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INTERNATIONAL TAXATION
Case Law Update

A. TRIBUNAL

1 ***Adore Technologies (P.) Ltd vs ACIT - [(2022) 145 taxmann.com 597 (Delhi-Trib)]***

Sums received by Singapore co. from Indian customers for the provision of Disaster Recovery up-linking services and playout services cannot be taxed in India as Royalty/ FTS under the DTAA.

FACTS

i) The assessee, a Singapore-based Company did not have a Permanent Establishment (PE) and/or business connection in India in the year under consideration and was eligible for beneficial provisions of India-Singapore DTAA ('DTAA').

ii) The primary business of the assessee was to provide broadcasters with state-of-art media technology solutions. The assessee offered a wide spectrum of satellite-based telecommunication services to media and entertainment businesses under the license from Info-Communications Development Authority of Singapore. The assessee had receipts majorly from the following activities from India:a) Up-linking Service and allied services b) Playout Services c) Sale of Equipment.

iii) The AO held that the considerations received by the Assessee from India for its activities relating to up-linking services and playout services were taxable as Royalty under Explanation 2 to section 9(1)(vi) of the Act and in particular under Explanation 6 thereto which provides that "for the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite including up-linking, amplification, conversion for down-linking of any signal, cable, optic fibre or by any other similar technology whether or not such process is secret"

iv) The AO held that the nature of disaster recovery up-linking service provided by the assessee was nothing but part of a process wherein signals were taken from the playout equipment and sent to the satellite for broadcasting them to cable operators/direct to home operators.

v) The Assessing Officer concluded by holding that income received under the head 'Disaster recovery up-linking service' was Royalty as per provisions of section 9(1)(vi) Explanation 2(iii) of the Act.

vi) In relation to income from Disaster Recovery Playout Service, the AO took a leaf from the submissions of the assessee wherein it had submitted that "Playout services are inextricably linked to up-linking services and encompass the provision of equipment infrastructure and manpower, to manage continuous playing of channel content based on minute to minute schedule. The AO, thus held that the playout service was of managerial and technical nature and fell within the ambit of the definition of Fees for Technical Services as defined in Explanation 2 under section 9(1)(vi) of the Act as well as Article 12(4)(a) of the DTAA.

vii) The DRP dismissed the assessee's objections. Aggrieved, the assessee filed an appeal before the Hon'ble ITAT.

DECISION

i) The Hon'ble ITAT noted that as per Article 12(3) of DTAA, Royalty has been defined to include, inter alia, use or right to use of secret formula or process and use or right to use of industrial, commercial or scientific equipment.

ii) It observed that the customers of the assessee were neither in possession of any equipment nor had any control over the equipment used by the assessee for providing up-linking and playout services to its customers and that while providing these services, the assessee was the sole bearer of the risks in relation to the said equipment.

iii) It held that the term process can be understood as a sequence of interdependent and linked procedures or actions consuming resources to convert inputs into outputs and that various tangible equipment and resources may be employed in executing a process but 'process' per se, just like a formula or design, is intangible. Further 'use of a process' envisages that the payer must use the 'process' on its own and bear the risk of its exploitation. However, in the case at hand, the 'process' was used by the service provider himself who bore the risk of exploitation or liabilities for the use as an entrepreneur and therefore, the said income could not be characterized as royalty. It relied on the following judgements of the Hon'ble Delhi High Court viz. New Skies Satellite [382 ITR 114], NEO Sports Broadcast Pvt Ltd. [264 Taxmann.com 323] and Asia Satellite Telecommunications Co. Ltd [332 ITR 340].

iv) As regards the receipts from Disaster Recovery Playout Services being treated as FTS, it held that the service was nothing but the broadcasting and/ or transmission of channels by the assessee for its customers, without any involvement in decision-making with respect to the playlists and the content being broadcasted. Moreover, the assessee did not have a right to edit, mix, modify, remove or delete any content or part thereof as provided by the customer. Thus, the disaster recovery playout service merely involved the provision of uninterrupted availability of the playout service at a predetermined level. Therefore, receipts from disaster recovery playout services were not in the nature of FTS as envisaged under Article 12(4)(a) of the DTAA as they were not ancillary or subsidiary to disaster recovery up-linking and allied services.

v) It further added that the receipts from disaster recovery playout services were not in the nature of FTS as they did not make available any technical knowledge, experience, skill, know-how, or process nor did it consist of the development and transfer of any technical plan or technical design. It relied on De Beers India Pvt Ltd [346 ITR 467 (Karnataka)], Guy Carpenter & Co. [346 ITR 504 (Delhi)] and Atos Information Technology, Singapore [ITA Nos. 7144/MUM/17 and 5744/MUM/18].

vi) Further, the Hon'ble Tribunal also concluded that the said receipts were also not in the nature of FTS as per Explanation 2 of section 9(1)(vii) of the Act.

vii) Accordingly, the assessee's appeal was allowed.

2 *Sameer Malhotra v. ACIT [(2022) 144 taxmann.com 180 (Mum- Tribunal]*

Where assessee held a Singapore driving license, Overseas bank account, tax residency certificate issued by Singapore authorities and the centre of vital interest also lay in Singapore because the assessee shifted to Singapore with his wife and daughters for employment and resided in Singapore and had habitual abode therein only, it was held that assessee could be treated as a resident of Singapore and not a resident of India for purpose of taxation of global income as per article 4 of India-Singapore DTAA.

Facts

i) The assessee declared a total income of Rs.1,59,36,999/- earned from DBOI Global Services Pvt. Ltd. (in short DBOI) in India from 01.04.2014 to 25.11.2014 and from J.P. Morgan Chase & Co., Singapore(in short "JPMC") during 15.12.2015 to 31.03.2015. Subsequently, the assessee revised his return of income whereby he restricted his income to Rs.47,82,630/- as earned only in India and claimed that income earned in Singapore was not taxable in India consequent to the relief u/s. 90 of the Act.

ii) The AO observed that the assessee was physically present in India for 182 days or more in F.Y. 2014-15 (A.Y. 2015-16) and as per section 6(1)(a) of the Act, " an individual is said to be resident in India in any previous year if he is in India in that year for a period or periods amounting in all to 182 days or more". Consequently, the AO determined that the assessee was resident in India in F.Y. 2014-15 (A.Y. 2015-16), as he was employed in India till November 2014 and thus consequently his global income was taxable in India.

iii) Before the AO, the assessee also submitted a tie-breaker questionnaire to make it's claim towards Singapore Residency and based on that the assessee claimed that income earned by him in Singapore could not be taxed in India. The AO, in order to analyze the "Tie Breaker Questionnaire" also considered Article 4 of India-Singapore DTAA ('DTAA').

iv) The CIT(A) held that if any individual was a resident of both the Contract States, then he shall be deemed to be a resident of the State in which he has a permanent home available to him. Article 4(2) of the DTAA was clearly applicable to the assessee, as he had a permanent home' available in India, though the same had been given on lease while leaving for Singapore, but the fact could not be denied that the ownership rights were with the assessee only, as the property was rented only for a period of 11 months (w.e.f. Dec. 01, 2014, to Oct. 31, 2015, to the tenant Mr Joy Ghosh). The assessee had taken on rent the property situated at Singapore only for a limited period w.e.f. 1st Jan. 2015 till 31st Dec. 2016. Thus, on the above facts, the CIT(A) held that it was evident that the permanent home available to the assessee, was only in India and not in Singapore. In the tiebreaker questionnaire, it had been submitted by the assessee that after completion of the foreign assignment, he was residing in India only.

v) The CIT(A) further held that even if for a moment, the assessee's claim was accepted that a permanent home was available to him in both the States, then he shall be deemed to be the resident of the State in which his personal and economic relations are closer (centre of vital interests). There was no doubt that even the centre of vital interests of the assessee was with India only and not with Singapore. In the tie-breaker questionnaire, mentioned in the assessment order, it had been explained by the assessee that the majority of savings, investments and personal bank accounts were in India. Even the test of 'habitual abode' was in favour of India, as the assessee was living in India after completion of a foreign assignment and there was no denial of the fact that the assessee was an Indian National. The ld. Commissioner also perused the provisions of Article-4 of the OECD Model Convention dealing with the definition of the term "resident" and held that it was evident that if the assessee was considered a resident of both the countries, even then, his status shall be determined as per OECD Model Convention, which makes it evidently clear that the assessee was resident of India and not of Singapore since (i) he had permanent residence in India; his economic interests were located in India; returned to India after completing foreign assignment; (ii) He had spent a substantial part of the time (i.e., more than 182 days) in India during the year under consideration; and (iii) he was an Indian National and did not have any domicile or any kind of economic or personal interest (in Singapore) and had permanent residence in India.

vi) The CIT(A) dismissed the appeal. Accordingly, the assessee filed an appeal before the Hon'ble ITAT.

Decision

i) The Hon'ble ITAT noted that the case of the assessee was that he was a resident of both India and Singapore and had Tax Residency Certificate from Singapore Revenue Authorities for the calendar Year 2014-15. Also, the Assessee was having Singapore driving License and an Overseas bank account and a house in India was not available to the assessee during the Singapore assignment period, as the same was on rent. Therefore, the permanent home test for the period i.e. 6th December 2014 to 31st March 2015 went in favour of the assessee. Further vital interest of the assessee was also lying in Singapore because he shifted there with his family and started employment and earnings and savings there. Accordingly, the assessee qualified as the ultimate Tax Resident of Singapore from 15th December 2014 onwards as per Article 15(1) of the Treaty, which reads as under:

> *"Subject to the provisions of Articles 16, 18, 19, 20 and 21, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised,*

> *such remuneration as is derived therefrom may be taxed in that other State. "*

ii) It further noted that the assessee further claimed that as he qualified to be a resident of both India and Singapore under Article 4(1) of the Treaty, the residency would need to be determined as per Article 4(2) of the Treaty on the below-mentioned criteria which provides –

4(1)................

4(2) Where by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows :

(a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);

(b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode ;

(c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national ;

(d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement."

iii) Further, it noted that as per UN Model Commentary, the concept of home has been defined as under :

> *"13. As regards the concept of home, it should be observed that any form of home may be taken into account (house or apartment belonging to or rented by the individual, rented furnished room). But the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.). "*

iv) It noted that the assessee along with his family members shifted to Singapore on 06.12.2014 and thereafter remained there during the period under consideration and earned the income while serving in Singapore itself. Further, in the Tie-Breaker Questionnaire, the assessee specifically mentioned that the apartment is on rent in Singapore as well and his wife and two daughters were also living along with him in the country of assignment, i.e., Singapore. The assessee also held a Driving License in both countries and both countries had been shown as his country of residence on various official forms and documents for the period from December 2015 to June 2016, further he paid taxes in Singapore while working there. Further, he had mentioned that all income which would be paid in future (i.e., bonus for the period Jan. 2016 to June 2016) for the work period in Singapore, would be taxable in Singapore.

v) It held that no doubt the tie-breaker questionnaire was important in determining the residency of a person, but that could not be exclusively taken into consideration as a base for deciding the residency. The permanence of a home can be determined on a qualitative and quantitative basis. It was not in controversy that the assessee for the period under consideration had shown the income earned in Singapore and paid the taxes in Singapore. Therefore, as per Treaty, he could not be subjected to tax in India in order to avoid double taxation. It relied on the decision of the Co-ordinate Bench of the Tribunal in the case of Raman Chopra vs. DCIT [(2016) 69 taxmann.com 452 (Delhi-Trib.)].

vi) It further noted that both the authorities below had not doubted the tax residency certificate issued by the Singapore authorities for the period under consideration and on the basis of that, the Income-tax had already been paid by the assessee in Singapore. Further, maybe, the assessee has stayed more than 182 days in India, however, he also qualified as a resident of both India and Singapore under Article 4(1) of the Treaty. As per clause (a) of Article 4(2) of the Treaty, a person shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests).

vii) It noted that the CIT(A) based on the tie-breaker questionnaire had held that there was no doubt that even the centre of vital interest of the assessee was with India only and not with Singapore, as the majority of the savings, investments and personal bank accounts were in India, whereas it was a fact that the assessee had worked in Singapore during the period under consideration and stayed therein only. Therefore, his personal and economic relations (Centre of vital interests) at that particular time/ period could not be brushed aside, as the assessee went to Singapore along with his family for earning income and consequently his personal and economic relations remained in Singapore only.

viii) As per Article 4(2)(b) of the DTAA, the habitual abode was also available for consideration in deciding the residency of a person. Habitual abode does not mean the place of permanent residence, but in fact, it means the place where one normally resides. During the period under consideration, the assessee resided in Singapore and had a habitual abode therein only. Therefore, for this reason, as well, the assessee could be treated as a resident of Singapore. Section 90(2) of the Act read with the DTAA. Consequently, the addition was deleted and the AO was directed to accept the revised return of income filed by the assessee.

3 *Aaradhana Realties Ltd. v. DCIT [(2022) 145 taxmann.com 628 (Mumbai- Trib.)]*

NAV method adopted by the assessee was accepted by Tribunal for computing ALP for the international transaction of sale of shares held in the investment company by the assessee to its AE.

Facts

i) The assessee undertook an international transaction of sale of equity shares of Essar Capital Limited (ECL) to its AE, i.e., Essar Capital Holdings Limited, Mauritius (ECHL, Mauritius) and bench-marked the aforesaid International Transaction by applying CUP methodology based upon the valuation certificate obtained by the assessee from an external valuer which determined the value of equity share of ECL at INR 4.797/- each as per NAV method. The independent valuer had also determined the value of the share by using Profit Earning Capacity Value (PECV) Method, however, since the same was coming as 'Nil', it was ignored. Since the assessee had sold shares of ECL to its AE at INR 10/- each, it was contended by the assessee that the transactions were at arm's length. The assessee contended before the TPO that the valuation undertaken by it was as per the guidelines issued by the erstwhile Comptroller of Capital Issues (CCI).

ii) The TPO rejected the external CUP Method adopted by the assessee and concluded that DCF Method was the correct method to be employed in the facts and circumstances of the case without specifying that the NAV method was incorrect. The TPO simply stated that CCA guidelines were not binding and that the same had been prescribed for a different purpose. Further, the difference between the arm's length price determined by the assessee and arm's length price determined by the TPO was treated as a loan/credit facility provided by the assessee to its AE and adjustment was made in respect of the arm's length interest thereon.

iii) Aggrieved, the assessee filed objections before the DRP which were rejected and consequently appeal was filed before the Hon'ble ITAT.

Decision

i) The Hon'ble Tribunal noted that the TPO/DRP had adopted DCF Method for determining the ALP of the transaction of sale of shares of ECL to ECHL, Mauritius by considering the actual published results instead of projected future cash flows as of the date of the transactions. It placed reliance on the decision of the Hyderabad Bench of the Hon'ble Tribunal in the case of DQ (International) Ltd (141 Taxmann.com 188) wherein it was held by the Hon'ble Tribunal that while computing the value of an intangible asset by using the DCF Method the future projections cannot be substituted with the actual figures.

ii) As regards the decision of the co-ordinate bench of the Hon'ble Tribunal in Ascendas (India) Private Ltd. (ITA No. 1736/MDS/2011), relied upon by the Revenue, it noted that the Tribunal had preferred the use of the DCF Method over the use of CCI Guidelines for arriving at the value of shares for the purpose of determining ALP. However, it accepted the plea of the assessee that in the present case, the DCF Method could not be adopted since ECL was an investment company with an inconsistent and unpredictable stream of revenues.

iii) It further placed reliance on the Indian Valuation Standard 2018 issued by the Institute of Chartered Accountants of India (ICAI), wherein in paragraph 52 it has been recommended that the use of other valuation approaches instead of income approach be adopted in cases where there was significant uncertainty about the amount in the timing of income/future cash flows.

iv) The Hon'ble Tribunal concluded that the DCF Method could not be adopted in the facts and circumstances of the present case as the assessee was an investment company incorporated on 30.01.2007 with unpredictable income/ cash flows. As regards the method adopted by the assessee for determining the value of shares of ECL, it noted that the shares of ECL were sold by the assessee on 23.06.2008, whereas the valuation report was based upon the audited financial statements of ECL as on 31.03.2008. In the synopsis of arguments filed before the Hon'ble Tribunal, since the Assessee had on without prejudice basis, stated that the value of shares determined on 23.06.2008 by following the method prescribed in Rule 11UA of the Income Tax Rules, 1962 was INR 112/- and this was accompanied by unaudited financial statements as on 23.06.2008, the Hon'ble Tribunal accepted the without prejudice submission of the assessee and adopted the value of INR 112/- as the fair market value of the share of ECL representing the ALP. Thus, the ground of the assessee was partly allowed.

v) As regards the adjustment on the amount of ALP of interest not charged on the deemed loan given by the AO to the AE (being the adjustment made for the shortfall in consideration received for the sale of shares to AE), the Hon'ble Tribunal relied on the judgement of the Hon'ble Bombay High Court in the case of Besix Kier Dabhol SA [26 taxmann.com 169 (Bom)], wherein it was held that in absence of a specific provision in the Act incorporating thin capitalization rules, the TPO was not permitted to re-characterize debt as equity for making transfer pricing adjustments. It further observed that it was admitted position that for the relevant assessment year there were no provisions in the Act providing for secondary transfer pricing adjustment and/or for making transfer pricing adjustment by treating debt as equity (such as general/specific anti-avoidance rules). The amount of receivable outstanding had arisen on account of a transfer pricing adjustment made by the TPO/Assessing Officer. Thus, the transfer pricing adjustment made by the TPO/Assessing Officer (w.r.t interest on outstanding receivables) was clearly in the nature of secondary adjustment and could not be sustained in the absence of a specific provision in the Act providing for the same. Accordingly, the said adjustment was deleted by the Hon'ble Tribunal.

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