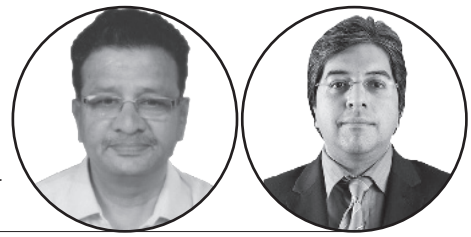

INTERNATIONAL TAXATION
Case Law Update

CA Tarunkumar Singhal & Dr. Sunil Moti Lala

A. HIGH COURT

1 *CIT v. Taj TV Limited*

[TS-126-HC-2020(BOM)] [INCOME TAX APPEAL (IT) NO.1437 OF 2017] for Assessment Year 2004-05 and 2005-06

An exclusive distributor in India would not be considered as a dependent agent under Article 5(4) of the India-Mauritius DTAA of the non-resident if the distributor is acting independently on its own account and on a principal to principal basis with the non-resident

Facts

i) The Petitioner (i.e. assessee) was engaged in the business of telecasting sports channel 'Ten Sports'. It was registered under the laws of Mauritius and a tax resident of Mauritius since 12th July, 2002 (prior to that, it was registered as a company in British Virgin Islands). The assessee collected revenue by way of advertisement and distribution of channel in India.

ii) The assessee had entered into distribution agreement with Taj India (a subsidiary of the assessee, incorporated in India) pursuant to which, the assessee had appointed Taj India as exclusive distributor in India to distribute the channel 'Ten Sports' to cable systems for exhibition to subscribers in India. The assessee had also entered into an advertisement agreement pursuant to which, the assessee had appointed Taj India as an advertising sales agent in India to sell commercial advertisements spots to prospective advertisers in India on the channel 'Ten Sports'.

iii) During the course of assessment proceedings, the AO held that Taj India was a dependent agent of the assessee and hence a Dependent Agency PE (hereinafter referred as DAPE) of the assessee was established in India. The First Appellate Authority upheld the action of the AO with respect to the advertisement agreement

as Taj India was fully dependent on the assessee for its business activities. However with respect to the distribution agreement, the First Appellate Authority held that Taj India was not acting as an agent of the assessee but had only acquired rights of distribution of channel from the assessee on its own behalf and hence it was held that Taj India did not constitute a DAPE of the assessee as per Article 5(4) of the India – Mauritius DTAA, with respect to the distribution agreement. On further appeal, the Tribunal upheld the order of the First Appellate Authority as Taj India was acting independently on a principal to principal basis.

iv) Cross appeals were filed before the HC by the assessee and the Revenue.

Decision

i) Assessee's appeal qua the advertisement agreement (with respect to which the Tribunal has held that Taj India was a DAPE of the assessee) was dismissed as being time barred.

ii) The High Court analyzed Article 5(4) of the India-Mauritius DTAA and observed that a DAPE is constituted only if the agent habitually exercises in the first contracting State an authority to conclude contracts in the name of the enterprise or he habitually maintains in the first contracting State a stock of goods or merchandise belonging to the enterprise from which he regularly fulfills orders on behalf of the enterprise.

iii) The High Court relied on the order of the Tribunal, wherein it was factually determined (after perusal of the distribution and the sub-distribution agreements) that Taj India was not acting as agent of the assessee but it had obtained the right of distribution of the channel for itself and subsequently, it had entered into contracts with other parties (i.e. the sub-distribution agreements) in its own name in which the assessee was not a party. In view of the same none of the conditions as mentioned in Article 5(4) of the India-Mauritius DTAA were fulfilled and hence DAPE of the assessee was not established in India i.e. qua the distribution agreement.

iv) In view of the above findings of the Tribunal, the High Court dismissed the appeal of the Revenue, as no substantial question of law arose from the order of the Tribunal.

2 *Shriram Capital Ltd. v. DIT(IT)*
[2020] 115 taxmann.com 388 (Madras)

Where assessee engaged services of a law firm in Indonesia for acquiring an insurance business in Indonesia, in view of fact that it was a case where services were provided by a person holding expertise in relevant field, it could be concluded that said services would fall in category of 'consultancy services' and thus FTS. Further, exception in section 9(1)(vii)(b) i.e. payment made by a resident for the purpose of making or earning any income from a source outside India, would not be applicable as the payment

Facts

i) The Petitioner (i.e. assessee) engaged the services of a law firm based in Indonesia (i.e. payee) for acquiring an insurance business in Indonesia. The services provided by the payee inter alia included drafting a Share Purchase Agreement, drafting Share Transfer Deed, assistance

in obtaining necessary approvals for the proposed acquisition, advising the assessee on all legal aspects and representation before the regulatory authorities if required etc.

ii) The assesse filed an application u/s 195 before the AO for making payment to the payee without deducting taxes thereon. The said application was rejected and the AO held that the services rendered by the payee are in nature of consultancy services and the proposed payment to be made was not for the purpose of generating any income from abroad by the assessee. Against the order of the AO, the assessee filed a revision application u/s 264 before the CIT who upheld the action of the AO by observing that the assessee did not had any business activities in Indonesia at the time of making the payment and hence the services were not rendered for the purpose of the business activities of the assessee in Indonesia. The assessee filed writ petition against the order of the CIT u/s. 264.

iii) Before the High Court, the assesse contended that the services were rendered outside India and accordingly the income did not accrue in India. Further the assessee also contended that the payment made to the payee fell under the exception to section 9(1)(vii)(b) since the fees payable were in respect of services utilised in a business or profession carried by the assessee outside India and for the purpose of making or earning any income from any source outside India.

iv) The Revenue contended that since the source of the income in the hands of the payee was from the assessee based in India, the said income would accrue in India. Further, the Revenue also contended that the payment made by the assessee was not for the purpose of making or earning any source of income outside India, but only for making an investment, which was part of the business of the assessEe operated from India.

Decision

i) The High Court analyzed the scope of work undertaken by the payee and concluded that the payee had expertise in the relevant field and hence the services would be characterized as consultancy services u/s. 9(1)(vii) and accordingly the assesse would be required to withhold taxes u/s 195.

ii) With respect assessee's plea that the payment fell within the exception to section 9(1)(vii)(b), the High Court held that there was a mere proposal for acquiring the insurance business in Indonesia and there was no source that existed in Indonesia at the time of making the payment to the payee.

iii) Further, the question as to whether the payee would be entitled to claim benefits of the India-Indonesia DTAA, was left open by the High Court, since Notification No. GSR 77(E), dated 4-2-1988 (notification notifying India-Indonesia DTAA u/s. 90) was not produced before the High Court.

3 *Paradigm Geophysical (P.) Ltd. v. CIT(IT)*

[2020] 115 taxmann.com 254 (Delhi) [W.P.(C.) NO. 1370 OF 2019] for Assessment Year 2012-13

Section 44DA would prevail over section 44BB post amendment *vide* Finance Act, 2010. Accordingly any income in nature of Royalty or Fees for Technical Services defined u/s. 9 would be taxable u/s. 44DA or 115A irrespective of the fact that the activities carried on by the assessee is utilised in the business of exploration or production of mineral oils u/s. 44BB.ation or production of mineral oils u/s. 44BB

Facts

i) The Petitioner (i.e. assessee), an Australian company, was engaged in the business of developing and providing customized software enabled solutions (i.e. 2D/3D images and graphs of the seismic marine data) and annual maintenance services thereof. The services provided by the assessee were used by the oil and gas industry in relation to excavation, extraction, production activities and seismic analysis.

ii) The assessee filed the return of income for AY 2012-13 by opting for presumptive taxation u/s 44BB. The case was selected for assessment and the AO held that the nature of services provided by the assessee were Royalty/FTS in nature and accordingly taxed the said income u/s. 44DA. Against the order of the AO, the assessee filed a revision application u/s. 264 before the CIT, however the CIT dismissed the revision application on the grounds of maintainability without dealing with the merits of the case. Subsequently on filing a writ petition before the Delhi HC against the order of the CIT, the High Court quashed the said order and directed the CIT to decide the issue on merits. In the second round of proceedings before the CIT u/s. 264, the CIT upheld the action of the AO, pursuant to which the assessee filed a writ petition.

iii) Before the High Court the assessee contended that since the said services were used by the oil and gas industry in relation to excavation, extraction and production, section 44BB would be applicable as held by the Supreme Court in case of Oil and ***Natural Gas Corporation Ltd vs. CIT (2015) 376 ITR 306*** (hereinafter referred as ONGC). The assessee further contended that even after the amendments to section 44BB and section 44DA, made by virtue of Finance Act, 2010, position in law remained unaltered and hence provisions of section 44BB would be still applicable to the present case.

iv) The Revenue contended that after the amendments made to section 44BB and section 44DA, by virtue of Finance Act, 2010 the provisions of section 44BB would not be applicable if the nature of income fell under section 44DA (i.e. if the income is in nature of Royalty/FTS). Further the Revenue also contended that the decision of Supreme Court in case of ONGC would not be applicable in the present case as the same was applicable to AY's prior to AY 2011-12.

Decision

i) The High Court observed that section 44BB applies in a scenario where the

assessee is engaged in the business of providing services in relation to prospecting, extraction or production of minerals oils. However vide amendments by Finance Act, 2010, if the income earned by the assessee falls within the purview of Royalty/FTS as defined u/s. 9, then the computation for the purposes of determining "profits and gains of business or profession" is to be done as per the provisions of section 44DA even if the said services are utilised in relation to prospecting, extraction or production of minerals oils. Having clarified the above legal position, the High Court then proceeded to analyse whether the income earned by the assessee would fall within the ambit of Royalty/FTS as defined u/s. 9.

ii) With respect to FTS, the High Court, by placing reliance on the decision of Supreme Court in case of ONGC, observed that the term "mining or like project" (as referred in Explanation 2 to section 9(1)(vii)) would also include activities in relation to prospecting, extraction or production of minerals oils and hence any services rendered in relation to prospecting, extraction or production of minerals oils would be excluded from the ambit of FTS u/s. 9(1)(vii) and accordingly the High Court held that in such scenarios provisions of section 44BB would be applicable.

iii) With respect to FTS, the High Court, by placing reliance on the decision of Supreme Court in case of ONGC, observed that the term "mining or like project" (as referred in Explanation 2 to section 9(1)(vii)) would also include activities in relation to prospecting, extraction or production of minerals oils and hence any services rendered in relation to prospecting, extraction or production of minerals oils would be excluded from the ambit of FTS u/s 9(1)(vii) and accordingly the High Court held that in such scenarios provisions of section 44BB would be applicable.

iv) The High Court also directed the AO to examine whether the assesse would be entitled to claim benefits of the India-Australia DTAA, though the assesse had not taken the said plea before the lower authorities.

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