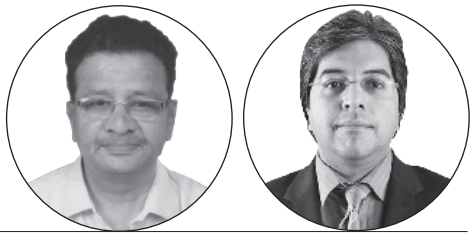

INTERNATIONAL TAXATION

Case Law Update

CA Tarunkumar Singhal & Dr. Sunil Moti Lala*

A. High Court

1 *PCIT vs. Valvoline Cummins (P.) Ltd. [2020] 121 taxmann.com 79 (Delhi)*

When the Revenue has failed to demonstrate the existence of any arrangement, on basis of which it could be inferred that, AMP expenses incurred by the assessee was not for its own benefit but for benefit of its AE, TP adjustment on account of AMP expenses ought to be deleted

Facts

i) The assessee was engaged in the business of marketing, distribution and production of quality branded automotive and industrial products and services. The assessee had two primary business segments i.e. manufacturing and trading. During the year under consideration, the assessee had entered into various international transactions with its AE and the said transactions were benchmarked using the TNMM.

ii) During the course of assessment proceedings, the TPO observed that the assessee had incurred 4.94% of the total sales as AMP expenditure as compared to the AMP expenditure to sales ratio of 0.28% in the case of comparables selected by the TPO and thereby, the TPO concluded that the assessee had incurred huge non-routine expenditure to promote the brand of AE and to develop marketing intangibles for the AE.

iii) Accordingly, in order to benchmark the AMP expenditure, the TPO used the Bright Line Test (BLT) and proposed that any expenditure in excess of the BLT was for the development of marketing intangibles, owned by the AE, which needed to be suitably compensated by the AE. The action of the TPO was upheld by the DRP.

iv) On further appeal, the Tribunal, by relying on the decision of Delhi High Court in assessee's own case for AY 2010-11 held that, since the

* assisted by CA Harsh Bafna.

Revenue was not able to demonstrate the existence of any arrangement or agreement on the basis of which it could be inferred that the AMP expense incurred by the assessee was not for its own benefit but for the benefit of its AE, the existence of international transaction could not be proved by the Revenue. The Tribunal further noted that the issue qua the determination of the ALP of an international transaction involving AMP expenses was pending before the Hon'ble Supreme Court, and held that if the decisions of Hon'ble Jurisdictional High Court in assessee's own case (supra), was modified or reversed by the Hon'ble Apex Court, then the AO would be entitled to pass the order afresh considering the decision of Hon'ble Apex Court.

v) On further appeal by Revenue, the Delhi HC held as under:

Decision

i) The Delhi High Court relied on co-ordinate bench decision in assessee's own case for AY 2010-11, which in turn relied on the decision of Delhi High Court in case of ***Sony Ericsson India India Pvt. Ltd. vs. CIT (2015) 374 ITR 118 (Del)*** and ***Maruti Suzuki Ltd. vs. CIT (2016) 381 ITR 117 (Del),*** wherein it was held that when the Revenue failed to demonstrate the existence of any arrangement, on basis of which it could be inferred, that AMP expenses incurred by the assessee was not for its own benefit but for benefit of its AE, bright line test could not be applied and consequently the TP adjustment on account of AMP expenses could not be made. In light of the above, the HC dismissed the appeal of the Revenue.

2 *DIT vs. Abbey Business Services India (P.) Ltd. [2020] 122 taxmann.com 174 (Karnataka)*

Where it was evident that the seconded employees had to work at such place as the assessee i.e. the I Co. may instruct and the employees had to function under the control, direction and supervision of the I Co. and in accordance with the policies, rules and guidelines applicable to the employees of the I Co., payments made by I Co. to F Co. as reimbursement of salary and administrative cost would not be taxable as fees for technical services.

Facts

i) The assessee, an Indian company was a subsidiary of a foreign company namely Anitco Ltd. Anitco Ltd was a group company of Abbey National Plc, (hereinafter referred as Abbey Plc), a foreign company resident of the United Kingdom (UK). Abbey Plc had entered into an agreement with the assessee to outsource certain processing activities. In order to facilitate the said outsourcing agreement, Abbey Plc entered into an agreement with the assessee for secondment of staff.

ii) As per the secondment agreement, the employees remained on Abbey Plc's payroll in order to protect employee pension and social security contributions in the UK. However, the employees were under the supervision and control of the assessee during the term of secondment. The assessee, in accordance with the terms of the secondment agreement, reimbursed Abbey Plc for salary and other administrative costs of the seconded employees.

iii) The assessee filed an application u/s 195(2) of the IT Act seeking authorization for payments to Abbey Plc without deduction of tax at source. The AO held that the application u/s 195 was filed much after the date of credit of the sums to the accounts of the payee i.e. Abbey Plc and therefore the application was non-est. Consequently, the AO disposed of the same without adjudicating the claim of the assessee on merits. Aggrieved by the action of the AO, the assessee thereupon filed a petition u/s 264 of the IT Act before Director of Income-tax who also rejected the petition preferred by the assessee.

iv) Thereafter, the AO initiated proceedings u/s 201(1) of the IT Act and thereby concluded that the seconded employees of Abbey Plc were highly technically skilled and therefore Abbey Plc was involved in providing technical services to the assessee and therefore the consideration paid by the assessee was in nature of 'fees for technical services' u/s 9(i) (vii) of the Act as well as under Article 13(4)(c) of India-UK DTAA. In light of the same, the AO treated the assessee as an 'assessee in default' u/s 201(1) for not withholding taxes at the time of making payments to Abbey Plc. The action of the AO was upheld by the CIT(A).

v) On further appeal, the Tribunal held that since the supervision and control over the seconded employees and the right to instruct them was with the assessee, though Abbey Plc was the legal employer, the assessee would be considered as the real and economic employer of the seconded employees. The Tribunal further held that the payments were pure reimbursement of salary and other costs and since there was no income element embedded in it, it could not be regarded as income chargeable under the IT Act. The Tribunal also held that since Abbey Plc had only seconded employees and had not rendered any services, the reimbursement would not constitute FTS under the Act. Further, since the said payments did not satisfy the condition of 'making available' technology, process, skills, etc, the payments would not be in nature of FTS under the India-UK DTAA.

vi) On further appeal by Revenue, the Karnataka HC held as under

Decision

i) The Karnataka High Court perused the Secondment Agreement and observed that it was evident that the seconded employees had to work at such place as the assessee may instruct and the employees had to function under the control, direction and supervision of the assessee and in accordance with the policies, rules and guidelines applicable to the employees of the assessee.

ii) The HC further observed that the seconded employees in their capacity as employees of the assessee had to control and supervise the outsourced activities and therefore, the assessee for all practical purposes was the employer of the seconded employees.

iii) Relying on the decision of the Delhi High Court in case of *DIT vs. HCL Info System Ltd. 274 ITR 261 (Delhi)*, the Karnataka HC held that there was no obligation in law for deduction of tax at source on payments made for reimbursement of costs incurred by a non-resident enterprise and therefore, no taxes were required to be withheld

on the amount paid by the assessee u/s 195 of the IT Act.

iv) Further, the Karnataka HC also distinguished the decision of Delhi HC in case of Centrica India Offshore Pvt. Ltd. W.P.(C) No. 6807/2012 dated 25-4-2014, by observing that, the Delhi High Court, in that case, was dealing with the issue as to whether the secondment of employees by non-resident companies, fell within Article 12 of India-Canada DTAA and Article 13 of India-UK DTAA, which embody the concept of service permanent establishment and since in the instant case, the issue of the permanent establishment was not involved, the said decision would not be applicable to the facts of the present case.

v) In light of the above, the HC dismissed the appeal of the Revenue.

3 *Wipro Ge Healthcare (P.) Ltd. vs. DCIT [2020] 118 taxmann.com 302 (Karnataka)*

When the remand order passed by Tribunal specifically directed the AO to carry out working capital adjustment and to re-examine as to whether two comparables would pass through all filters applied by TPO, since there was a limited remand of matter for judicious consideration, the mandatory procedure prescribed under section 144C of passing a draft order ought to have been followed

Facts

i) The assessee, a domestic company, had entered into various international transactions with its AEs.

ii) During the course of assessment proceedings, the AO made a reference to the TPO to determine the ALP of the said international transactions. The TPO proposed certain TP-adjustments, which were objected before the DRP. The DRP upheld the action of the AO and on further appeal before the Tribunal, the Tribunal granted relief to the assessee by remanding the matter to the file of the TPO to carry out working capital adjustment and to re-examine as to whether two comparables namely FCS Software Solutions and Thinksoft Global Services Ltd. would pass through all filters applied by TPO.

iii) In the remand proceedings, the AO passed an assessment order along with a notice of demand (impugned order).

iv) The assessee filed the present writ contending that impugned order was liable to be quashed since the mandatory procedure of passing a draft order u/s 144C was not followed by the AO and instead a final order along with a notice of demand was passed.

Decision

The Karnataka High Court allowed the writ petition of the assessee, by observing as under:

i) The Karnataka High Court observed that the Tribunal had remanded the matter for judicious consideration afresh and therefore, the mandatory procedure prescribed u/s 144C of the IT Act, to the extent of such remand, ought to have been followed by the AO. The HC further observed that ordinarily, a remand results into a reconsideration of the matter regardless of its scope, and therefore, there ought to have been a draft order u/s 144C to which the assessee would have filed objections before the DRP. The HC further held that the remand order expects a judicious determination by a fresh look

and there could not be a mechanical exercise in a case of remand of this nature.

ii) The HC also rejected the plea of the Revenue that there was an alternate remedy available to the assessee and that consequently the present writ could not be entertained, by holding that the argument of alternate remedy does not bar the writ jurisdiction of the High Court when the impugned order has a demonstrable error of law on its face resulting into prejudice to the Assessee. Further, the HC also observed that nothing was stated as to how the Revenue would be affected by the invocation of writ jurisdiction by the assessee when the full opportunity of representation was given to both the sides.

iii) In light of the above, the High Court allowed the writ petition of the assessee by quashing the impugned order and the consequential demands. Further, the HC remitted the matter to the AO for fresh consideration, in accordance with the law and after hearing the assessee.

B. Tribunal

4 *Bengal Tiger Line (P.) Ltd. [2020] 121 taxmann.com 165 (Chennai - Trib.)*

Where the income of a Singapore based shipping company was taxed in Singapore on an accrual basis and not on receipt basis, Article 24 of India-Singapore DTAA could not be applied, to deny the benefit of Article 8 of India-Singapore DTAA to the said Singapore based shipping company.

Facts

i) The assessee, a tax resident of Singapore, was engaged in the business of operation of ships in international traffic. During the year under consideration, the assessee received freight income in respect of various vessels which sailed from the ports in the Indian sub-continent and South-East Asia.

ii) For the year under consideration, the AO had issued a double income-tax (DIT) relief certificate under section 172 of the IT Act, where relief was granted to the assessee in respect of the freight income from the operation of ships in international traffic, wherein it was held that the said freight income was not taxable in India by virtue of Article 8 of the India-Singapore DTAA, which inter alia provides that income from shipping operations would be taxed only in the country of residence (i.e. Singapore in the present case). The assessee, filed its return of income, by claiming that the income received from shipping operations in India would not be taxable in India pursuant to Article 8 of the India-Singapore DTAA.

iii) During the course of assessment proceedings, the AO rejected the assessee's contention that the freight income was not taxable in India pursuant to Article 8 of the India-Singapore DTAA, by observing as under:

a. The freight income earned by the assessee was not taxed in Singapore by virtue of Section 13F of the Singapore Income-tax Act (Singapore ITA) and therefore in view of Article 24 of the India-Singapore DTAA, which inter alia provides that provisions of India-Singapore DTAA would be applicable only if the income had

suffered tax in Singapore, i.e. an income which was not taxed in Singapore could not be granted tax exemption in India.

b. The assessee had claimed exemption of the income in both the countries and therefore, there was no income which was being doubly taxed in order to invoke the provisions of the India-Singapore DTAA and hence, the said income was taxable in India.

c. The AO also rejected the certificate/ letter issued by the Inland Revenue Authority of Singapore (IRAS) which stated that international shipping income was taxable in Singapore on an accrual basis.

iv) The DRP, by relying on the decision of Mumbai Tribunal in case of ***Hindalco Industries Limited vs. ACIT [2005] 2 SOT 528 (Mum)*** and on the Vienna Convention, upheld the action of the AO and observed that the purpose and object of a DTAA between two sovereign countries is to avoid double taxation of similar income in two countries and further the benefit of relief would be available only when a particular income is taxed in one of the Contracting State (source country) and the same income would also be subjected to tax in another Contracting State (country of residence). Since the income from shipping operations was exempt under the Singapore ITA (country of residence), the other Contracting State (source country) was very much within its power to tax the particular income as per the laws of that country i.e. in India u/s 44B of the IT Act.

v) On appeal, the ITAT held as under:

Decision

i) The Tribunal observed that, by virtue of Article 8 of India Singapore DTAA, income derived by a resident of a Contracting State, from the operation of ships in international traffic was taxable only in that State i.e., the shipping income of a Singaporean resident by the operations of ships in international waters would be taxable only in Singapore on an accrual basis. Accordingly, Article 8 of the India-Singapore DTAA did not provide an exemption, rather, it vested the exclusive right of taxation of shipping income to the country of residence i.e. Singapore and therefore, India, by entering into DTAA with Singapore, had given up its right to the taxation of shipping income of a non-resident in India.

ii) The Tribunal further observed that the Article 24 of the India-Singapore DTAA contemplates twin conditions for its applicability viz. the first condition being that the income should be exempt or taxed at a reduced rate by virtue of any article under the India-Singapore DTAA and the second condition being that the said income is taxable on "receipt" basis in the other Contracting State i.e. Singapore in the present case.

iii) With respect to the first condition, the Tribunal held that Article 8 of India-Singapore DTAA did not provide for any exemption or reduced rate of taxation of such income, rather, it vested the exclusive right of taxation of shipping income to the country of residence i.e. Singapore. Accordingly, the shipping income earned in India was neither exempt nor taxed at a reduced rate as per Article 8 and thus

the first condition for the applicability of Article 24 was not fulfilled. The Tribunal also placed reliance on the letter issued by the IRAS dated 17-9-2018, wherein it was specifically stated that provisions of Article 24 of India-Singapore DTAA would not be applicable to the shipping income earned by residents of Singapore.

iv) With respect to the second condition, the Tribunal placed reliance on the letter issued by the IRAS dated 17-9-2018, wherein it was clarified that the income of a Singaporean company from the operation of ships in international traffic was taxable in Singapore on "accrual" basis and thus the Tribunal held that even the second condition was not fulfilled in the present case.

v) Thus, the Tribunal held that the provisions of Article 24 of the India-Singapore DTAA did not apply to the case of the assessee and therefore the income of the assessee was not taxable in India in light of Article 8 of the India-Singapore DTAA.

vi) The Tribunal also placed reliance on the decision of the Hon'ble Gujarat High Court in the case o***f M.T. Maersk Mikage vs. DIT (International Taxation) [2016] 72 taxmann.com 359 (Gujarat HC),*** wherein it was held that income earned by Singapore based shipping company through shipping business carried out at Indian Ports, was not taxable at Singapore on basis of remittance but on basis of accrual and therefore Article 24 of India-Singapore DTAA would not apply to deny the benefit of Article 8 of India-Singapore DTAA to said Singapore based shipping company.

5 *Huawei Technologies Co. Ltd. vs. ADIT [2020] 122 taxmann.com 130 (Delhi - Trib.)*

1. Where assessee, a Chinese Company, was engaged in the business of supplying and installation of telecommunications network equipment's to telecom companies in India through its Indian subsidiary i.e. I Co. in as much as that the I Co. was not independent to carry out installation and commissioning of equipment and there were frequent visits of expat employees of the assessee which exerted control to carry out various business activities -- the I Co. constituted a fixed place PE as its premises were at disposal of the assessee's employees. Further, since the assessee and the I Co. jointly submitted bids for tenders, the said activity resulted in the constitution of dependent agent PE. Also, since the act of installation had been performed only with the supervision of assessee's resources, the activity of supervision in connection with installation constituted 'Installation PE' as per Article 5(2)(j) of the India-China DTAA

Facts

i) The assessee, a tax resident of China, was primarily engaged in the business of supplying (on an offshore basis) the following goods to various customer (including customers in India):

   a. Non-terminal products (i.e. advanced telecommunication network equipment, namely, core and access network equipment, mobile network equipment and data communications equipment, etc.) for use in fixed and mobile phone networks; and

   b. Terminal products (i.e. mobile phone handsets).

ii) The supplies were made on a principal to principal basis and the property in the equipments passed outside India. The assessee had a subsidiary in India (i.e. I Co.) who was involved in the integration, installation and commissioning services in relation to telecom network equipment (equipment) supplied from outside India by the assessee. The assessee also rendered technical services to I Co. under the terms of a technical services agreement (TSA).

iii) During the years under consideration i.e. AY 2009-10 to 2016-17, the assessee earned revenue on account of sale of telecom network equipment and terminal equipment/mobile handsets but did not offer the revenue from the sale thereof to tax in India in view of Article 7 of the India-China DTAA (in the absence of a PE in India). However, the income accrued from the provision of technical services to I Co was offered to tax in India as FTS on a gross basis in accordance with Article 12 of the India-China DTAA.

iv) A survey was conducted in the office premises of I Co, and pursuant to the same, various documents were found, and statement of various senior executives were also recorded by the AO. During the assessment proceedings, the AO specifically asked the assessee as to why revenue from supply and installation of equipment should not be taxed in India.

v) The Assessing Officer (AO) held:

a. W.r.t Business connection: The assessee had a business connection in India under section 9(1)(i) of the Income-tax Act, 1961 (ITA);

b. W.r.t Fixed place PE: The business of the assessee was carried out in India with the help of employees who regularly worked from the I Co's premises and thereby had a fixed place PE in India as per Article 5(1) of the India-China DTAA.

c. W.r.t Installation PE: The employees of the assessee had visited India to perform activities relating to installation projects, which lasted for more than 183 days and thereby had an installation PE in India under Article 5(2)(j) of the India-China DTAA.

d. W.r.t Service PE: The employees of the assessee had rendered services in India (other than in nature of technical services) and such services had continued in India for more than 183 days and thereby had a service PE in India under Article 5(2)(k) of the India-China DTAA.

e. W.r.t Agency PE: The process of joint bidding done by the assessee and the I Co resulted in dependent agency PE under Article 5(4) of the India-China DTAA.

vi) The action of the AO was upheld by the DRP and on further appeal, the Tribunal held as under:

Decision

Whether the assessee had a 'business connection' in India

i) The Tribunal observed that a real and intimate relationship existed between the assessee and the I Co, as, the sale of telecommunication network equipment served no purpose of a

buyer unless the telecommunication network equipment were installed and commissioned (which was done by the I Co). Hence, the activities of the assessee continued till the telecommunication network equipment were installed and commissioned in India and this entire sequence of activities contributed directly to the earning of income of the assessee in its business even if the sale transaction was concluded outside India.

Whether the sale of the equipment took place outside India

ii) The responsibility for installation and commissioning along with the supply of equipment was with the assessee and the installation of the said equipment was within its scope of work.

iii) The Tribunal observed that the customers/buyers had the right to reject the entire shipment/goods/ equipment on the failure of acceptance test in India. In view of the above, the Tribunal held that the dominant purpose of the assessee was not to sell telecommunication equipment but to commission it after due customisation of hardware and software in accordance with the requirement of the service provider and this was possible only after taking certain activities in India in respect of the equipment supplied by the assessee.

iv) The Tribunal placed reliance on the Delhi HC in D***IT vs. Ericsson AB [2011] 16 taxmann.com 371 (Delhi HC),*** the decision of Hon'ble Supreme Court in case of ***Usha Beltron vs. State of Punjab [2005] 7 SCC 58 (SC)*** and Andhra Pradesh HC decision in case of ***Larsen and Toubro Ltd. vs. State of Andhra Pradesh [2015] 64 taxmann. com 288 (Andhra Pradesh HC),*** wherein it was held that taxable event takes place in India if the buyer had the right to reject equipment on the failure of the acceptance test carried out in India.

v) Accordingly, since the assessee undertook the risk of rejection of supply in India, there was an extension of the business of the assessee in India in respect of the supply of equipment to India.

Whether the assessee had a PE in India under the India-China DTAA

i) The ITAT considered the following factual factors while holding that the assessee had a PE in India under the India-China DTAA.

   a. The Indian resources i.e. employees of I Co. were not only involved in negotiating deals on behalf of the assessee but were also part of the joint bidding team. The Indian resources were participating in the bid process including deal negotiations along with Chinese resources with customers in India. The assessee seconded Chinese resources to I Co for the advancement of business in India.

   b. The assessee did not supply a standard product, but product based on specific requirements of the customer. The assessee closely monitored the progress in a project at various stages starting from bidding stage to final implementation phase by sending its key resources which exerted control to carry out various business activities in India.

   c. The assessee's products were technically complex advanced products and it was the technology

and manufacturing efforts which played an important role in selling the product.

d. The representatives of the assessee were allowed to use the premises of I Co. The foreign expatriate experts in the technology behind the equipment were present in India onsite to supervise the installation and commissioning process. The I Co was not technically equipped to do the installation and commissioning on its own and thus requisitioned the expats to supervise the installation process at the site in India.

e. The installation and other managed services were carried on by I Co under supervision of the assessee. There was no dispute that technology ownership was with the assessee.

f. The I Co was economically dependent on the assessee as the I Co was not capable of supplying the equipment in the bid; it handled the work of installation of telecom equipment supplied by the assessee on technical support provided by the assessee. Further, the business of I Co was wholly and exclusively for equipment supplied by the assessee.

vii) In view of the above factual factors and by placing reliance on the decision of Hon'ble Supreme Court in case of ***Formula One World Championship Ltd. vs.. CIT [2017] 80 taxmann.com 347 (SC),*** the Tribunal held as under:

a. The I Co could not independently carry out the installation and commissioning of the equipment. The act of installation had been performed only with the supervision of assessee's resources which meant that supply and installation were integral. Therefore, the activity of supervision in connection with installation constituted 'Installation PE' as per Article 5(2)(j) of the India-China DTAA.

b. Frequent visits of assessee's employees exerted the control to carry out various business activities of the assessee and therefore considering the facts in totality, the I Co not only constituted dependent agent PE of the assessee but also service PE and fixed place PE within Article 5 of the India-China DTAA.

6 *Amarchand & Mangaldas & Suresh A Shroff & Co vs. ACIT [TS-666-ITAT-2020(Mum)]*

Where assessee, a law firm in India, rendered professional services to its clients in Japan, the said professional fees would be taxable as fees for technical services in Japan under Article 12 of the India-Japan DTAA (in the absence of the make available clause) and would not fall within the purview of Article 14 of the India-Japan DTAA which was applicable only to individuals and not partnership firms. Consequently, the assessee firm was eligible to claim credit of taxes, withheld in Japan by its Japanese clients from the fees remitted to India. Further, where the view (w.r.t tax deduction at source) of the source state is reasonable and bonafide, the foreign tax credit cannot be denied in the state of residence, on the ground that the tax was not paid in accordance with the DTAA

Facts

i) The assessee, a partnership firm and a tax resident of India had earned income from rendering professional legal services to its clients in Japan. The Japanese clients of the assessee had withheld taxes at 10% on the gross amount of professional fees paid to the assessee under Article 12 of the India-Japan DTAA which does not contain the make available clause and is applicable to services of a managerial, technical or consultancy nature excluding, inter alia, payments made to individuals for Independent Personnel Services (IPS) which are covered under Article 14. The assessee, filed its return of income in India, claiming the foreign tax credit (FTC) of the taxes withheld by its Japanese clients.

ii) The AO was of the view that the income received from the Japanese clients qualified as income in nature of IPS under Article 14 of the India-Japan DTAA and therefore in absence of a fixed base of the assessee in Japan, the said income was not liable to be taxed in Japan and thus the Japanese clients should not have withheld taxes on the gross amount of professional fees paid to the assessee. The AO relied on the decision in case of Maharashtra State Electricity Board ***vs. DCIT [(2004) 90 ITD 793 (Mum)], Dy. CIT vs. Chadbourne & Parke LLP [(2005) 2 SOT 434 (Mum)],*** and ***Ershisanye Construction Group India (P.) Ltd. vs. DCIT [(2017) 84 taxmann.com 108 (Kol)].*** In view of the above, the AO denied the claim of FTC by holding that the taxes withheld in Japan were not 'in accordance with' the India-Japan DTAA and thus not eligible for FTC in India. The action of the AO was upheld by the CIT(A).

iii) On further appeal, the Tribunal held as under:

Decision

W.r.t classification of professional fees i.e. whether taxable under Article 12 or Article 14 of the India-Japan DTAA

i) At the outset, the Tribunal acknowledged that there were overlapping areas under the definitions of FTS and IPS under the India-Japan DTAA inasmuch as income from professional service could get covered under both the Articles. However, on perusal of Article 12 and Article 14 of the India-Japan DTAA, the Tribunal held that Article 12 of the India-Japan DTAA was applicable to the assessee, by observing as under:

   a. A DTAA has to be read as a whole and the provisions of the DTAA are to be construed in harmony with each other. Reliance in this regard was placed on the decision in case of ***Hindalco Industries Ltd vs. ACIT [(2005) 94 ITD 242 (Mum)]*** and ***DCIT vs. Boston Consulting Group Pte Ltd [(2005) 94 ITD 31 (Mum)]***

   b. Article 12(4) of the India-Japan DTAA very clearly excludes IPS income derived by individuals from the purview of FTS and thus such exclusion supports the interpretation that professional income derived by other entities (i.e. non-individuals) were covered by the FTS Article and IPS Article i.e. Article 14 of the India-Japan DTAA would be applicable only to 'individuals'. Consequently, the Tribunal observed unless the provisions of Article 14 of the

India-Japan DTAA are held to apply only to individuals, the exclusion clause under Article 12(4) of the India-Japan DTAA, which excludes individuals earning income taxable under Article 14, would not make any sense.

c. The Tribunal recognised that as per a valid school of thought, Article 14 comes into play only for individuals while Article 7 is for entities other than individuals and therefore it was for this reason that Article 14 was removed from the OECD Model Convention. The Tribunal also placed reliance on the Mumbai Tribunal decision in case of ***Linklaters LLP vs. ITO [(2011) 9 ITR (T) 217 (Mum)].***

d. The Tribunal also distinguished the decisions relied upon by the AO, by observing that said decisions were in the context of the DTAA's (i.e. China, U.K. and the USA) other than India-Japan DTAA, and the provisions of the India-Japan DTAA are not in pari material (since Article 12 and Article 14 of those DTAA's were differently worded vis-à-vis India-Japan DTAA) with the provisions of those DTAA's.

W.r.t grant of FTC under Article 23 of the India-Japan DTAA

ii) In view of the above, the Tribunal held that taxes were rightly withheld by the Japanese clients which was in accordance with the provisions of the India-Japan DTAA and thus the assessee was entitled to claim FTC.

iii) Further, the Tribunal observed that for ascertaining whether the income is taxed "in accordance with" the provisions of the DTAA for the purpose of FTC, it has to be seen as to whether the view so adopted by the source jurisdiction (i.e. Japan in the present case) is a reasonable and bona fide view. The Tribunal relied on the ruling of *Canadian Pacific Ltd. vs. the Queen [76 DTC 6120]* at p. 6135, wherein the Federal Court emphasized the importance of uniform interpretation of phrases used in global treaty networks and held that unless the interpretation given in the source country is "manifestly erroneous", the same may be followed in the resident country also to achieve a uniform interpretation of the tax treaty. The Tribunal also acknowledged that while it may not always be possible to desire uniformity in interpretation due to the law being made by various judges and legal frameworks in which tax treaties are to be interpreted in each country, different treatments by treaty partner jurisdictions could result in hardship to taxpayers.

iv) The Tribunal, accordingly, held that since the Japanese tax authorities had consciously taken a call rejecting the plea of the assessee for non-taxation of the income received by the assessee under Article 14 of the India-Japan DTAA, the view of the Japanese Tax Authorities was a reasonable view in the context of India-Japan DTAA and, at the minimum, was not a 'manifestly erroneous' view.

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