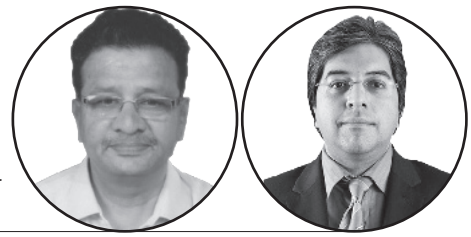

INTERNATIONAL TAXATION

Case Law Update

CA Tarunkumar Singhal & Dr. Sunil Moti Lala

A. HIGH COURT

1 *Pr. Commissioner of Income Tax, Delhi vs. Maruti Suzuki India Ltd.*

[TS-778-HC-2019 (DEL)], WP (C) 13241/2019

The High Court dismissed Revenue's writ challenging the Tribunal's additional ground admission on DTAA rate applicability for DDT

Facts

i. Assessee raised an additional ground praying for restricting the levy of dividend Distribution Tax [DDT] to the beneficial rate of 10% as per DTAA, instead of 16.6% charged in terms of Sec. 115-O of the Income-tax Act.

ii. The Tribunal passed an interim order admitting the additional ground.

iii. Revenue preferred a writ petition challenging the Tribunal's interim order.

iv. Revenue contended that the said interim order was passed without jurisdiction as (1) the additional ground admitted was never raised before the AO and (2) the additional ground could not have been raised by the assessee as it was a resident Indian company and not the recipient of the dividend declared.

v. Revenue additionally contended that the written submissions filed by it were not considered by the Tribunal while passing the interim order.

Decision

i. The High Court held that the impugned order was an interlocutory order passed by the Tribunal in the course of the proceedings. It was not an order determining any rights of the parties on merits. All that the Tribunal had done was to permit the assessee to raise the additional ground.

ii. The Court clarified that the Revenue would have the right to assail the interlocutory order admitting the additional ground as well as the finding that the Tribunal may return on the said additional ground, in case it was aggrieved by the final order that the Tribunal may pass in the pending appeal while preferring an appeal under section 268 of the Income-tax Act.

iii. Additionally, the Court directed the Tribunal to advert to the written submissions filed by the Revenue at the time of final adjudication of the pending appeal, including additional ground permitted to be raised before it.

iv. Accordingly, the High Court dismissed Revenue's writ.

2 *Rolls-Royce Plc vs. Deputy Director of Income Tax*

[TS-756-HC-2019(DEL)], ITA 969/2019, ITA 970/2019, ITA 972/2019, ITA 973/2019, ITA 974/2019 Assessment Year: 2004-05 to 2007-08, 2009-10

The Court dismissed assessee's appeal and upheld Tribunal order which in turn followed its earlier order since the assessee (a) could not point out as to how the current year facts were different (b) raised new pleas which were not raised earlier

Facts

i. The assessee appealed to the High Court against an order of the Tribunal.

ii. The Tribunal had rejected appeals filed by the appellant *inter alia*, on the premise that the High Court had held in favour of the Revenue *vide* its decision dated 30th August, 2011 that Rolls-Royce India Ltd ("RRIL"), a hundred percent subsidiary of the appellant, constituted Permanent Establishment ("PE") of the appellant in India.

iii. Counsel for the appellant submitted that the Tribunal had erred in proceeding on the basis of the said decision of the High Court, since in taxation matters, concept of *res judicata* does not apply and the issues arising in each year have to be considered afresh.

iv. Appellant also submitted that the amendment incorporated in the second *Explanation* in section 9(1) of the Income-tax Act with effect from 1 April, 2019 would not have retrospective application.

v. Appellant also contended that the income of the assessee, on the basis that RRIL constituted its PE, had already been subjected to tax in the hands of PE i.e. RRIL, and the Revenue was seeking to tax the same again.

Decision

i. The Court held that it was for the appellant to point out as to how the facts pertaining to the relevant assessment years were different from the facts on which the decision for the previous assessment years was rendered. However, the appellant had not been able to point out any such pertinent difference in facts.

ii. With respect to the *Explanation* in section 9(1), the Court held that the submission of the appellant had no merit, as while determining the issue of whether RRIL constituted the PE of the appellant, the authorities had not relied upon the said *Explanation* at all.

iii. With respect to the contention that income of the assessee, on the basis that RRIL constituted its PE, had already been subjected to tax in the hands of PE i.e. RRIL, the Court held that this aspect did not raise a substantial question of law, since it was clearly a factual issue. Additionally, it was held that the order of the CIT(A) was available when the High Court rendered its decision on 30th August, 2011. Since no such plea was raised then, it was not open to the appellant to raise it now.

iv. Thus the appeals were dismissed.

B. TRIBUNAL DECISIONS

3 *Dar Al Handasah Consultants (Shair & partners) India Private Limited vs. DCIT*

[TS-1122-ITAT-2019(PUN)-TP]

Assessment Year : 2010-11

Transfer Pricing – Deduction u/s. 10A - Is the assessee entitled to Section 10A deduction on additional income in respect of TP-adjustment offered in modified tax return filed pursuant to resolution under APA for AY 2010-11 – Held: Yes

Facts

1. During AY 2010-11, the assessee, Dar Al Handasah Consultants (Shair & Partners) India Private Limited, filed its original return declaring total income of ₹ 45.21 lakh. The Assessee had reported an international transaction of ITeS with transacted value of ₹ 37.54 crore and thereafter the AO made a reference to the TPO for determining ALP. The TPO selected certain comparables with their average PLI of OP/OC at 26.26%, which resulted in TP adjustment. Pursuant to DRP's directions, AO in the final assessment order dated 30-01-2015 passed u/s. 143(3) r.w.s. 144C(13) made TP-addition of ₹ 2.75 crore.

2. In the meantime, the assessee entered into an APA with the CBDT on 24-11-2015, in which the Operating Profit margin of not less than 17% was agreed under TNMM. Pursuant to the APA, assessee filed a modified return in terms of Section 92CD(1) for AY 2010-11, which was a part of rollback years, showing total income at ₹ 45.21 lakh, which was the same sum as was declared in the original return of income. The only change which occurred in the modified return was that assessee increased the profit margin to 17%, in consonance with the APA, from the originally declared profit margin of 15%, which resulted in enhancement of income by a sum of ₹ 20.36 lakhs. Simultaneously, assessee claimed a further deduction u/s. 10A for the amount equal to the enhanced income, as a result of which no further additional income was offered.

3. The AO, in its order dated 30-3-2017 passed u/s. 143(3) r/w Section 92CD, did not accept assessee's claim for the enhanced deduction on the additional income of ₹ 20.36 lakh primarily on the ground that the modification in the return u/s. 92CD(1) was permissible only to the extent of stipulation in the APA and the APA in question did not provide for any such deduction. AO took note of the mandate of Section 10A(3) which provides that the sale proceeds in respect of export of software should be brought into India in convertible foreign exchange within a period of six months from the end of the relevant previous year. AO considering that the enhancement in the amount of sale value was brought into India in convertible foreign exchange after such prescribed period held that the assessee was not entitled to further deduction u/s. 10A to the tune of ₹ 20.36 lakh. On appeal, CIT(A) upheld AO's view.

Decision

On appeal, the Tribunal held in favour of the assessee as under:

1. The Tribunal noted that there was no quarrel on the fact that the assessee originally filed return claiming deduction u/s. 10A, which was also allowed by the AO except to the extent of TP-adjustment. In this backdrop, the Tribunal stated that the question that arose now was to whether assessee was entitled to further deduction u/s. 10A on the additional income offered in the modified return.

2. The Tribunal observed that foundation of the action of the authorities below for the denial of deduction was premised on the

understanding that the modified return cannot breach the mandate of the APA, which, in turn, restricts its scope only to the determination of ALP and nothing more than that. In this context, on examining Section 92CC with the caption "Advance Pricing Agreement", the Tribunal observed that the crux of these provisions was that the arm's length margin or price is settled as per the terms of the APA, the manner of determination of ALP may be by any of the methods referred to in Section 92C(1) or any method de hors the prescription of Section 92C(1) and the provisions of Section 92C (Computation of ALP) and Section 92CA (Reference to the TPO) shall not apply in respect of the ALP determination under the APA.

3. The Tribunal also referred to Section 92CD which deals with giving 'Effect to the advance pricing agreement' and observed that as per sub-sections (3) and (4) of Section 92CD, *"once an assessee has filed modified returns under sub-section (1) of section 92CD, the AO is obliged to make/ complete the already completed or pending assessments u/s. 92CD itself afresh having regard to or in accordance with the terms of the APA."* The Tribunal further pointed out that Section 92CD(5) also enshrines limitation period for making/completing such assessments. The Tribunal thus concluded that, *"the Act contains a separate designated procedure for dealing with the assessments pursuant to the APA, which also contains distinct time limits in this regard."*

4. While proceeding with examining the question as to whether assessee was entitled to deduction u/s. 10A in assessment u/s. 92CD on the additional income offered in the modified return, the tribunal believed that the answer to the question could be found out by answering the following three sub-questions:-

(a) Whether proviso to 92C(4) debars deduction u/s. 10A on additional income in assessment u/s. 92CD?

The Tribunal considered AO's claim that assessee cannot be allowed deduction u/s. 10A in respect of incremental income offered in the modified return, which as per the AO, was eloquently proscribed by the proviso to subsection (4) of Section 92C/92CA. In this context, the Tribunal referred to Section 92C which deals with the computation of ALP by the AO and observed that sub-section (4) provides that where an ALP is determined by the AO under sub-section (3), AO may compute the total income of the assessee having regard to the arm's length price so determined. Proviso to this sub-section, which is the bedrock for the denial of the assessee's claim, states that *".... no deduction u/s. 10A . . . . . shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section".*

The Tribunal observed that under Section 92CA, through which a reference is made by the AO to the TPO for ALP determination and thereafter assessment is finalized by the AO in terms of TPO's order, provides through sub-section (4) that on receipt of order from the TPO, `the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C' in conformity with the ALP determined by the TPO.

The Tribunal stated that notwithstanding the ALP determination by the AO or the TPO, the assessment is finalised by the AO

in terms of the mandate contained in sub-section (4) of Section 92C, which specifically provides that no deduction u/s. 10A shall be allowed in respect of the amount of income by which the total income is enhanced after computation of income under this sub-section. The Tribunal pointed out *"A close scrutiny of the crucial words in the proviso decodes that the denial of deduction is permissible only when, first there is computation of income under sub-section (4) of sections 92C/92CA of the Act and second, the total income is enhanced because of such computation, namely, by virtue of the transfer pricing adjustment."* The Tribunal explained that *"it is vivid that the proviso restricting the granting of deduction u/s. 10A on enhanced income applies only where the computation of income is made under the sub-section (4) of sections 92C/92CA, which talks of making some transfer pricing addition by the AO."* Accordingly, the tribunal clarified that, *"If the computation of income is neither u/s. 92C nor 92CA, namely, no transfer pricing addition is made by the AO, then it is obvious that the proviso shall have no application and the* fortiori *is that there will not be any denial of deduction under the sections given in the proviso."*

The Tribunal considered the scheme of assessment u/s. 92CD pursuant to the APA, under which assessee was mandated to file modified returns in consonance with the APA. The Tribunal observed that thereafter, assessment was made by the AO u/s. 92CD(3)/(4) in accordance with the APA and since the incremental income was offered by the assessee itself in the modified return in accordance with the APA, *"it cannot be equated with the computation of income u/ss. 92C/92CA of the Act, as the later provisions talks of making some transfer pricing addition by the AO."* The Tribunal also pointed out that, "*suo motu* offering of additional income by the assessee pursuant to the APA is of the same nature as the assessee itself offering some transfer pricing adjustment in the original return of income. In that case also, deduction u/s. 10A, if otherwise permissible, would be allowed and not curtailed as it will not be a case of transfer pricing addition made by the AO." Thus, the Tribunal opined that "deduction u/s. 10A cannot be disallowed in respect of additional income offered in the modified return as it is not a transfer pricing addition made by the AO but the additional transfer pricing income offered by the assessee in consonance with the APA with the CBDT."

The Tribunal further pointed out that second component for magnetizing the proviso is that the 'total income of the assessee is enhanced'. The Tribunal noted that an enhancement of income pre-supposes some action of the authorities after the filing of the return of income by assessee, which has the consequence of increasing the total income from the one declared by the assessee. In this context, the tribunal observed that filing of the modified return u/s. 92CD with the income as agreed between assessee and CBDT under the APA is an 'act of the assessee' in offering the additional income and 'not an act of the AO' in making the enhancement of the total income. Accordingly, observing that assessee itself had filed a modified return of income at the mutually agreed rate of 17% under the APA, the Tribunal held that *"there cannot be any question of the AO making*

any enhancement in the income as a result of transfer pricing adjustment so as to attract the proviso to section 92C(4) of the Act."

Thus, the Tribunal concluded that *"proviso to section 92C(4) does not per se debar deduction u/s. 10A on additional income in assessment u/s. 92CD."*

(b) Whether assessment u/s. 92CD provides for granting deduction u/s. 10A?

Examining Section 92CD(2), the Tribunal observed that sub-section itself provides that *"if an assessee is otherwise eligible for deduction under any other appropriate provision in respect of the income offered in the modified return, there cannot be any embargo on granting deduction under such relevant provision."* The Tribunal noted that this saving clause contained in sub-section (2), making all other provisions of the Act applicable in the assessment of the modified return, includes applicability of Section 10A as well, subject to the fulfillment of others conditions as set out in the section. Opining that *"if an assessee is otherwise entitled to deduction u/s. 10A, or for that matter under any other provision of the Act, in respect of the income offered in the modified return, the same cannot be denied",* the tribunal rejected AO's view that in absence of any specific provision in Section 92CD for granting of deduction u/s. 10A, no deduction can be allowed, as sans merit.

Thus, the Tribunal concluded that, *"assessment u/s. 92CD provides for granting deduction u/s. 10A of the Act."*

(c) Whether the assessee satisfied the conditions of deduction u/s. 10A?

On perusal of Section 10A(3), the Tribunal observed that *"the condition for bringing into India the requisite convertible foreign exchange within a period of six months from the end of the previous year is not be all end all of the issue."* Further considering that the sub-section (3) also extends to *"such further period as the competent authority may allow in this behalf", the tribunal opined that "if the competent authority has allowed further period for bringing into India the convertible foreign exchange, the assessee will be entitled to deduction u/s. 10A."* The Tribunal further pointed out that *Explanation 1* to Section 10A(3) states that "competent authority" means the RBI or such other authority as authorized under any law for the time being in force for regulating payments and dealings in foreign exchange.

The Tribunal noted that Section 92CC(1) mandates that CBDT enters into an APA with the approval of the Central Government and thus APA is a package deal aimed at reducing litigation. The Tribunal also stated that, *"If the APA contains some clause relaxing the rigour of any provision or to facilitate the tribunal in its workability, such a clause will prevail over the normal provisions of the Act."* Further, also referring to Section 92CC(2) [which states that a person shall furnish a modified return in accordance with and limited to the agreement], the Tribunal stated that a corollary which follows on a harmonious construction of sub-sections (1) and (2) of Section 92CD is that *"if the APA contains a clause departing from the normal provisions, it is such clause which shall prevail upon the normal provision."*

The Tribunal referred to Clause 7 of the APA entered into between assessee

and CBDT which dealt with the "Critical assumptions" and provided that 'the critical assumptions (as referred to in the Rules) shall, for the purposes of this Agreement, be as specified in Appendix II.' Scrutinizing Clause 5 of the Appendix II dealing with 'Invoicing and Credit terms', the Tribunal observed that the CBDT provided for raising the invoice for additional amount and also 'realise it' in the month following the month in which the APA was signed. Keeping it simple, the Tribunal stated that *"the CBDT not only stipulated for raising of the invoice for the additional income but also for the realisation of the additional amount within the month following the month in which the Agreement is signed."* The Tribunal thus opined that the APA contained a clause for realizing the amount or bringing into India convertible foreign exchange for the additional amount of invoice within one month's period. The Tribunal further held that *"There can be no other reason for mandating in the APA for bringing into India convertible foreign exchange within one month following the month in which the APA is signed except for the granting the consequential benefits of such realization, even though sub-section (1) of section 92CD gives time of three months for filing the modified return."*

The Tribunal further stated that APA had made it mandatory for the assessee to bring in convertible foreign exchange in India within one month but for granting the relevant deductions connected with the realization of convertible foreign exchange in India, there was no purpose to stipulate it in the APA. Accordingly, the Tribunal opined that, *"This stipulation is, thus, a direction to grant deduction u/s. 10A only if the assessee succeeds in bringing in convertible foreign exchange in India within one month, bringing the case within the saving clause of sub-section (2) of section 92CD."* Considering that assessee brought into India the convertible foreign exchange within the stipulated one month period, the tribunal held that *"it became entitled to deduction u/s. 10A."*

Lastly, the Tribunal noted that para 2 of Clause 6 of the APA provided that ALP determination for rollback years was subject to the condition that the ALP would get modified to the extent that it did not result in reducing the total income or increasing the total loss, as the case may be, since assessee had already declared in the return of income for given AY. In context of this, the tribunal observed that total income of ₹ 45.21 lakh declared by the assessee in the original return remained at the same level in the modified return after the increase in the income due to the APA and with the simultaneous claim of deduction u/s. 10A. Stating that *"it is neither a case of reducing the total income nor increasing the total loss*", the tribunal thus held that *"assessee has satisfied the condition of deduction u/s. 10A(3) read with section 92CD(2)."*

5. Therefore, allowing assessee's appeal, the tribunal held that "proviso to section 92C(4) does not debar deduction u/s. 10A on additional income in assessment u/s. 92CD." Further held that "assessment u/s. 92CD provides for granting deduction u/s. 10A." Lastly, noting that assessee satisfied the requirement of Section 10A(3) r.w.s 92CD(2), the Tribunal held that it entitled assessee "to deduction u/s. 10A on the additional amount of ₹ 20,36,023/-."

❍□❍