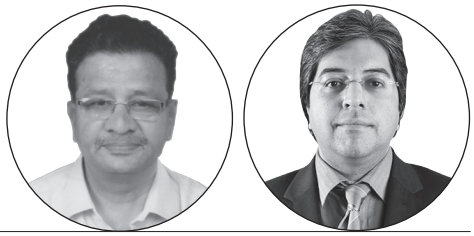
INTERNATIONAL TAXATION

Case Law Update



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A. High Court

1 *Decan Holdings BV vs. Income Tax Officer & Anr- TS-1008-HC-2021(Del)*

Withholding rate of 5% applicable on dividend receivable by Dutch Co., in view of the India-Netherlands DTAA (prescribing rate of 10%) read with its protocol and DTAAs with India-Netherlands/Slovenia/Lithuania/ Colombia (prescribing lower rate of 5%)

Facts

i) The assessee-petitioner, a company incorporated under the laws of Netherlands was engaged in the business of acquiring strategic ownership interests, owning and disposing of ownership interests in other companies and enterprises, both in the Netherlands and abroad with a primary focus on the food and agriculture, agrochemicals, speciality chemicals, agri-technology (Ag-Tech) and pharmaceuticals sector. It held 58.39% of the shares of Deccan Fine Chemicals (India) Private Limited [DFCPL]. During the current financial year ("FY") i.e. 2021-22, DFCPL proposed to distribute a dividend of INR 65.68 cr. to the Petitioner.

ii) The Petitioner filed an application dated 13th August 2021 under Section 197 before the Assessing Officer (AO) requesting him to issue a certificate authorizing the Petitioner to receive dividend income from DFCPL subject to a lower withholding tax rate of 5% as applicable under the Double Taxation Avoidance Agreement ("said DTAA") between India and Netherlands read with the Protocol. Since the protocol to the said DTAA provides for "Most Favoured Nation" ("MFN") clause in terms of which when India enters into a DTAA with another member country of the OECD wherein India limits its tax deduction at source ("TDS") to a lower rate than the one agreed between India and Netherlands, then the same would also apply to the said DTAA. Though the said DTAA prescribes a withholding rate of 10% since India had entered into DTAAs with other OECD member countries being Slovenia/ Lithuania / Colombia wherein tax rate on dividend income was agreed at a lower rate of 5%, owing to the

MFN clause, the lower withholding rate was prayed for.

iii) The Petitioner's application to withhold tax at a lower rate was rejected consequent to which the petitioner filed a writ petition before the Hon'ble Delhi HC.

Decision

i) Since the issue involved in the present writ petition was no longer res integra as it was covered by the judgment of this Court in ***Concentrix Services Netherlands B.V. vs. ITO (TDS), W.P.(C) 9051/2020 [2021] 127 taxmann.com 43 (Delhi)*** and ***Nestle SA vs. Assessing Officer, Circle (International Taxation), W.P.(C) 3243/2021***, the impugned order and certificates were set aside. The HC further directed that a certificate under Section 197 of the Act be issued in favour of the Petitioner, indicating therein, that the rate of tax, on dividend, as applicable qua the Petitioner is 5% under India-Netherlands DTAA.

2 *PCIT vs. 3I India Ltd-TS-580-HC-2021(Bom)-TP*

HC: Derides Revenue for challenging ITAT order (on facts and selection of comparables) in a ritualistic manner, & dismisses Revenue's appeal as devoid of merits

Facts

i) The Assessee was carrying on the activity of the investment advisory services. Consequent to selection/ rejection of comparables on the ground that the assessee in addition to investment advisory services also rendered portfolio services the TPO made an upward adjustment. The DRP partly allowed the assessee's objections. The Tribunal allowed the assessee's appeal. Aggrieved, Revenue preferred an appeal before the Hon'ble Bombay HC framing and proposing 7 substantial questions of law.

Decision

i) As regards the first 5 substantial questions of law i.e with respect to the ground that assessee in addition to investment advisory services, had also rendered portfolio management services (PMS), HC noted that the Tribunal in the impugned judgment had come to a finding of fact that there was no evidence of assessee rendering any such additional services and held that no separate PMS services need to be benchmarked as the same was part and parcel of rendering of investment advisory services which was evident from the functions performed in terms of the "Investment Advisory Agreement" entered between the assessee and its AE.

ii) As regards the remaining 2 questions w.r.t selection of comparables, the HC observed that the finding of the Tribunal was entirely one of fact and the Revenue had failed to show as to how the findings arrived at by the Tribunal was perverse in any matter. HC further observed that Revenue had also not been able to demonstrate that the analysis done by the Tribunal while excluding the companies suggested by the Revenue from the list of comparables, was in any manner contrary to the settled position in law.

iii) HC further opined that the entire exercise of making transfer price

adjustment on the basis of comparables was nothing but a matter of estimate of broad and fair guesswork of the authorities based on factual relevant material brought before the authorities, i.e., TPO, DRP and the Tribunal which are the fact-finding authorities.

iv) HC also relied on Jurisdictional HC decisions in the case of ***Eight Roads Investment Advisors Pvt Ltd- TS-156-HC-2020 (Bom)*** and ***Barclays Technology Centre India Private Ltd-TS-787-HC-2018 (Bom)-TP*** wherein HC had dismissed Revenue's appeal challenging ITAT' comparables selection absent substantial question of law.

v) Finally, HC observed that the Tribunal had not committed any perversity nor applied incorrect principles to the facts of the case & dismissed Revenue's appeal as devoid of merit.

vi) HC further exclaimed that this was one more appeal filed in a ritualistic manner which had unnecessarily taken up the scarce time of the Court & directed the CIT & CIT (Judicial) to review all appeals filed and withdraw the same, in case the only challenge therein is to the finding of facts and there is no evidence of perversity.

B. Tribunal

3 *Convergys India Services Pvt Ltd vs. ACIT – TS-559-ITAT-2021(Del)-TP*

ITAT: Treats forex gain as operating; Deletes TP-adjustment on interest on AE receivables

Facts

i) The Assessee, a wholly-owned subsidiary of Convergys Customer Management Group Inc., USA (CMG USA) was incorporated in January 2001. It was primarily engaged in the provision of IT-enabled customer care back-office support services. It entered into a service agreement with CMG USA to provide Information Technology enabled customer care back-office support services with effect from April 1, 2001.

ii) (a) During the course of the TP proceedings, the TPO rejected the economic analysis undertaken by the assessee and proposed a TP adjustment on account of the provision of ITeS by the assessee, by treating the forex gains as non-operating income. (b)Further, the TPO reclassified the outstanding receivables beyond the credit period of 30 days as deemed loans to the AE and treated them as a separate international transaction. The TPO further imputed interest on the same by applying a markup of 400 basis points on LIBOR, thereby making an addition

iii) The DRP upheld the action of the TPO. Aggrieved, the assessee filed appeal before the Tribunal.

Decision

a) Foreign Exchange fluctuation

i) The Tribunal noted the argument of the assessee that as per the service agreement between the assessee and its AE, the forex fluctuations were to be compensated by the AE in case of any loss due to exchange rate fluctuation occurring between the date of invoice and date of payment & that it was clear that the foreign exchange risk was not borne by the assessee. Accordingly, any gain or loss arising from foreign exchange fluctuation would form part

of the computation of mark-up and hence should be treated as operating in nature. The assessee had consistently included forex gain as an operating item while computing its margins, which was accepted by TPO in the earlier year.

ii) The Tribunal held that forex fluctuation was an integral part of the sale and purchase transactions & that it was in essence, an integral part of the 'transfer price' for any transaction. Hence it was by default, an operating item. Since a forex gain/loss was a direct outcome of the 'international transaction' with an AE, it,, therefore, partakes the same character as that of the international transaction. Hence, Forex gain/loss very much forms part of the international transaction. The Tribunal thus concluded that forex gain was operating income by placing reliance on ***PCIT vs. Ameriprise India (P.) Ltd. (ITA 206/2016)-TS-174-HC-2016(Del)-TP, Mckinsey Knowledge Centre (P.) Ltd. vs. Dy. CIT (77taxmann.com 164 (Delhi - Trib.)Virginia Transformer India P. Ltd. vs. ITO-TS-651-ITAT-2017(Del)-TP***

b) Interest on Receivables

iii) The Tribunal held that it is settled principle that there is no need to benchmark the interest on receivables where the interest had not been charged from either of the parties i.e. payables and receivables. In the instant case, a period of 90 days had been allowed and the amounts had been received within the range of 90 to 95 days. In the absence of any fact to prove that the assessee was liable to payment of interest, no adjustment was warranted. There cannot be one straight jacketed formula to allege that the assessee had received interest or the delay was allowed to confer an undue advantage to the other party. The Tribunal placed reliance on ***Pr. CIT vs. Kusum Health Care Pvt. Ltd- TS-412-HC-2017(Del)-TP*** wherein the Hon'ble Delhi High held that the inclusion in the Explanation to Section 92B of the Act of the expression 'receivables' does not mean that de hors the context, every item of 'receivables' appearing in the accounts of an entity which may have dealings with the foreign AEs, would automatically be characterized as an international transaction. It further went on to hold that there can be a delay in the collection of monies for the supplies made, even beyond the agreed limit, due to various factors which would have to be investigated on a case to case basis. The Tribunal also placed reliance on the case of Gillette India Limited (ITA No. 40/2017) wherein the Hon'ble Rajasthan High Court has affirmed the order of the Tribunal wherein it was held that the transaction of allowing credit period to the AE for the realization of its sale proceeds is not an independent international transaction but is closely linked with the sale transactions of the AE. Thus, the Tribunal deleted the adjustment on outstanding receivables to non-AE.

4 *ESPN Star Sports Mauritius SNC et Compagine vs. DCIT -TS-528-ITAT-2021(Del)-TP*

ITAT: Denies profit attribution; No business connection or fixed place PE/DAPE in India for ESPN Star Sports Mauritius since no fixed place- available at the disposal of the assessee. Further, attribution of profits-not warranted- where PE is compensated at ALP

Facts

i) The assessee, a Mauritius based partnership firm was engaged in the business of selling airtime and program sponsorship in connection with programming non-standard television from Mauritius on ESPN, Star Sport etc. The assessee entered into an agreement with ESPN Software India Pvt. Ltd. (ESPN India) to sell airtime to Indian advertisers and the remuneration was declared & accepted by TPO to be at ALP.

ii) AO/CIT(A) concluded the assessment for relevant AY 2012-13 in line with AY 2011-12 and held that assessee had business connection under Sec 9(1)(i) of the Act and also a Fixed place PE as well as DAPE under Article 5(2) and Article 5(4) r.w Article 5(5) respectively of the India-Mauritius DTAA (through ESPN India) and attributed 50% of the net profits of ESPN Mauritius to it's PE in India.

iii) Aggrieved, the assessee filed appeal before the Tribunal.

Decision

i) The Tribunal acknowledged that though the co-ordinate bench in the earlier year in the assesses's case had not touched upon the issue of whether ESPN Star Sports constituted a Fixed place PE of the assessee in India under DTAA between India and Mauritius, it opined on the same in the current AY by placing reliance on SC ruling in case of ***E-Funds IT Solutions- TS-469-SC-2017*** to conclude that the assessee had no business connection in India in terms of section 9(1) of the Act and also had no PE under Article 5(2), 5(4) and 5(5) of India Mauritius DTAA. The Hon'ble SC in E-funds had, in turn, relied on Hon'ble SC ruling in ***Formula One-[2017] 80 taxmann.com 347(SC)*** wherein, presence of Fixed place PE was overruled in the absence of the same being available at the "disposable of the assessee".

ii) Thus, the Tribunal held that since there was no PE, there could not be any attribution of profit.

iii) Further, after noting that ESPN India had been remunerated at ALP as was evident from the TPO's order, the Tribunal for sake of completeness relied on coordinate bench ruling in assessee's own case for AY 2009-10 and AY 2011- 12 which in turn had relied on rulings pronounced by Hon'ble SC in ***Honda Motors Co-TS-126-SC-2018, E-funds IT Solutions (supra), Morgan Stanley-[2007] 162 Taxmann 165(SC)*** and Hon'ble Delhi HC in ***BBC Worldwide-[2011] 16 Taxmann.com 162,*** to hold that no further attribution of profits to PE was warranted if PE was found to be remunerated at ALP.

iv) Accordingly, the Tribunal allowed the appeal of the assessee.

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