INTERNATIONAL TAXATION
Case Law Update

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A. SUPREME COURT

1 ***CIT- Int. Tax vs. Infosys Ltd. - [2024] 164 taxmann.com 701 (SC)***

SLP dismissed against High Court ruling that where assessee, an Indian software development company, sub-contracted certain overseas work to its wholly owned subsidiary in China and made payment to it for sub-contract work done, assessee was not required to deduct TDS on said payment - since amendment to section 9 by Finance Act, 2010 and substitution of Explanation to said section which provided for deduction of tax at source on such payment treating same as FTS u/s 9(1)(vii) was effective from 2011-2012, same would not apply to assessee during relevant assessment years 2009-10 and 2010-11.

B. HIGH COURT

2 ***CIT (TDS). v. Idea Cellular Ltd. - [2024] 164 taxmann.com 323 (Calcutta)***

Following the judgment of Hon'ble Supreme Court in ***Engineering Analysis Centre of Excellence (P.) Ltd. vs. Commissioner of Income-tax [2021] 125 taxmann.com 42/281 Taxman 19/432 ITR 471 (SC)/(2022) 3 SCC 321***, the Hon'ble HC held that provisions of Section 9(1)(vi), as amended by Finance Act, 2012 with retrospective effect from 01.06.1976, (which came into operation only after 31.03.2012), would not apply to assessee - cellular service provider who had availed/ used a standard facility that did not amount to royalty under Section 9(1)(vi) for assessment year 2012-13. Thus, assessee could not be held liable to deduct tax as at the relevant time there was no such liability.

3 ***CIT vs. Lucent Technologies GRL LLC - [2024] 164 taxmann.com 703 (Bombay)***

Following the judgment of Hon'ble Supreme Court in ***Engineering Analysis Centre of Excellence (P.) Ltd. vs. Commissioner of Income-tax [2021] 125 taxmann.com 42/281 Taxman 19/432 ITR 471 (SC)/(2022) 3 SCC 321***, the Hon'ble HC held that amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/ suppliers, as consideration for resale/use of computer software through EULAs/distribution agreements, was not payment of royalty under Section 9(1)(vi) for use of copyright in computer software and the same did not give rise to any income taxable in India

4 *International Management Group (UK) Ltd. vs. CIT - [2024] 164 taxmann.com 225 (Delhi)*

Advisory and managerial services provided by assessee, a tax resident of UK, to BCCI for establishment, commercialization and operation of IPL events outside India was not liable to be taxed as FTS.

Facts

i. Assessee, a tax resident of UK, had entered into service agreement with BCCI for providing advisory and managerial services for establishment, commercialization and operation of IPL events. It had received consideration of ₹ 28 crores from BCCI for providing advisory and managerial services for establishment, commercialization and operation of the IPL.

ii. Adopting the profit split method, it had attributed revenue of INR 20.19 crores to the Indian PE. The net income of INR 7.83 crores attributable to activities undertaken in India had been offered to tax on net income basis in accordance with the provisions of section 44DA read along with the provisions of article 7 of the India - UK DTAA. The remaining revenue of ₹ 7 crores, according to the assessee, pertained to work done outside India and was thus not attributable to the PE and consequently not liable to be taxed in India.

iii. The AO held that the receipts of ₹ 7 crores received for work done outside India was liable to be taxed as Fee for Technical Services (FTS).

iv. The DRP held that the same was attributable to the service PE of the assessee which would be liable to tax under article 13 of the DTAA being FTS.

v. The Hon'ble Tribunal further held that the make available stipulation comprised in article 13 of the DTAA also stood satisfied.

vi. Aggrieved, the assessee filed appeal to the Hon'ble HC.

Decision

i. The Hon'ble HC held that, no expertise, skill or know-how had been made available to BCCI and that there was no discernible intent on part of BCCI to absorb or internalise assessee's unique skills and knowledge in curation of sporting leagues. No part of that knowledge or skill stood transferred to BCCI. Consequently, the said services could not be taxed as FTS under Article 13 of the DTAA.

ii. Further, it was held that since the services rendered by assessee were utilized outside India and were availed of for purposes of earning income from a source outside India, the same was covered under the exception forming part of s.9(vii).

iii. It concluded that, in light of the admitted position of a Service PE existing in the relevant assessment years, the income attributable to that entity was correctly offered to tax under article 7 of the DTAA. Insofar as the revenue attributable to the UK office was concerned, it was already found that the same did not qualify

for taxation under article 13 since the "make available" test was not fulfilled.

iv. Accordingly, assessee's appeal was allowed and impugned order of the Tribunal was set aside.

C. TRIBUNAL

5 *Pralay Pradyotkanti Ghosh vs. ITO – [2024] 164 taxmann.com 705 (Ahmedabad – Trib.)*

Salary income received by assessee from his foreign employer was held to be exempt income because of his non-residential status as salary was earned for working in international waters

Facts

i. The assessee was an Engineer (Under Water Inspector) working at offshore fields. During the year under consideration, he had received salary income from his Singapore based employer for the work done in oil fields in Bay of Bengal in international water. It had deducted tax on the same under section 192, however, the same was shown as "exempt income" in the return of income filed by the assessee.

ii. The AO, however, concluded that the oil fields in Bay of Bengal were part of Indian Territory and therefore, the work performed by the assessee could not be termed as work outside Indian Territory. He further concluded that co-ordinates of KG-D6 Oil Fields in Bay of Bengal were situated within Exclusive Economic Zone of India and the same was within the part of "India" as defined in section 2(25A). Accordingly, he made an addition of the same to the total income of the assessee under section 5(2)(b) read with section 9(1)(ii).

iii. The CIT (A) held that the income earned by the assessee was salary for the activities within India and, thereby upheld the addition made by the AO.

iv. Aggrieved, the assessee filed appeal to the Hon'ble Tribunal.

Decision

i. The Hon'ble Tribunal held that as per Section 2(25A), 'India' includes its territorial waters, the seabed and subsoil underlying such waters, the continental shelf, the Exclusive Economic Zone (EEZ), and other maritime zones as defined in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976.

ii. It further held that the EEZ extends up to 200 nautical miles from the baseline but does not constitute territorial waters, which extend only up to 12 nautical miles. The EEZ is recognized for its resource exploitation rights, but does not extend India's sovereignty to the extent that territorial waters do. Operations on a foreign ship within the EEZ, especially those not involving direct interaction with the seabed or subsoil, are not automatically considered as services rendered within 'India' for tax purposes.

iii. It noted that Notification No. GSR 304(E) specifically extends the Act only in respect of income derived from specified activities. It held that the CIT (A) had failed to consider the fact that sub-section 9 of section 7 of The

Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 gives freedom of navigation to foreign ships and therefore employees working on such ships who are not carrying out activities as specified by the said notification are not deemed to be working in India.

iv. It further noted the provisions of s 9(1)(ii) which states that income earned from services rendered in India is taxable. Since the assessee's duties, which were not covered by Notification No. GSR 304(E), were performed on a foreign ship operating beyond the territorial waters (though within the EEZ) it held that the services were not rendered in India.

v. It held that given the facts and relevant legal provisions, if the assessee qualified as an NRI under section 6, the salary income earned from services performed outside the territorial waters of India would be exempt under the Act. Since, the AO had passed his order under section 143(3) read with section 144C(3) and had verified the Continuous Discharge Certificate and passport entries of the assessee, it concluded that the AO had confirmed the residential status as non-resident. Therefore, the salary income earned by the assessee was "exempt income". Accordingly, the addition was deleted.

6 *India Property (Mauritius) Company-II vs. ACIT – [2024] 164 taxmann.com 440 (Delhi – Trib.)*

It was held that where assessee, a Mauritius based company, was incorporated as an investment fund and held investment in Indian companies for more than five years and had validly discharged its burden by establishing that day to day administrative activities of assessee company were as per law of land, AO was not justified in denying treaty benefits to assessee.

Facts

i. Assessee, a company incorporated in Mauritius was engaged in business of investment activities. During year under consideration, assessee transferred shares of Indian companies and thereby earned long term capital gains (LTCG) on such transfers

ii. In view of provisions of section 90(2), assessee claimed LTCG as exempt as per article 13(4) of India-Mauritius Tax Treaty

iii. AO denied treaty benefits to assessee on the ground that assessee was a mere conduit entity without any economic substance

iv. The DRP upheld the AO's order

v. Aggrieved , the assessee filed appeal to the Hon'ble Tribunal.

Decision

i. The Hon'ble Tribunal noted that assessee was an investment fund, which pooled capital from investors from various countries through series of funds

investor vehicles/feeder funds creating a master fund which was used for investment into various entities in India.

ii. Further, assessee was earlier also making investment and divestments and still held investment in various other companies.

iii. There was no allegation of AO on basis of any evidence that any investment flowing from India was received for creating assessee.

iv. After noting that the investments were held for over five years before they were transferred and that day to day administrative activities of assessee company were as per law of land, it held that except for suspicion there was no evidence with AO to rebut statutory evidence of presumption of genuineness of business activity of assessee company on basis of TRC held by assessee.

v. It concluded that the AO was not justified in denying treaty benefits to assessee.

vi. Accordingly the assessee's appeal was allowed.

7 *Tiger Global Eight Holdings vs. DCIT (International Taxation) – [2024] 165 taxmann.com 16 (Delhi – Trib.)*

Where assessee, a Mauritius based company, claimed benefit of tax exemption under India-Mauritius DTAA in respect of long term capital gain arising from sale of shares of an Indian company, it was held that the AO was not justified in denying the tax exemption under the DTAA merely on the basis of suspicion that the assessee was a conduit company engaged in treaty shopping – since the assessee had provided all necessary documents to AO to prove a) its residential status b) that it was controlled and managed by its board of directors in Mauritius c) all decisions with respect to investment holding company and divestment decisions were taken by board of directors of assessee in Mauritius d) Board of Directors of assessee had sole authority over affairs of assessee e) assessee had an office space in Mauritius, where all its accounting records, registers, books of accounts and other statutory records were maintained.

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"Be not afraid, for all great power throughout the history of humanity has been with the people. From out of their ranks have come all the greatest geniuses of the world, and history can only repeat itself. Be not afraid of anything. You will do marvelous work."

— *Swami Vivekananda*