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INTERNATIONAL TAXATION
Case Law Update

A. HIGH COURT

1 *CIT vs. Citicorp Investment Bank (Singapore) Ltd. [(2023) 151 taxmann.com 510 (Bombay HC)]*

Where, assessee FII, a tax resident of Singapore, in its return, declared a capital gain on the sale of debt instruments and claimed exemption under Article 13(4) of India-Singapore DTAA and placed on record certificate given by Singapore authorities to the effect that capital gain income would be brought to tax in Singapore without reference to the amount remitted or received in Singapore, the assessee was entitled to benefit of Article 13(4)

Facts

i. The assessee, a tax resident of Singapore, is registered as a Foreign Institutional Investor (FII) in the debt segment with the Securities and Exchange Board of India (SEBI). The assessee had invested in debt securities in India during the year in consideration, i.e. A.Y.-2010-2011.

ii. In its return, the assessee inter alia declared a capital gain of ₹ 86,62,63,158/- on the sale of debt instruments and claimed exemption under Article 13(4) of the India-Singapore Double Taxation Avoidance Agreement (DTAA).

iii. During assessment proceedings, the assessee was asked to explain as to how the provisions of Article 24 of DTAA stood complied in order to claim capital gain as an exemption in India. Article 24 provides:

Article 24

1. Where this Agreement provides (with or without other conditions) that income from sources in a Contracting State shall be exempt from tax, or taxed at a reduced rate in that Contracting State and under the laws in force in the other Contracting State the said income is subject to tax by reference to the amount thereof which is remitted to or received in that other Contracting State and not by reference to the full amount thereof, then the exemption or reduction of tax to be allowed under this Agreement in the first-mentioned Contracting State shall apply to so much of the income as

is remitted to or received in that other Contracting State.

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iv. The assessee submitted that being a FII, it was liable to tax in Singapore on its worldwide income (irrespective of the amount repatriated to Singapore). It further submitted that even Singapore Revenue Authority had confirmed the above tax position vide their certificate dated 4th April 2012. The assessee further submitted that Article 13(4) of DTAA provides for the taxation of capital gain in Singapore and if, the assessee is offering its worldwide income for taxation in Singapore then the remittance of such income to Singapore has no relevance for the purpose of claiming benefit under the DTAA.

v. AO rejected this contention of the assessee on the ground that provisions of Article 24 of DTAA provide for restriction of exemption under Article 13(4) of such capital gains to the extent of repatriation of such income to other country, i.e., Singapore.

vi. The DRP also rejected the objections filed by the assessee.

vii. The Hon'ble ITAT held that the assessee was entitled to the benefit of Article 13(4) of DTAA between India and Singapore and allowed the appeal of the assessee.

viii. Aggrieved by the order of the Hon'ble Tribunal, the Revenue filed appeal before the Hon'ble Bombay High Court.

Decision

i. The Hon'ble High Court noted that as the property alienated were debt instruments, the assessee would come under Article 13(4) of DTAA (relevant extract reproduced below), whereby gains from the alienation of any property (debt instrument in this case) would be taxable only in Singapore, of which the alienator (the assessee) was a resident. Therefore, the entire capital gain of ₹ 82,58,83,330/- was taxable in Singapore.

Article 13 - Capital Gains

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2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base, maybe taxed in that other State.

3. Gains from the alienation of ships or aircraft .....

4. Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned In paragraphs 1, 2 and 3 of this Article shall be taxable only in that State."

ii. Further, w.r.t Article 24 of the DTAA, the Hon'ble High Court held that the exemption or reduction of tax to be allowed under the DTAA in India should only apply to so much of the

income as was remitted to or received in Singapore where the laws in force in Singapore provided that the said income was subject to tax by reference to the amount which was remitted or received in Singapore. When under the laws in force in Singapore, the income was subject to tax by reference to the full amount thereof, whether or not remitted to or received in Singapore, then in that case Article 24(1) would not apply.

iii. The Hon'ble High Court noted that the AO had held that the assessee had not produced any evidence to show the required repatriation as mandated by Article 24 of DTAA for entitlement of exempted income. It held that this was an incorrect statement as rightly held by the Hon'ble Tribunal. The assessee had placed on record even before the AO a certificate dated 16th April 2012 from Singapore Tax Authorities certifying that the income derived by the assessee from buying and selling of Indian Debt Securities and from Foreign Exchange transactions in India would be considered under Singapore Taxes Law as accruing in or derived from Singapore and such income would be brought to tax in Singapore without reference to the amount remitted or received in Singapore.

iv. The Hon'ble High Court concluded that therefore, Singapore authorities had themselves certified that the capital gain income would be brought to tax in Singapore without reference to the amount remitted or received in Singapore. It further added that as per circular no. 789 dated 13th April, 2000 and also as held in the judgement of ***CIT vs. Lakshmi Textiles Exporters Limited [(HC Mad) 245 ITR 522***] it was clear that such certificates issued by the Singapore Tax Authorities constitute sufficient evidence for accepting the legal position.

v. Thus, the Hon'ble High Court dismissed the appeal filed by the Revenue.

2 *CIT(IT) vs. Springer Nature Customer Services Centre GMBH [(2023) 152 taxmann.com 277 (HC - Delhi)]*

Where assessee, a German-based company entered into a commissionaire agreement with an I Co whereby the assessee was appointed as a non-exclusive sales representative of I Co for the promotion, sale and distribution of print and electronic books and journals published by I Co, commission for providing said services could not be taxed as FTS since assessee only rendered support to business operations and there were no special skills or knowledge that assessee's personnel were required to possess to render the said services, furthermore assessee also did not render any professional advice, or service concerning a specialized field. (AY 2013-14)

Facts

i. The assessee, a German company, was part of Springer Science + Business Media Group [in short, "The Springer Group"]. The Springer Group was engaged in the business of publishing books, and academic journals, in the field of natural sciences, technology and medicine. As part of the Springer Group's business model, the assessee functioned as a non-exclusive sales representative globally, except in America, of the Springer Group's affiliated publisher entities, which included Springer India Pvt. Ltd. ('SIPL').

ii. Pursuant to its appointment as a Commissionaire by SIPL, the assessee promoted, sold and distributed, print

and electronic books and journals published by SIPL. Besides this, under the very same Commissionaire Agreement, the assessee provided sales and marketing services, customer services, order handling, delivery invoicing, debtor and subscription management, and processing of return copies, amongst other services. Resultantly, the assessee collected subscription and other revenue/fees from the sale of electronic books and journals to third-party customers, which it ultimately paid to SIPL, albeit after retaining its commission, as agreed under the Commissionaire Agreement. It also provided services to its affiliate publishers.

iii. The Assessing Officer (AO), via order, passed under Section 143(3) read with Section 144C(3)(a) of the Act, inter alia made the following additions to the income of the assessee.

  i. The first addition concerned an amount equivalent to Rs. 24,84,114 paid to the assessee by SIPL against a Commissionaire Agreement which consisted of two components viz i) commission fee, amounting to ₹ 22,89,835 classified in the Form 3CEB report filed by SIPL as "production and editorial charges". ii) ₹ 1,94,279, which, as per the Form 3CEB report filed by SIPL, was categorized as "service charges" for the sale of "Indian journals in printed form".

  ii. The second addition made by the AO was of ₹ 16,67,83,110 which represented the subscription fees received by the assessee against e-journals from two Indian entities, namely, Informatics Publishing Private Ltd. and ZS Associates.

iv. The AO treated the aforementioned three additions as royalty u/s 9(1)(vi) of the Act and Article 12 of the India-Germany Double Taxation Avoidance Agreement (in short, "DTAA").

v. The CIT(A) deleted the second component of the first addition, i.e., the amount equivalent to ₹ 1,94,279, which had been categorized as "service charges" for the sale of "Indian journals in printed form". Further, the CIT(A) categorized the first component of the first addition, i.e., ₹ 22,89,835, as a fee for technical services ('FTS') instead of a royalty. The CIT(A), accordingly, took recourse to the provisions of Section 9(1)(vii) of the Act and Article 12(4) of the DTAA.

vi. W.r.t to the other additions, the CIT(A) upheld the order of the AO i.e. considered them as Royalty. Aggrieved, the assessee filed an appeal before the Hon'ble Tribunal.

vii. The Hon'ble Tribunal relying on the decision of its coordinate bench dated 23.08.2022, passed in ITA Nos. 434 and 3826/DEL/2019 in the matter of ***Springer Verlag GmbH vs. DCIT*** deleted the first component of the first addition, which was confirmed by the CIT(A).

viii. The Hon'ble Tribunal deleted the other additions and held that subscription fees could not be treated as Royalty by following the decision of the Supreme Court in ***Engineering Analysis Center of Excellence (P.) Ltd. vs. CIT, [2021] 432 ITR 471 (SC)***.

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

Decision

i. The Hon'ble High Court noted that Section 9 creates a deeming fiction as regards income accruing or arising in India, which, inter alia, involves FTS paid by a person who is a resident. 9(1)(vii)(b) r.w. Explanation 2 appended to the said provision defines FTS to mean any consideration, (including any lumpsum consideration), for rendering any managerial, technical or consultancy services. It held that thus for the first component to be treated as FTS, the services rendered by the respondent/assessee would have to fall under one or more of the following categories, i.e., managerial, technical or consultancy services which is evident upon a plain reading of the provisions of Section 9(1)(vii)(b) read with explanation 2 of the Act and Article 12(4) of the DTAA.

ii. It quoted Article 12(4) of the India-Germany DTAA which defines FTS as follows:

"The term "fees for technical services" as used in this Article means payment of any amount in consideration for the services of managerial, technical or consultancy nature, including the provision of services by technical or other personnel, but does not include payment for services mentioned in Article 15 of this Agreement."

It added that therefore, for the consideration received by the assessee against services rendered as per the Commissionaire Agreement to be construed as FTS, the services would have to fall under one or more categories mentioned above, i.e., managerial, technical or consultancy services.

iii. It noted that it was not disputed by the Revenue that the assessee under the Commissionaire Agreement, was required to promote, sell and distribute books and journals published by SIPL in print and electronic form and also that the following services were rendered by the respondent/assessee: (i) Global sales and marketing services (ii) Customer services (iii) Order-handling (iv) Address maintenance (v) Stock keeping and inventory management (vi) Invoicing (vii) Delivery (physical as well as online) (viii) Debtor management services (ix) Subscription management (x) Return copies processing and that for rendering the aforementioned services, the respondent/assessee was paid a commission, at the rate of 9.9%, on the net revenue amount of "any and all" sales commissioned through the intermediary of the assessee (Article 4a of the Commissionaire Agreement).

iv. It further noted that the assessee was empowered to retain the commission when transferring the revenue to SIPL, (or via any other payment of commission agreed upon between SIPL and itself) and the title in the publications remained with SIPL (which the assessee could assign "property/licenses" to third parties, albeit on behalf of SIPL).

v. The Hon'ble High Court added that there was nothing in the Commissionaire Agreement which was suggestive of the fact that the respondent/assessee was required to discover, develop, or define/evaluate the goals that SIPL had to reach, or even frame policies that led to these goals, or supervise or execute or change policies that were already adopted. The assessee was

not performing, as it were, executive or supervisory functions. All that the assessee was obliged to do was render support to business operations.

vi. W.r.t to the criteria (for a service) to be termed as FTS, the Hon'ble High Court concluded that there was no reference to any special skill or knowledge that the respondent/assessee personnel brought to bear in rendering the services encapsulated in the Commissionaire Agreement. Promotion, sale, or distribution of SIPL's publications, or rendering support services of the nature referred to in Article 3 of the Commissionaire Agreement, although involving human intervention, did not fall in the category of technical and/or consultancy services.

vii. The Hon'ble High Court also added that there were no special skills or knowledge that the respondent/assessee's personnel were required to possess to render the services that were contemplated under the Commissionaire Agreement. The respondent/assessee also did not render any professional advice, or service concerning a specialised field. As indicated above, for a service to be categorised as a technical service, it had to be concerned with applied science, i.e., using scientific knowledge for practical applications, or industrial science concerning, relating to or derived from industry.

viii. Thus, the Hon'ble High Court held that the contention of CIT(A) that the said amount received by the assessee had attributes of FTS was erroneous. It also relied on the judgement of ***IT vs. Panalfa Autoelektrik Ltd [(2014) 227 taxmann.com 351 (Delhi)***]. [In this judgment this issue has been extensively dealt with after considering the order of the Authority for Advance Ruling (AAR) rendered in ***Wallace Pharmaceuticals (P.) Ltd [2005] 278 ITR 97 (AAR)***].

ix. W.r.t to the second addition, the Hon'ble High Court held that the submission of Revenue that the subscription fee should be treated as FTS could not be accepted, as this was not the stand of the Revenue before the Tribunal. This was a flip-flop which the assessee would do well to abjure.

x. It further added that the subscription amount could not be treated as royalty, having regard to the fact that there was nothing on record to suggest that the assessee had granted the right in respect of copyright to the concerned subscribers of the e-journals. All that the assessee did was to sell the copyrighted publication to the concerned entities, without conferring any copyright in the said material.

xi. The Hon'ble Tribunal thus upheld the order of the Tribunal and held that the Tribunal was right in deleting the addition made under this head, given the judgment rendered by the Supreme Court in the case of Engineering Analysis.

3 *CIT(IT) vs. Alibaba.Com Singapore E-Commerce (P). Ltd. (IT) [(2023) 152 taxmann.com 110 (HC- Bombay)]*

Where assessee, a Singapore-based company, provided website facilities to Indian suppliers to do online business through a global trade marketplace for which assessee charged subscription fees, it was held that the arrangement between assessee and subscribers was for the provision of a standard facility and not for "rendering of

any technical, managerial or consultancy services" as provided in section 9(1)(vii) and thus subscription fees could not be taxed as FTS. Further, I Co who provided to assessee customer support, after-sales support and payment collection services from subscribers in India etc., could not be treated as DAPE as it had entered into several collaborations with other partners like assessee and assessee did not have any financial, managerial or any other type of participation in it

Facts

i. The assessee, Alibaba.com Singapore E-Commerce Private Ltd. was a company incorporated under the laws of Singapore which was evidenced by the certificate of incorporation. The document indicated that the entire control and management of the assessee is from Singapore. Thus, in terms of Article 4 of Indo-Singapore DTAA, it was a tax resident of Singapore, holding a valid 'tax resident certificate'.

ii. The entire structure of various holding companies of the 'Alibaba.com Group' showed that the immediate holding company was 'Alibaba.com International (BVI) Holding Ltd.', a company incorporated in British Virgin Island and the ultimate holding company was 'Alibaba.com Ltd.', a company incorporated in Cayman Island.

iii. During the years under consideration, the assessee had transacted with 'Alibaba.com Hong Kong Ltd.' (Alibaba Hong Kong) by way of availing of Web Hosting and related services. Alibaba Hong Kong was not the parent company of the assessee which was wrongly so mentioned and presumed by the A.O. in the impugned assessment order.

iv. The Alibaba website, i.e., www.alibaba.com, was commonly used by the entire Alibaba Group and services were being provided to the suppliers from all across the countries including India but excluding China, Hong Kong and Macau. The website facilitated Indian suppliers to do business online through a global trade marketplace. Indian subscriber subscribed to the assessee's service/facility offering under the "International Trust Pass" (ITP) and "Gold Suppliers Services Arrangement" (GSS) for which it charged a service fee.

v. The assessee had entered into a 'Co-operation Agreement' with Infomedia, an Indian Listed Company that provided the assessee customer support, after-sales support and payment collection services from subscribers in India etc. for which it was paid remuneration ranging between 40% to 50% plus cash bonus depending upon the target achieved by Infomedia as per the terms of the Co-operation Agreement.

vi. The service fee from Indian subscribers earned by the assessee and received via Infomedia was not offered to tax (as there was no business connection/permanent establishment of the assessee in India, nor the said payment was in the nature of Royalty or FTS).

vii. The AO held the service/subscription fee to be taxable considering the following points –

  i. Alibaba Singapore was not eligible to avail the benefits of the India-Singapore Tax Treaty on the grounds that, firstly, the assessee has no presence in Singapore and that the entire management of the assessee was based in Hong Kong; secondly, the Services to the Indian Subscribers were provided

by Alibaba Hong Kong, since it was the owner of the Website; and lastly, the Website was a trade mark of Alibaba Hong Kong;

ii. Information constitutes a 'business connection' for the assessee in India since the definition of business connection is an inclusive one;

iii. The subscription fees earned are partly in the nature of business income, royalty and fees for technical services;

iv. Business income:- The term 'source' does not mean the location of the payer, but the place where profit-making activities are carried out. In other words, the source is a 'profit-making apparatus', and since the Website constitutes a profit-making apparatus for which payments are made to the assessee by the subscribers, therefore, income is deemed to accrue or arise in India under section 9(1)(i) of the Act.

v. Fees for Technical Services:- The subscription fees earned were in the nature of fees for technical services on the ground that the scope of the term 'fees for technical services' is very wide and needs to be interpreted very broadly.

vi. The AO eventually assessed the total taxable income of the assessee as business income and taxed the assessee accordingly

viii. The DRP upheld the conclusion of the AO that the assessee was ineligible to claim the benefit of India Singapore DTAA, on the ground the assessee was only an intermediary between Indian subscribers and Alibaba Hong Kong. It further added that Infomedia was a dependent agent permanent establishment (DAPE) of the assessee and accordingly there was a permanent establishment/business connection of the assessee in India and its income was taxable in India as a business profit/ business income. The DRP accordingly directed that income attributable to the business connection shall be interalia, 50% of the remittance received by the assessee from Infomedia.

ix. The assessee and the department filed Cross-Appeals before the Hon'ble ITAT.

x. The issue of taxability under Royalty had been rejected by the DRP and the department did not challenge this aspect. Therefore, this issue was not a dispute before the Hon'ble ITAT.

xi. The Hon'ble Tribunal noted the submission of the assessee that the servers which host the website were located in California USA. In a nutshell, it had been pointed out that, firstly, Alibaba.com Ltd. was the owner of the IPR and of the domain name Alibaba.com; secondly, the website was operated by Alibaba Hong Kong; and lastly, the server was located in California USA. The assessee was doing online business providing business-to-business services (B2B services and providing the same kind of facility as that of yellow pages by providing a portal for giving information about the different products and services in the electronic form.

xii. The Hon'ble ITAT concluded that the assessee had a limited role as its role was confined to facilitating the posting of the advertisement or displaying of the information about the product and services in the electronic form into the web portal.

xiii. After considering the Co-operation Agreement between the assessee and Infomedia, the Hon'ble ITAT gave a finding that Infomedia had entered into several collaborations with other partners like the assessee and that the assessee did not have any financial, managerial or any other type of participation in Infomedia. Infomedia carried out a host of other activities for other clients and it was an independent entrepreneur. The Hon'ble ITAT concluded on facts that the activities of Infomedia under the "Cooperation Agreement" with the assessee were in the ordinary course of business and in no way it was dedicated wholly or almost wholly to the assessee and consequently it could not be treated as DAPE.

xiv. The Hon'ble ITAT concluded that the assessee could not be reckoned to have any kind of business connection in India in the form of Infomedia u/s 9(1)(i) r/w Explanation 2.

xv. W.r.t to FTS, the Hon'ble ITAT held that the arrangement between the assessee and the subscribers was for the provision of services for standard facility and not for "rendering of any technical, managerial or consultancy services" as provided in section 9(1)(vii) r/w Explanation 2 of the Act. It also relied on the judgment of the Apex Court in the case of ***Commissioner of Income-tax-4, Mumbai vs. Kotak Securities Ltd. [(2016) 383 ITR 1 (SC)***] and held that constant human endeavour or human intervention is an essential requirement for treating the rendering of services as "technical".

xvi. Accordingly, the Hon'ble Tribunal dismissed all the appeals filed by the revenue and allowed all the appeals filed by the assessee.

xvii. Aggrieved by the order, the Revenue filed an appeal before the Hon'ble High Court.

Decision

i. The Hon'ble High Court noted that the Hon'ble ITAT, after hearing the rival submissions, had given extensive factual findings as to why the conclusion of the AO, as well as DRP, were erroneous.

ii. Agreeing with the conclusion of the Hon'ble Tribunal, the Hon'ble High Court observed that in the orders passed by the AO and the DRP, the entire focus was on the fact that the website www.alibaba.com was registered in Hong Kong and was the trademark of Alibaba Hong Kong. AO had completely denied the existence of the assessee as an independent entity as if the assessee was only a front or a shadow entity of Alibaba Hong Kong. If the AO was so convinced that the entire activity in India to various subscribers was actually carried out by Alibaba Hong Kong and not by the assessee, then we would have expected him to do something to Alibaba Hong Kong and not the assessee.

iii. The Hon'ble ITAT had considered various documentary evidences, including the Tax Residency Certificate of the assessee, and had come to a factual finding that it could not be held that the assessee was either a non-existent entity or some kind of conduit of Alibaba Hong Kong which was not even the parent company. The Hon'ble ITAT had even reproduced a group structure of Alibaba.com and had come to a conclusion that Alibaba.com Hong

Kong was a separate entity from the assessee.

iv. The Hon'ble High Court held that the tax residency and residence status of the assessee was also established by filing the certificate of incorporation of the assessee. It showed it was incorporated in Singapore on November 06, 2007. Audited financial statements and the return of income of the assessee for the relevant years, which were filed before the Singapore Authorities, showed that the subscription fees were received by the assessee from the subscribers all over the world, including from India, as its own income

v. Accordingly, the Hon'ble ITAT had concluded that these facts showed that the assessee alone was the economic owner of the subscription fee it received from Indian subscribers and it received the revenue in its own right and not on behalf of Alibaba Hong Kong.

vi. It added that the Hon'ble ITAT also came to a finding that only the alibaba.com logo was registered in Hong Kong and that assessee only used the website of alibaba.com. It further held that the Hon'ble Tribunal had appreciated many other facts (which were not being mentioned in the order for the sake of brevity,) proving that the conclusions derived by the AO and the DRP were erroneous.

vii. It agreed with the conclusion of the Hon'ble Tribunal that the tax residency certificate was sufficient to determine the proof of residency and that the income-tax authorities could not ignore the valid tax residency certificate issued by the Government authority of the other contracting state, i.e., Singapore.

viii. It also rejected the Revenue's reliance on SC ruling in Vodafone International and argument that the Revenue had blanket powers to negate or ignore the TRC, holding that SC only observed that the TRC did not prevent the Revenue to enquire into a possible tax fraud, which was not alleged in the present case.

ix. On the issue of as to whether the assessee had any business connection in India in the form of Infomedia and whether Infomedia constituted a dependent agency PE for the assessee in India, it held that Indian Company i.e. Infomedia 18 Pvt. Ltd. with which the Assessee had a cooperation agreement was not its dependent agent permanent establishment (DAPE) as it was an independent entrepreneur which was compensated for its services and entered into several collaborations with others like Assessee. Further, the Assessee did not have any financial, or managerial participation in Infomedia. Also, the Assessee had a limited role in facilitating the posting of the advertisement/information on the web portal and the subscribers and the buyers would reach out to each other from the information provided by the Assessee without any participation or involvement of the Assessee.

x. It concurred with the finding of the Hon'ble ITAT given in light of the documents, facts and provisions of section 9(1) (i) r/w Explanation 2 and the proviso to the explanation, that the assessee could not be reckoned to have any kind of business connection in India in the form of Infomedia.

xi. It noted that the Hon'ble ITAT had also relied upon Circular 7 of 2003 dated May 09, 2003, issued by CBDT

which clarified that the term "business connection" would not include the cases of business activities being carried out through, inter alia, any independent agent if any such independent agent is acting in the ordinary course of its business. Therefore, it held that this was also a factual finding of ITAT.

xii. The Hon'ble High Court agreed that the income of the assessee could not be held to be deemed to accrue or arise in India in terms of section 9(1)(i) of the Act. Once the income of the assessee cannot be taxed as business income in India under 9(1)(i) then it is not necessary to go into the DTAA.

xiii. The Hon'ble High Court agreed with the conclusion of the Hon'ble Tribunal that activities highlighted by the AO were not carried out by the assessee at all and that the services provided by the assessee to the Indian Customers were merely that of displaying/storing data of Indian Subscribers, being limited to the provision of an E-commerce platform for advertising of products or services in India.

xiv. It held that the Hon'ble ITAT had rightly concluded that arrangement between Assessee and the subscribers was for the provision of services for standard facility and not for 'rendering of any technical, managerial or consultancy services' as provided in section 9(1)(vii), relying on SC ruling in Kotak Securities wherein it was held that if any technology or a process had been put to operation automatically without much human interface or intervention, then such technology per se cannot be held as rendering of technical services by human skills.

xv. The Hon'ble High Court concluded that the entire subject matter of the appeal was fact-based. Hence, it upheld the order of the Hon'ble Tribunal and dismissed Revenue's appeal.

B. TRIBUNAL (SPECIAL BENCH)

4 *Star India (P.) Ltd. vs. ACIT [(2023) 151 taxmann.com 77 (ITAT- Mumbai)]*

Held that where assessee made payments to AE(ESPN) for the acquisition of bundle of sports broadcasting rights (BSB rights) which ESPN had acquired from International Sport Bodies (ISBs), merely because the price paid by assessee was less than that what was agreed to be paid by the AE to ISBs, the same could not be said to be at ALP by applying CUP as MAM – since the said payment was part of a controlled transaction. Thus, in the instant case, 'Other Method' would be MAM to benchmark international transaction

Facts

AY 2014-15 [Background]

i. The assessee made payments to its AE i.e. ESPN Star Sports Ltd. (ESS) for the acquisition of a bundle of sports broadcasting rights (BSB rights) that ESS had acquired from International Sport Bodies(ISBs). The transaction of acquiring the BSB Rights (rights to broadcast through television/internet/mobile various sports events like ICC Tournaments including Cricket World Cup, Champions League T20 cricket, Formula-1 GP2 and Wimbledon Championships etc.) from ESS was thus concluded for 1211 USD million (by means of Master Rights Agreement (MRA) entered on 31-10-2013) in the financial year relevant to AY 2014-15.

ii. The assessee adopted as CUP, the price paid by ESS for acquiring such BSB Rights for a total sum of 1388 USD million. Since the overall purchase price of 1211 USD million agreed between ESS and the assessee was 9.5% less than the agreed price between ESS and third parties [International Sport Bodies (ISBs)], the assessee claimed that the international transaction was at ALP.

iii. As the payment schedule was of 5 years, the assessee had claimed a deduction of ₹ 1013.26 crore on this score for AY 2014-15. It applied the Comparable Uncontrolled Price (CUP) method for demonstrating that the international transaction of acquiring the BSB Rights was at Arm's Length Price (ALP).

iv. To substantiate the agreed price of 1211 USD million, the assessee furnished the report of the independent valuer. Such value was determined by adopting Discounted Cash Flow (DCF) method.

v. The TPO found some errors in the independent valuer's report and consequently determined the ALP of the overall international transaction at 411 USD million instead of 1211 USD million as determined by the assessee.

vi. This resulted in a variation between actual consideration (1211 USD million) and ALP consideration (411 USD million) at 800 USD million, being, 66.06% [800(1211-411)/1211*100] of the actual consideration.

vii. The assessee had reported the value of this international transaction for the A.Y. 2014-15 at ₹ 1013.26 crore. By applying 66.06% to the value of the transaction, the TPO proposed a transfer pricing adjustment of ₹ 669.36 crore for AY 2014-15.

viii. DRP provided no relief.

ix. For AY 2014-15, the Hon'ble Tribunal noted that the assessee submitted an expert's opinion as well as another valuation report before the DRP for the first time supporting its earlier valuation, which was again contradicted by the TPO during the remand proceedings.

x. On consideration of the entire conspectus of the case, Tribunal held that the valuation of BSB Rights was a highly technical matter, which could be done only by a person having expertise in the field. It, therefore, set aside the assessment order and remitted the matter with a direction to the Revenue to ascertain the correctness of the assessee's valuation reports by getting the valuation done through an expert in the field.

AY 2015-16

xi. For the given AY i.e. AY 2015-16, the assessee claimed deduction towards the value of the international transaction of 'Purchase of the BSB Rights'. It filed Form No.3CEB containing a list of international transactions, including, payment of ₹ 3075,24,15,714/- for acquiring Bundle of Sport Broadcasting Rights (BSB Rights) hitherto held by its US-based AE i.e. ESS [which in turn was acquired by ESS from ISBs (i.e. International Sport Bodies)]. The assessee claimed the said payment to be at ALP by applying the 'Other Method' on the basis of the report of an independent valuer. However, during assessment proceedings, it changed its MAM to CUP claiming the said payment to be at ALP since it was less than the third-party cost paid by AE (ESS) to ISBs. TPO extensively discussed and

reproduced its order for immediately preceding AY in its order for the given year, determining excess payment on an overall basis at 66.06% towards full terminal value and the part finite period value. Finding the facts of this year identical to the preceding year, the ALP of the transaction was determined at ₹ 1043 crores thereby recommending TP adjustment. AO notified the draft order with TP adjustment at ₹ 2031.50 crore.

xii. No reprieve was provided by DRP which relied on its own order for the AY 2014-15.

xiii. The assessee filed an appeal before the Hon'ble Tribunal and a Special Bench was constituted for the same.

Decision

PER Hon'ble VP

W.r.t Change in MAM by Assessee

i. The assessee adopted the `Other method' as the most appropriate method ('MAM') as per its Transfer Pricing Study Report for the determination of the ALP of the international transaction of Purchase of BSB Rights. Then it advocated for the CUP as the MAM before the TPO. The ld. DR contended that a method once chosen as the most appropriate in its TPSR cannot be changed by the assessee in further proceedings

ii. On-going through the prescription of sub-sections (1) and (2) of section 92C read with section 92, it gets highlighted that the legislature has used the word `shall' for determining the ALP under the most appropriate method and the most appropriate method is to be applied having regard to the nature of transaction or class of transaction etc.

iii. The ultimate aim of Chapter-X of the Act was to determine the arm's length price of the transaction. The methods prescribed are only the means of achieving the object of the ALP determination. Technicalities of the assessee having selected a wrong comparable or adopted a wrong method cannot come in the way of determining the correct ALP.

iv. Just as the TPO has the right to change the method applied by the assessee as per what he feels was right, if an assessee applies a particular method as most appropriate and thereafter realizes, during the course of the proceedings, that the method applied by it was not the most appropriate having regard to the nature and class of transactions etc., he can also back-out from the method earlier selected provided the new method is actually the most appropriate having regard to the nature of the transaction under consideration.

v. In both scenarios, viz., where either the TPO rejects the assessee's selection of the method or the assessee itself realizes its mistake in the selection of the method, it is for the Tribunal (the next appellate authority in the hierarchy) to examine the correctness of the newly selected method as the most appropriate in the facts and circumstances of the case. If the Tribunal holds that the change in the method by the TPO or the assessee resiling from its earlier selection is correct, then there can be no impediment in switching over to the new method because the legislature stipulates that the most appropriate method shall be applied for determining the ALP.

vi. The selection of the actual most appropriate method in the facts of the case was essential and not the perception of the assessee or the TPO to this effect. It thus follows that there can be no estoppel to the change of a method so long as the new method is, in fact, most appropriate for determining the ALP. (Reliance was placed on the judgment of the Hon'ble Delhi High Court in ***Pr. CIT vs. Matrix Cellular International Services Pvt. Ltd. (2017) 100 CCH 0191 Delhi High Court)***.

W.r.t to CUP vs Other Method as MAM

vii. The manner of determination of ALP under section 92C had been set out in rule 10B, which stated that: `For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction … shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely'.

viii. W.r.t to the correct method, the first method (CUP) and the last method (`other method') were price-based, whereas the remaining methods (RPM, CPM, PSM and TNMM) were profit-based.

ix. Ongoing through the mandate of the CUP method, it follows that the benchmark price is the actually transacted price (charged or paid and not some theoretical price) in a comparable uncontrolled situation; and the benchmark property is the property transferred (that is the same and not some similar) property.

x. In the definition of arm's length price, the preference and the first mention is of the price applied and then the price proposed to be applied. Here, it is pertinent to note that the definition of ALP is applicable to all six methods. The first part of this definition of the price which is applied applies to the first five specific methods and the latter part of the price proposed to be applied, in addition to the price which is applied, fits into the description of the last 'other method'.

xi. Narrowing down the proposition, if the CUP method was pitted against the `other method', then there was no prize for guessing that it was the former which would prevail over the latter provided the comparable uncontrolled data required for it was available. The ensuing discussion would demonstrate that the data required for the application of the CUP exists and was on record.

xii. Though the statute does not give priority to any method for selection as the most appropriate method, the ambit of the 'other method' in contrast to the specific methods makes it a method of last resort because of its relatively lesser exactitude and meticulousness.

xiii. Thus, CUP was the most appropriate method in the facts and circumstances of the case.

xiv. W.r.t to the ALP as determined by the assessee under the CUP method, it was noted that the nature of the transaction of `Purchase of Bundle of Sports Broadcasting Rights' was purchase on an aggregate basis by the assessee from ESS at a consideration lower than the third party costs payable by ESS.

xv. Thus, there is no need to examine the ALP based on valuation report(s) or expert opinions submitted by the assessee under the `Other method' and

also the deficiencies pointed out by the TPO in the valuation report, forming the bedrock of the transfer pricing adjustment. Therefore, the ALP of the international transaction of `Purchase of Bundle of Sports Broadcasting Rights' determined by the assessee is correct under the CUP method and does not warrant any interference.

PER Hon'ble AM

W.r.t to the Change in MAM

xvi. The Hon'ble AM held that every assessee, transfer pricing officer, Dispute Resolution Panel or any appellate authority determining the arm's-length price or adjudicating the same are duty-bound to follow the mandate of rule 10 C to hold what is the most appropriate method out of the method prescribed under section 92C of the act. Therefore, The MAM is a single method selected out of 6 methods prescribed under that section.

xvii. Reliance was placed on the judgement of ***Principal Commissioner of Income Tax vs. Metrix Cellular International Services Private Limited [2018] 90 taxmann.com 54 (Delhi)*** for the above mandate.

xviii. One has to consider the nature and class of the international transaction, parties to the transaction and functions performed by them with respect to the assets employed and risks assumed and the most important was the availability, coverage, and reliability of data necessary for application of that method.

xix. Thus, it is always possible that during the journey of determining the Arm's length price, MAM already considered is not appropriate, one can resiling from the most appropriate method adopted in its transfer pricing study report with a caveat that provided the earlier method selected by the assessee or for that matter any assessing authority or appellate authority, does not fulfil the requirement of rule 10C(2) of the rules and new MAM selected fulfils it.

xx. Therefore, there was no bar to any of the parties in concluding the most appropriate method by reselling the earlier method selected by it, if it is confirming the requirement of rule 10C(2) of The Income Tax Rules. The Hon'ble AM agreed with this part of the view expressed by the Hon'ble VP.

W.r.t to CUP vs Other Method as MAM

xxi. It was apparent that the assessee undertook to fulfil all risk and to earn the reward of these contracts as per these novation agreements or sublicenses according to the master rights agreement. Thus, the assessee had stepped into the shoes of ESS so far as all the liabilities of the various contracts entered into as well as reward of those contracts.

xxii. The price paid to ESS was not comparable to the prices paid to sports bodies (Third Parties) and would not constitute CUP. CUP Method compares the price charged with regard to a controlled transaction for the transfer of goods or services to the price charged for the transfer of goods or services in a third-party scenario having comparable circumstances. Necessarily, there have to be two prices for CUP to succeed and in the current scenario, no evidence was available that a third party had purchased such sporting rights from another party.

xxiii. After considering various aspects of the valuation report prepared by the various valuers as well as expert report, the MAM to determine the arm's-length price of the international transaction of sale of a bundle of rights was the 'other method', the ALP of this international transaction was to be determined applying the 'other method'.

PER Hon'ble JM

W.r.t to Change in MAM

xxiv. Agreed with both the Hon'ble VP and Hon'ble AM that the assessee, in principle, can resile from the most appropriate method as was adopted in the TPSR, provided that the new method confirms the requirement of Rule 10C(2) of the Income-tax Rules, 1962.

xxv. The tribunal being the last fact-finding authority was duty bound to ascertain the correct facts, nature & class of transactions, the FAR analysis, reliability of data and thereafter arrive at the Most Appropriate Method to benchmark the impugned international transaction, which might resile from the Method adopted by the assessee in the TPSR.

W.r.t to CUP vs Other Method as MAM

xxvi. Agreed with the Hon'ble VP that CUP Method when pitted against Other Method would prevail, provided reliable data under uncontrolled conditions is available.

xxvii. However, agreed with the Hon'ble AM that in the given facts of the present case, the 'Other Method' and not the 'CUP Method' was the most appropriate method as the agreed prices paid by the assessee to various sports bodies by virtue of the liabilities assumed under the agreements entered into with ESS represented only the discharge of liabilities and was a part of the controlled transaction which was paid to non-AE [Sports Bodies]at the instance of the AE [ESS]. It therefore did not represent uncontrolled price/transaction under uncontrolled conditions and hence did not constitute reliable data to undertake CUP analysis.

xxviii. If the assessee's manner of application of the CUP Method was to be taken to its logical conclusion, then the benchmark price ought to have been the value of the contracted liabilities i.e. USD 1338.03 million and there would not have been any reason for ESS under uncontrolled circumstances to give a discount of 9.5% and bear loss on this count. The very fact that the independent consideration agreed by the assessee and ESS of USD 1210.65 million was different than the value of contracted liabilities of USD 1338.03 million showed that the market conditions had indeed gone a change and an independent party would not have acquired these designated rights in 2013 for the same price which ESS had negotiated with ISBs.

xxix. Thus, the 'Other method' and not CUP was to be adopted as MAM.

Conclusion

xxx. Finally, the Hon'ble Members in majority directed to place the matter before the Division Bench for disposal having regard to the decision of the Special Bench on the issue that the arm's-length price of the international transaction is required to be determined by adopting 'Other Method' as MAM.

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