordingly, it was held that neither under Article 5(2)(k) nor under Article 5(4) read with 5(5) of the tax treaty, the assessee had a PE in India and, therefore, the distribution fee received by the assessee cannot be held to be taxable in India.

Disallowance u/s. 40(a)(i) – Nil TDS certificate obtained from AO u/s 195(2) – Held : No disallowance under section 40(a)(i) of the Income-tax Act if the assessee has not deducted tax at source based on 'nil' withholding certificate obtained from the AO

DCIT vs. Carl Zeiss India (P) Ltd. - [TS-463-ITAT-2015(Bang.)]

Facts

i) The assessee, a company incorporated in Singapore, is a 100 per cent subsidiary of Carl Zeiss, AG Germany. The Carl Zeiss group manufactures and sells optical products. It was engaged mainly as a front office of the assessee in India facilitates the sale of the group's products in India, apart from providing it sales support in India.

ii) During the year under consideration, the assessee had made payment for reimbursement of the expenditure in respect of the services

rendered by the head office through three senior management officials. The payment was made under the cost sharing arrangements and claimed as reimbursement to the head office.

iii) The assessee had obtained a nil withholding tax certificate from the AO before remitting the amount to its head office.

iv) During the assessment proceedings, the Assessing Officer (AO) noted that the assessee had claimed INR 11.25 million under the head office cost of senior management.

v) The AO held that the services provided by the head office through three senior management officials fall within the category of Fee for Technical Services (FTS) under section 9(1)(vii) of the Act as well as the India-Singapore tax treaty. It was held that since the assessee did not deduct tax at source, the said payment was disallowed under section 40(a)(i) of the Act and added to the total income.

vi) The AO also made the disallowance in respect of the expenditure on account of advertisement and sales promotion. The expenditure on account of printing, reimbursement, sales promotion, stall charges were covered under section 194C of the Act, and the expenditure on account of training charges were covered under section 194J of the Act.

vii) The Commissioner of Income-tax (Appeals) [CIT(A)]:

a) Deleted the addition made by the AO in respect of one senior management personnel;

b) Confirmed the addition made by the AO in respect of other personnel holding that the payment was in the nature of FTS; and

c) Held that the AO failed to establish the fact that payments made by the Indian branch towards advertisement and sales promotion expenditure, qualified as payments covered under sections 194C / 194J of the Act and therefore, the provisions of withholding tax were not attracted to such payments. Accordingly, the CIT(A) had deleted the disallowance made by the AO.

Decision

The Tribunal held in favour of the assessee as under :–

A) Re: Reimbursement of Head Office expenditure

i) The assessee had remitted the amount to the non-resident after obtaining a certificate from the AO under section 195(2) of the Act. The AO while granting the certificate under section 195(2) had duly recorded the fact that the payment in question is in respect of availing the services of Carl Zeiss Pte. Ltd., Singapore under the agreement for providing certain managerial and human resources to the Indian branch.

ii) The AO noted that the payment was in connection with salaries and other cost of managerial and HR officials charged to the Indian branch which includes the cost of the MD, Chief Officer, HR & Quality and web administrator for IT application specialists. Thus, after considering the submissions of the assessee that the services provided by the non-resident from Singapore does not fall within the definition of FTS under Article 12 of the India-Singapore tax treaty, the AO issued a 'nil' withholding certificate for making remittance.

iii) The provisions of section 40(a)(i) of the Act can be invoked only when there is a failure on the part of the assessee to comply with the provisions of Chapter XVIIB of the Act. The payment in question was to a non-resident company and therefore, the provisions for deductions of tax as provided under section 195 of the Act are relevant.

iv) The assessee had already made an application under section 195(2) of the Act for seeking permission from the authority concerned to remit the said payment to the non-resident without a deduction of tax at source as nil and allowed the assessee to remit the said amount without deduction of tax at source.

v) Once the assessee had complied with the provisions of Section 195 of the Act and had obtained a certificate from the AO in accordance with the requirement of Section 195(2) then, the assessee cannot be penalized by invoking the provisions of Section 40(a)(i) of the Act during assessment.

vi) Accordingly, without going into the issue of the nature of payment – whether FTS of not, it was held that once the assessee had complied with the provisions of section 195(2) of the Act, no disallowance can be made under section 40(a)(i) of the Act with respect to the said amount paid to the non-resident.

B) Advertisement and sales promotion expenditure

After going through the details, the Tribunal held that the advertisement and sales promotion expenditure did not fall within the scope of section 194C or 194J of the Act. Accordingly, the decision of the CIT(A) was upheld by the Tribunal.

[Note: In this regard, the reader may also refer to Mangalore Refinery and Petrochemicals Ltd vs. CIT [2008] 113 ITD 85 (Mum.)]

India-UK DTAA – Payment for capturing and delivering of live coverage of cricket matches – Whether taxable as FTS or royalty – Held : Not taxable in India either as FTS or as Royalty.

IMG Media Limited vs. DDIT - (TS-483-ITAT-2015(Mum.))

Facts

i) The assessee is incorporated in the UK and a tax resident of the same. The assessee is a world leader in the field of multimedia coverage of sports events, including cricket.

ii) The assessee and the BCCI had entered into an agreement for capturing and delivering of the live audio and visual coverage of cricket matches conducted under the brand name Indian Premier League (IPL).

iii) The assessee contended that it had a service Permanent Establishment (PE) in India and income attributable to the Indian operations was computed under the Transactional Net Margin Method (TNMM). However, AO held that the amount received by the assessee was in the nature of FTS as well as royalty and accordingly assessed the entire amount of gross receipts.

iv) The Dispute Resolution Panel (DRP) held that the concept of a 'service PE' does not have an application, once it is held that the gross receipts are taxable as FTS or as royalty. The DRP held that the amount received by the assessee was in the nature of FTS under the Income-tax Act, 1961 (the Act) and the tax treaty.

Decision

On appeal, the Tribunal held in favour of the assessee as under:

A) Re: Taxability as Fees for Technical Services

i) The Tribunal observed that the assessee possesses the required expertise in live audio-visual coverage of matches and hence, the BCCI has engaged the assessee to produce and deliver live audio-visual coverage of the IPL Cricket Matches conducted by it.

ii) The job of the assessee shall come to an end once the feed is produced and delivered to the licensed broadcasters in the form of digitalised signals. As per the agreement, the BCCI shall supply the equipment like cameras, microphones, etc. of the required quality to the assessee.

iii) Article 13(4)(c) of the tax treaty uses the expression 'make available'. Though the said expression has not been explained in the context of the India-U.K. tax treaty, the assessee claimed that the principle or concept of 'make available' explained in the India-USA protocol should also be applied in respect of the India-U.K. treaty also.

iv) The assessee produces the feed (programme content) of live coverage of audio-video visuals of the cricket matches by using its technical expertise. After that, it delivers the feed in the form of digitalised signals to the licensees (broadcasters). There was no dispute that the licensees receive the feed on behalf of the BCCI.

v) What was delivered by the assessee was a final product in the form of programme content produced by it by using its technical expertise. The assessee did not deliver or make available any technology/knowhow to the BCCI.

vi) Production of 'programme content' by using technical expertise is altogether different from provision of technology itself. In the earlier case, the recipient would receive only the product and he could use it according to his convenience, whereas in the latter case, the recipient would get the technology/knowhow and hence he would be able to use the technology/knowhow on his own in order to produce any other programme content of a similar nature.

vii) In the latter case, the technology/knowhow would be 'made available' to the recipient, in which case the payment given would fall under the category of FTS. However, in the former case, there is no question of making available any technology/knowhow and hence such payment is to be considered as payment for production of 'programme content or live feed' and not for supply of technology.

viii) The object of the production of live feed was to offer quality coverage of the live cricket matches to the viewers. The assessee's job was restricted to the production of live coverage and the job of broadcasting the same was undertaken by the BCCI. The BCCI, in turn, had given licence to certain companies to undertake the job of broadcasting of the live coverage on behalf of BCCI.

ix) Since the assessee was supplying the live coverage in the form of digitalised signals, it had to ensure that the broadcasters also do have the compatible technology and equipment so that the live coverage can be broadcasted without compromising on the quality. The same was sought to be achieved by synchronising the quality of technical equipment between the assessee and the broadcasters (licensees). Such kind of synchronisation of technology would ensure a seamless function and complete co-ordination between the assessee and the broadcasters.

x) Thus, there is a difference between the technology involved in the production of live coverage feed and the technology necessary to broadcast the same in the required quality. Hence, in order to ensure and maintain the quality of live coverage feed, it becomes necessary on the part of the assessee to specify or oversee the technology available with the broadcasters.

xi) The specification of the technical requirements does not mean that the assessee had supplied the technology involved in the production of live coverage feed to the broadcasters. If that be the case, the broadcasters should be in a position to use the technology in order to produce the live feed on their own.

xii) In the present case, the tax department had not established that the broadcasters (who are acting on behalf of the BCCI) or the BCCI itself had acquired the technical expertise from the assessee which would enable them to produce the live coverage feeds on their own after the conclusion of IPL cricket matches. Consequently, the essential condition of the 'make available' clause fails and hence the amount received by the assessee cannot be considered as FTS under Article 13(4)(c) of the tax treaty.

xiii) The DRP had observed that the live coverage of cricket matches involved instant and continuous production and broadcasting of live matches. Further, the broadcasters were able to split the programme content in order to insert advertisements. All these aspects, would not bring the payment under the category of FTS. It only shows the technical expertise of the assessee to produce flexible programme content to provide enhanced viewing quality of live matches.

xiv) The decision in the case of Nimbus Sport International Pte Ltd. [2012] 18 taxmann.com 105 (Del.) was distinguishable on facts of the present

case, since the said decision was covered by the India-Singapore tax treaty and the principle or concept of 'make available' had not been examined by the Tribunal.

xv) Since the amount received by the assessee was not FTS under Article 13(4)(c) of the tax treaty, it was not necessary to examine its taxation under section 9(1)(vii) of the Act.

B) Re: Taxability as royalty

i) The job of the assessee ends upon production of the 'programme content'. According to the assessee, the programme content shall become the property of the BCCI. In the present case, the tax department had not brought any material on record to show that the assessee had kept the ownership rights over the programme content.

ii) The assessee had received the money for producing live coverage of cricket matches. The equipment required for the said purpose may be brought by the assessee itself or it may be provided by the BCCI.

iii) Under commercial terms, if the assessee was required to bring the equipment, then the consideration payable for the production of live coverage of cricket matches should go up. Thus, it was a simple case of a commercial agreement entered between the parties with regard to the modalities to be followed and the same was not a determining factor to decide about the nature of payment received by the assessee.

iv) A careful perusal of the definition of 'royalties' under the tax treaty indicates that the payment, in order to constitute as royalty, should have been made 'for the use of, or the right to use any copyright, etc'. However, in the instant case, the payment was made by BCCI to the assessee for producing the programme content consisting of live coverage of cricket matches. There was nothing on record which indicates that the assessee had retained the ownership of the program content.

v) The Tribunal relied on the decision of the Delhi High Court in the case of *CIT vs. Delhi Race Club [2015] 273 CTR 503 (Del.)* where it has been held that live television coverage of any event is a communication of visual images to the public and would fall within the definition of the word 'broadcast' in section 2(dd) of the Copyright Act. However, section 13 does not contemplate broadcast as a work in which 'copyright' subsists, as the said section contemplates 'copyright' to subsist in literary, dramatic, musical and artistic work, cinematograph films and sound recording. Accordingly, broadcast or live coverage does not have a 'copyright'.

vi) The Tribunal observed that though the said decision of the Delhi High Court was rendered in the context of the provisions of section 194J of the Act; yet the section imports the definition of the term 'royalty' from Explanation 2 to section 9(1)(vi) of the Act. Under the definition given in the said provision, 'royalty' means a consideration for the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property.

vii) In the instant case, the BCCI becomes the owner of the programme content produced by the assessee. The job of the assessee ends upon the production of the programme content and the broadcasting was carried out by some other entity to which a licence was given by the BCCI. Hence, the question of a transfer of all or any right does not arise in the facts and circumstances of the instant case.

viii) Accordingly, the payment received by the assessee cannot be considered as 'royalty' under the tax treaty. Though, it was not necessary to examine the applicability of provisions of section 9(1)(vi) of the Act, yet the facts discussed above would show that the payment received by the assessee cannot fall within the purview of Section 9(1)(vi) of the Act also.

[Note: On a similar point, the reader may also refer to the favourable decision of the Mumbai Tribunal in the case of *ADIT vs. Neo Sports Broadcast Private Ltd. vs. [2011] 133 ITD 468 (Mum)].*