INTERNATIONAL TAXATION
Case Law Update

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A. HIGH COURT

1 ***PCIT vs. TT Steel Service India (P.) Ltd. - [2024] 168 taxmann.com 515 (Karnataka)***

The Hon'ble HC held that clause (i) of section 92BA having been omitted by Finance Act, 2017 with effect from 1-4-2017, the resultant effect is that it had never been passed and thus, reference made by AO to the TPO for specified domestic transaction mentioned in clause (i) of section 92BA was not valid.

2 ***Cadence Design Systems (India) vs. DCIT- [2024] 168 taxmann.com 122 (Delhi)***

The Hon'ble HC held that entities having high brand value (TCS E-Serve and Infosys BPO Ltd.) being able to command greater profits could not be selected as comparables.

B. TRIBUNAL

3 ***Attachmate Corporation. vs. ACIT- [2024] 168 taxmann.com 152 (Delhi – Trib.)***

Where assessee, a non-resident, had entered into International Distributor/Reseller Agreements with distributors in India for supplying software products and for providing ancillary support services and had received certain amounts from Indian distributors for providing software updates and patches, the Hon'ble Tribunal held that since no cogent material/evidence was produced to establish that the 'make available' condition stood satisfied, amount received by assessee for providing software updates and patches could not be treated as FIS under article 12(4)(b) of India-USA DTAA.

4 ***DCIT vs. Doosan Power Systems India (P.) Ltd. [2024] 168 taxmann.com 502 (Chennai – Trib.)***

Where assessee-company made payment of freight charges to a Korean company for availing logistics services in connection with

shipment of goods from various ports outside India to India, the Hon'ble Tribunal held that since said payments were mere simplicitor freight charges and not for any right to use equipment i.e. ship, the same could not be taxed as royalty u/s 9(1)(vi). Further, since the Korean company did not have any place of business/office in India through which business activities of assessee were carried on, there existed no business connection in India. Therefore, no income arose through business connection in India under section 9(1)(i). Further, as per the India-Korea tax-treaty, the business profits of a foreign company would not be taxable in India, if such company does not have a permanent establishment in India through which the business is carried on. Therefore, since the Korean company did not have any place of business/office in India through which business activities of the company were carried on, the profits arising from logistics services would be taxable only in the resident state i.e., Korea. Even on perusal of provisions of section 195, it attracts tax only on chargeable income, if any, paid to a non-resident. Since there was no tax liability, the question of tax deduction would not arise. Thus, the disallowance under section 40(a)(i) made by the AO was devoid of merits.

5 *Bharti Airtel Ltd. vs. ACIT [2024] 168 taxmann.com 10 (Delhi – Trib.)*

a) The assessee had paid agency fee to foreign banks without deduction of tax at source and the AO held the assessee liable u/s 201(1)/(1A). The Hon'ble Tribunal held that, since Indian branches of said banks had not played any role of facility agent, no part of agency fee could be attributed to Indian Branches, even if they were held as PE and consequently the assessee was not liable to deduct tax at source and could not be held to be assessee in default.

b) The Hon'ble Tribunal held that where assessee, Indian telecom service provider, made remittance towards bandwidth charges to foreign service providers, such bandwidth charges could not be treated as royalty either under treaty provisions or under section 9(1)(vi) [see Facts & Decision below].

Facts – (b)

i. The assessee, a resident corporate entity providing mobile telecom services in India, remitted bandwidth charges to certain Foreign Telecom Service Providers, without deduction tax source.

ii. The AO observed that while remitting such amounts to the Foreign Telecom Services Providers, the assessee had failed to deduct tax at source. Therefore, a show-cause notice was issued to the assessee, as to why the tax and interest thereon under section 201(1)/201(1A) should not be levied. The AO held that the payments made were in the nature of royalty (liable for tax withholding @ 20%) as they were basically for the use or right to use of equipment or process. Consequently, he passed order u/s 201(1)/(1a).

iii. The CIT (A) held that the remittances towards bandwidth charges made to foreign telecom service providers could not be treated as royalty in cases where such foreign telecom service providers were located in countries with whom India had signed DTAAs. However, he held that the remittances could

be treated as royalty in cases where payments were made to foreign telecom service providers located in countries with whom India had not signed any agreement. Accordingly, he disposed of the issue by granting partial relief to the assessee.

iv. Appeal was filed to the Hon'ble Tribunal.

Decision - (b)

i. After having examined the relevant facts and nature of payments made, the Hon'ble Tribunal found that the issue stood conclusively decided in favour of the assessee by the decision of the Jurisdictional HC in case of ***CIT vs. Telstra Singapore Pte. Ltd. [2024] 165 taxmann.com 85 (Delhi).***

ii. It noted that the Jurisdictional HC had occasion to interpret the provisions contained under section 9(1)(vi) and, more specifically, what is meant by secret formula/process etc. as used in Explanations 2, 5 and 6 under section 9(1)(vi). After a detailed analysis, the Court finally came to the conclusion that bandwidth charges could not be treated as royalty for use or right to use of an equipment, secret formula or process.

iii. It further noted that the Court had held that the amendment made to domestic law, cannot automatically be imported to the treaty provisions without making corresponding changes in them.

iv. It further held that it was clearly discernible from the observations of the Jurisdictional HC; while interpreting the provisions of Explanations 2 and 6 to section 9(1)(vi), that availing of services provided by the telecom service providers had not accorded a right over the technology possessed or infrastructure used by it. The Court had further observed that the customer had not been provided a corresponding general or effective control over any intellectual property or equipment. The Court had also observed that the consideration that the service recipient paid also could not possibly be recognized as being intended to acquire a right in respect of a patent, invention, process or equipment.

v. The Hon'ble Tribunal finally concluded that, the ratio laid down by the Jurisdictional HC as noted above would not only apply to the payees located in treaty countries but also to payees located in non-treaty countries. Thus, in the ultimate analysis, it held that the bandwidth charges remitted by the assessee to the service providers could not be treated as royalty either under the treaty provisions or under section 9(1)(vi) and therefore, the assessee was not required to deduct tax at source on these remittances.

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