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INTERNATIONAL TAXATION
Case Law Update

A. SUPREME COURT

1 *DIT vs. Travelport Inc. [(2023) 149 taxmann.com 470 (SC)]*

The Hon'ble Apex Court held that the question as to what proportion of profits arose or accrued in India was a matter of fact and accordingly dismissed the Revenue's Appeal

Facts

i. The assessee, a US based entity, was providing electronic global distribution services to Airlines through "Computerized Reservation System" ('CRS'). For the said purpose, the assessee maintained and operated a Master Computer System, said to consist of several main frame computers and servers located in other countries, including USA.

ii. Further, it was noted that this Master Computer System was connected to airlines servers, to and from which data was continuously sent and obtained regarding flight schedules, seat availability, etc. In order to market and distribute the CRS services to travel agents in India, the assessee had appointed Indian entities and had entered into distribution agreements with them.

iii. Further, there was no dispute w.r.t the fact that out of the earning of USD 3/Euro 3 (per booking), the assessee paid various amounts to the Indian entities ranging from USD/Euro 1 to USD/Euro 1.8 i.e. 33% to 60% of their total earnings.

iv. The AO during the assessment procedure came to the conclusion that the entire income earned out of India by the assessee was taxable. This was on the basis that the income was earned through the hardware installed by the assessee in the premises of the travel agents and that therefore the total income of USD/EURO 3 was taxable.

v. The CIT(A) upheld the order of the AO.

vi. The Hon'ble Tribunal held that the assessee constituted Permanent Establishment ('PE') in two forms, namely, fixed place PE (i.e. computers placed in the premises of the travel agents and the nodes/leased lines form a fixed place PE) and dependent agent PE ('DAPE') (i.e indian entities

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in the form of dependent agents appointed by the assessee and they habitually secure contracts in favour of the assessee). It further held that activities were processed in the host computers in USA/Europe and that the activities in India were only miniscule in nature. Accordingly, with regard to the attribution of profits to the PE constituted in India, the Tribunal assessed it at 15% of the revenue and held, on the basis of the functions performed, assets used and risks undertaken (FAR) that this 15% of the total revenue was the income accruing or arising in India and this 15% worked out to 0.45 cents. However, the Hon'ble Tribunal further observed that the payment made to the Indian entities ranged from USD/Euro 1 to USD/Euro 1.8 or even more, which was much more than the revenue attributed by the Hon'ble Tribunal from activities carried out in India. Hence, it concluded that no further tax was payable.

vii. The Revenue filed miscellaneous application before the Tribunal, but the Tribunal dismissed the same clarifying that no further income was taxable in India as the remuneration paid to the agent in India exceeded the apportioned revenue.

viii. Accordingly, appeal was filed by Revenue w.r.t apportionment of revenue before the Hon'ble Delhi High Court against the order of the Tribunal. However, the Hon'ble High Court dismissed the appeal filed by the Revenue on the ground that no question of law arose and also held that insofar as attribution was concerned, the Hon'ble Tribunal had adopted a reasonable approach.

ix. Aggrieved by the order of the Hon'ble Delhi High Court, the Revenue filed appeal before the Hon'ble Supreme Court.

Decision

i. The Hon'ble Supreme Court noted that the Tribunal arrived at the quantum of revenue accruing to the assessee in respect of bookings in India which could be attributed to activities carried out in India, on the basis of FAR analysis (Functions performed, assets used and risks undertaken). Further, it also noted that the Commission paid by the assessee to the distribution agents was more than twice the amount of attribution and the same was already taxed. Hence, the Tribunal was correct in its conclusion.

ii. Further, w.r.t to the profit to be attributable, the Hon'ble Supreme Court held that under explanation 1(a) to Section 9 of the Act, what portion of income could be reasonably attributable to the operations carried out in India was a question of fact and on this question of fact Tribunal had taken decision considering the relevant factors.

iii. W.r.t to the Revenue's contention that such attribution was not in accordance with Article 7 of India-US DTAA, the Hon'ble Supreme Court pointed out that as per the treaty the entire income derived by the Assessee would be taxable whereas Section 9(1)(i) confined taxability to income attributable to operations in India.

iv. Thus, the Hon'ble Supreme Court dismissed the appeal filed by the Revenue. As regards, the question w.r.t the PE, it declined to answer the same.

B. HIGH COURT

2 ***Bid Services Division Mauritius Limited vs. AAR (IT) [(2023) 148 taxmann.com 215 (Bombay)]***

The impugned order of AAR denying benefit of capital gains exemption under Indo-Mauritius DTAA to sale of shares by Mauritius SPV/Corporate Holding structure prior to 1-04-2017 was quashed by the Hon'ble Bombay High Court and the matter was remanded back to the AAR since it had not considered the TRC and Press Release dated 29th August, 2016

Facts

i. Petitioner, a private limited company incorporated under the laws of Mauritius on 23rd August, 2005, was a wholly owned subsidiary of Bid Services Division (Proprietary) Limited, South Africa the ultimate holding company being the Bidvest Group Limited in South Africa ("Bidvest").

ii. The Petitioner was a holder of Category-I Global Business License issued by the Finance Services Commission, Mauritius and also had a valid Tax Residency Certificate ("TRC") issued by the Mauritius Revenue Authority certifying that the Petitioner was a tax resident of Mauritius and entitled to avail the benefits of the Mauritius DTAA.

iii. The Petitioner filed its corporate tax returns in Mauritius and was a non-resident under the provisions of the Income Tax Act, 1961. The Petitioner did not have any permanent establishment/fixed place of business nor any business connection/operations in India.

iv. The Petitioner was a party to the consortium which applied to the bid opened by the Airport Authority of India ('AAI') for development of Delhi and Mumbai Airports. GVK-SA Consortium consisting of GVK Industries Ltd. and SA Airport Operators (SA Airport Operators was a joint venture of Airports Company South Africa Limited (ACSA), Old Mutual Life Assurance Company South Africa Limited and the Bidvest Group Limited (BidVest)) filed their expression of interest on 20th July, 2004, with the AAI for both the Mumbai and Delhi airports. Bidvest was one of the parties to the joint venture which in turn was a part of the Consortium.

v. Bidvest informed AAI vide letter dated 9th September, 2005 that BSDM (i.e. Petitioner) would hold 27% of the total share capital of the Joint Venture Company (the "JVC") if the Consortium was selected as the successful bidder.

vi. Accordingly, the bid was submitted on 12 September 2005, wherein, the bid agreement also provided the option to change the consortium partner. Along with the bid, the shareholding pattern of the consortium was also submitted wherein the Petitioner was shown as bidder and shareholder.

vii. The Consortium was selected as the successful bidder for modernisation and development of the Mumbai airport. Subsequently, Mumbai International Airport Limited ("MIAL") was incorporated on 2nd March, 2006.

viii. On 4th April, 2006, the AAI also entered into an Operation, Management and Development Agreement (the "OMDA") with MIAL and on the same day shareholders agreement was entered into between AAI, MIAL and the prime members i.e. GVK Airport Holdings Pvt. Ltd. ("GAHPL"), Petitioner and

AGL, which recorded the terms and conditions that govern their relationship as the shareholders of the JVC and recorded their respective rights and obligations.

ix. Under the Shareholder's agreement the Petitioner agreed to subscribe and acquire 27% of the total issued and paid up share capital of MIAL. This 27% share capital of MIAL comprised of 216,000,000/- shares, which was acquired in five tranches between the years 2006 and 2012 by the Petitioner. The balance equity shares in MIAL were subscribed to by GAHPL (37%), AGL (10%) and AAI (26%) respectively.

x. The Board of Directors of the Petitioner vide board meetings held on 20th February, 2011 and 28th February, 2011 in Mauritius decided to transfer its shares in MIAL to GAHPL.

xi. On 1st March, 2011, the Petitioner entered into a Share Purchase Agreement ("SPA") alongwith subsequent addendums with GAHPL and GVK Industries Limited, both of which are companies incorporated under the Companies Act, 1956, whereby the Petitioner agreed to sell and transfer to GAHPL and GAHPL agreed to purchase and acquire from the Petitioner the shares constituting 13.5% of the total paid up share capital, comprising of 108,000,000 shares of MIAL for the purchase price of USD 287,222,000.

xii. On 18th April, 2011, Petitioner made an application under Section 197(1) of the Act to the Assistant Director of Income Tax Circle-1(1) (International Taxation), New Delhi for obtaining a "Nil" withholding tax certificate and was issued a certificate dated 20th May, 2011, authorising GAHPL to make payment/remittance of USD 287,222,000 to the Petitioner for the transfer of shares without deduction of any tax at source under Section 195 of the Act.

xiii. Subsequently, on 3rd October, 2011, the sales consideration for the sale and purchase of the above-mentioned offered shares was reduced to US$ 231,000,000 due to change in payment mechanism and other changes and it was duly communicated to Assistant Director of Income-tax (International Tax). The said transfer was completed in the financial year 2011-12.

xiv. On 10th February, 2012, Petitioner filed an application under Section 245Q(1) before the AAR to determine the correctness of its belief that the capital gains that arose in the hands of the Petitioner by virtue of the sale of shares held by it in MIAL would not be taxable in India having regard to the provisions of Article 13(4) of the India-Mauritius DTAA.

xv. The matter was heard on 27th July 2015 and the application filed by the Petitioner was finally admitted. After twice the office of AAR getting vacated and twice a new bench being formed, the matter was heard on 22nd August, 2019, wherein, the Petitioner reiterated the submissions made by the Petitioner regarding the non-taxability of the gain arising from the transaction of sale of the shares, (effected pursuant to the SPA dated 1st March 2011) held by the Petitioner in MIAL having regard to the provisions of Article 13(4) of the India-Mauritius DTAA.

xvi. However, AAR did not accept the contentions of the Petitioner regarding the non-taxability of the gain arising from the transaction of sale of shares to be effected pursuant to the SPA dated 1st March, 2011 held by the Petitioner in MIAL, by virtue of Article 13(4) of the Mauritius DTAA and passed ruling dated 10th February, 2020 rejecting the contentions raised by the Petitioner holding that the Petitioner is not entitled to the benefits under Article 13(4) of the Mauritius DTAA.

xvii. Aggrieved by the order, the Petitioner filed a writ petition before the Hon'ble Bombay High Court.

Decision

i. The Hon'ble Bombay High Court noted that the AAR had observed that the Petitioner was incorporated in Mauritius on 23rd August 2005 i.e. two weeks before submission of technical and financial bid by the GVK-SA Consortium. That when the expression of interest was filed by the Consortium on 20th July 2004, the Petitioner was not even in existence. Also, right from the very start Bidvest i.e. the ultimate holding company, was involved as member of the Consortium and not the Petitioner. That, it was only at Stage 2 of the bidding process that the Petitioner was substituted in place of Bidvest.

ii. The AAR had also concluded that the Petitioner company being a shell company without any tangible assets, employees, office space etc. being incorporated a few days before the bidding, had no management experts or financial advisers on its pay roll or on hire.

iii. The Hon'ble High Court further noted that as per AAR, according to the Indo-South Africa DTAA, the capital gains on share sale is taxable in India and if the Petitioner was not interposed, the Bidvest group would have to pay capital gains tax in India on the share sale transaction.

iv. The Hon'ble Bombay High Court studied the Article 13 of the India-Mauritius DTAA thoroughly and noted that with respect to capital gains that gains derived by a resident of a contracting State from the alienation of any property other than those mentioned in paragraphs 1, 2 and 3 of the Article should be taxable only in that State i.e. in the present case in Mauritius and not in India.

v. The Hon'ble High Court took note of Circular No 682 of 1994 and 789 of 2000 and the Press release dated March 1st , 2013, which suggested that TRC would be a conclusive evidence for accepting residence as well as beneficial ownership for the purposes of the DTAA and that the same was not considered by AAR.

vi. The Hon'ble High Court relied on the decision of the Apex Court in the case of Azadi Bachao Andolan which had upheld both the above-mentioned circulars. Also it added that the decision of the Apex Court in the case of ***Vodafone International Holding B.V vs Union of India*** also had upheld circular No 789 and had held TRC to be a conclusive evidence. The same were again not considered by AAR.

vii. The Hon'ble High Court further added that no doubt mere holding of a TRC cannot prevent an enquiry if it can be established that the interposed entity was a device to avoid tax. However, the decisions of the Apex Court cited above have clearly upheld the conclusivity of the TRC absent fraud or illegal activities.

viii. The Hon’ble High Court further added that except bald allegations, no material had been placed on record to demonstrate or establish that Petitioner was a device to avoid tax or that there was fraud or any illegal activity. Also, the entire structure as well as the transaction of sale was in the full knowledge of the Indian Authorities including the tax authorities.

ix. The Hon’ble High Court also noted that in the Press Release dated 29th August 2016, by the CBDT it was cleared that investments made before 1st April 2017 have been grandfathered and will not be subject to capital gains taxation in India. Hence, Article 27A of the India-Mauritius DTAA would not apply to them.Even this release was not considered by AAR.

x. The Hon’ble High Court interalia relied on Paras 65 to 68 of the judgement of the Hon’ble Apex Court in the case of ***Vodafone International Holding B.V. vs. Union of India [(2012) 17 taxmann.com 202 (SC)]*** reproduced below:

“65. In the thirteenth century, Pope Innocent IV espoused the theory of the legal fiction by saying that corporate bodies could not be ex-communicated because they only exist in abstract. This enunciation is the foundation of the separate entity principle.

66. The approach of both the corporate and tax laws,particularly in the matter of corporate taxation, generally is founded on the above-mentioned separate entity principle,i.e., treat a company as a separate person…..”

67. It is generally accepted that the group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. However, the fact that a parent company exercises shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the parent company resides…Thus, whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and circumstances surrounding the transaction…

68. The common law jurisdictions do invariably impose taxation against a corporation based on the legal principle that the corporation is "a person" that is separate from its members…Holding Structures are recognized in corporate as well as tax laws. Special Purpose Vehicles (SPVs) and Holding Companies have a place in legal structures in India.…The Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the "look at" test to ascertain its true legal nature… The corporate business purpose of a transaction is evidence of the fact that the impugned transaction is not undertaken as a colourable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device.”

The Hon’ble High Court concluded that the logic that Petitioner was brought in for ease of doing business or for operational reasons and to provide supportive business environment found favour with the aforesaid observations.

xi. Thus, based on the above discussion, the Hon'ble High Court quashed the order of the AAR and allowed the appeal and remanded the matter to the AAR to decide the matter with respect to the guidance given by the Hon'ble High Court.

C. TRIBUNAL

3 ***Franke Faber India (P.) Ltd. vs. DCIT [(2023) 149 taxmann.com 105 (ITAT-Pune)]***

Where assessee paid management fee to its AE and to benchmark said transaction TPO accepted cost allocation on basis of average total assets and third party sales, but refused to accept allocation done on basis of headcount, such course of action adopted by TPO being contrary to mandatory statutorily stipulated procedure, could not be countenanced

Facts

i. The assessee, engaged in manufacturing kitchen appliances like kitchen hoods, gas hobs, cook tops, cooking range, sinks and other kitchen related accessories, was a wholly owned subsidiary of Faber S.p.A. The assessee filed a revised return declaring current year's loss at Rs. 18,93,87,541,duly accompanied by Form No. 3CEB containing details of certain international transactions.

ii. The concerned transaction was 'Payment of Management Fees' amounting to 10.79 crores. The assessee had determined the ALP of the transaction on segregate basis with the Transactional Net Margin Method (TNMM) as the most appropriate method, using Operating Profit to Operating Cost as Profit Level Indicator (PLI) The assessee had shortlisted 18 comparable companies having arm's length range of profit between 4.15% to 8.78%. The Associated Enterprise (AE) was selected as Tested Party, whose PLI of 5% was declared as falling between the arm's length range.

iii. The AO during the proceedings had made reference to the TPO.

iv. The TPO noticed that the ALP of similar transaction in the proceedings for the A.Y. 2011-12 to 2015-16 was determined at Nil on the ground that the assessee could not show any tangible benefit having been derived from such services. However, the TPO did not follow the approach for the current year. Rather, he examined the working of the allocation of Management Fees paid by the assessee to its Associated Enterprise (AE) under various heads, such as, Group CEO; Group legal;Group Human Resources; Group Corporate Finance; Group Corporate Information Services; Division Strategic decision; Support, Division Finance and Controlling; Division Human Resources etc.

v. Further, the TPO noted that the AE allocated costs to various group companies under different sub-heads including the Group CEO by using certain keys, such as, 1/3rd of average total assets; 1/3rd of total third party sales and 1/3rd of average full time equivalent head count. However, he was of the opinion that allocation on the basis of head count was not appropriate as there may be certain high level management persons and employees working in different countries.

vi. The TPO further observed that the assessee incurred its own separate costs at Rs. 13.36 crore in addition to payment to its AE towards Management Services fee of Rs. 10.79 crore. He accepted the cost allocation on the basis of average total assets and third party sales, but refused to accept allocation done on the basis of head count. Thus, he allowed management cost of Rs. 7.89 crores and disallowed 2.89 crores on the basis of his workings.

vii. Further, no relief was allowed by the Dispute Resolution Panel.

viii. Aggrieved, the assessee filed an appeal before the Hon'ble Tribunal.

Decision

i. The Hon'ble Tribunal noted that the issue in such earlier years had no bearing on the issue in the year under consideration and which could be decided independently because in the earlier years, the TPO had determined Nil ALP of the expenditure on the ground that the assessee had not received any benefit, whereas in the current year, the adjustment had been made by changing the basis of cost allocation as adopted by the assessee.

ii. The Hon'ble Tribunal further added that though the TPO mentioned in his order that he was reworking out the cost allocation on the basis of costs incurred rather than head count, but actually he determined the allowable portion of costs on the basis of sales ratio.

iii. The Hon'ble Tribunal after reading the provisions of Chapter X concluded that it transpired from the provisions of Chapter X read in conjunction with the relevant Rules, that any income arising from or expense paid to AE had to be determined in the hands of the Indian entity as per its ALP calculated under any one of the methods and given effect in the computation of total income accordingly. It further added that the procedure for computing total income is to first, ascertain the value of the international transaction; then, determine its ALP under any of the six methods; and thereafter to make transfer pricing adjustment representing excess of ALP over the transacted value of income or excess of transacted value over the ALP of the expenditure.

iv. The Hon'ble Tribunal held that the TPO did not compute the ALP of the international transaction but simply proposed the transfer pricing adjustment on the basis of some working done by him to the value of international transaction. Further, it added that the course of action adopted by TPO had no sanction of law as determination of ALP was mandatory as per the law.

v. The Hon'ble Tribunal concluded that no comparison of the Payment of Management Fee in an uncontrolled situation was made nor even the allocation of the third component on the basis of head count was done by considering any comparable uncontrolled instance. Hence, such a course of action adopted by the TPO was contrary to the mandatory statutorily stipulated procedure and hence, could not be countenanced.

vi. The Hon'ble Tribunal thus deleted the adjustment and accepted the ALP determination done by the assessee on which TPO had not commented at all.

4 *BCCI vs. DCIT - [150 taxmann.com 246 (ITAT - Mumbai)]*

Payment of Compensation by BCCI to overseas cricket association i.e. CSA (Cricket South Africa) under Termination Agreement would neither be taxable under the provisions of the Act nor under the India-South Africa DTAA.

Facts

i. The assessee, a national body for Cricket in India and a society registered under the Tamil Nadu Societies Registration Act, founded in the year 1929 with the object of promoting and developing Cricket in India are fostering the spirit of sportsmanship and member of the International Cricket Council ("ICC"), the international regulatory body for Cricket, derived substantial income from the conduct of Cricket tournaments and matches and was regularly assessed to tax in India.

ii. In the year 2008, the assessee commenced the conduct of a Cricket Tournament, namely, the Champions League T20 ("CLT20"). The participants in the CLT20 Tournament included the winners and/or runners-up of the domestic 20-over leagues of India, Australia, South Africa, etc.

iii. With a view to maximise the commercial success of the CLT20 Tournament and to ensure the participation of teams from South Africa in the CLT20 Tournament each year, in addition to the other teams of ICC member countries, the assessee arrived at an arrangement, inter-alia, with Cricket South Africa ("CSA"), which was the national body for Cricket in South Africa.

iv. Under the said arrangement, CSA ensured that the winning and, where appropriate, the runner-up Cricket team(s) involved in the domestic Twenty20 Cricket competition administered by CSA would be participating in CLT20 Tournament organised by the assessee each year.

v. It was agreed between the assessee and CSA that the assessee would pay a quantified participation fee to CSA each year towards the participation of teams from its jurisdiction for the duration of the CLT20 term. Thus, the participating teams in the said tournament included the winner and runner-up of the Indian Premiere League and similar teams which were winners and runner-ups in corresponding domestic T20 league tournaments held in other countries

vi. The assessee awarded the media/broadcasting rights relating to the CLT20 Tournament to ESPN Star Sports by way of a Rights Agreement, which was subsequently novated in favour of Star India Private Ltd for the duration of the CLT20 term.

vii. The assessee, through its sub-committee i.e. Champions League Governing Council ("Governing Council"), entered into Rights Agreement on 10/09/2008 with ESPN Star Sports for the grant of certain rights like Media Rights, Umpires Sponsorship Rights, Title Sponsorship Rights, Official Sponsorship Rights, etc. in relation to CLT20 Tournament.

viii. Under the terms of the Rights Agreement, the assessee was obliged, inter-alia, to ensure the participation of teams from CSA for such a period. Following demands from Star India

Private Ltd, being the right holder of the tournament, and with the concurrence of CSA it was mutually decided to discontinue staging of the CLT20 Tournament from the year 2015 onwards and revoke aforesaid arrangements with CSA on mutually settled terms and conditions.

ix. Subsequently, Star India Private Ltd conveyed its desire to discontinue the exercise of its rights and requested for termination of the CLT20 Rights Agreement.

x. The agreement dated 29/05/2015 i.e. the Rights Agreement granting media/ broadcasting rights to Star India Private Ltd was terminated and a sum of USD 380 million was paid to the assessee as compensation. Further, on 25/06/2015, the assessee entered into an agreement with CSA to revoke the arrangement with CSA under which they were obliged to ensure the participation of the teams under its jurisdiction in the CLT20 Tournament.

xi. Further, as part of the said agreement, CSA agreed that for a period of 4 years being the remainder period of the CLT20, if the assessee organised any similar tournament and called upon them to ensure participation of at least two teams from South Africa, then, CSA shall ensure such participation on reasonable terms and conditions for which separate participation fees as may be agreed between the parties would be payable.

xii. It was further agreed that during the said period, CSA would not directly or indirectly, manage, operate, stage, involve itself and/or any teams from South Africa or otherwise participate in any tournament which was in any way similar to the CLT20 Tournament.

xiii. As compensation for the termination of the CLT20 Tournament and in consideration of CSA's obligations in the aforesaid agreement, the assessee agreed to pay CSA, net of taxes, an amount of USD 22,696,000. Although the assessee was of the view that the said payment was not taxable in India, as a measure of abundant caution, the assessee grossed up the payment by 43.26% and remitted the tax to the credit of the Revenue.

xiv. The assessee then filed an appeal before the CIT(A) under section 248 of the Act, seeking declaration that the tax was not required to be deducted on the said amount. However, the learned CIT(A) vide impugned order held that CSA received compensation by way of annual price fees and non-compete fees from the assessee.

xv. The CIT(A) mentioned that the situs of the entire cause of action arose in India as the head office of the assessee was in India; all the agreements were signed in India; cause of action for all the matches, which were primarily played or to be played was in India; and the agreement for the sale of media rights between the assessee and ESPN initially and later on cancellation agreement between the assessee and Star India Private Ltd was also signed and executed in India.

xvi. The CIT(A) also held that the assessee constituted Dependent Agent Permanent Establishment ('DAPE') of CSA on the basis that the Governing Council of CLT20 comprised representatives from the assessee, CSA and Cricket Australia

("CA") and the assessee acted as an agent not only for CA and CSA, but also for other teams which participated in CLT20 as per the terms and conditions of the agreement.

xvii. Aggrieved, the assessee filed an appeal before the Hon'ble Tribunal.

Decision

i. The Hon'ble Tribunal noted that the only dispute in the appeal was regarding taxability of compensation paid to the overseas Cricket Association for the termination of the agreement.

ii. The Hon'ble Tribunal noted that the assessee had deducted taxes under section 194E of the Act in respect of annual participation fees paid to the CSA and the same was not in dispute. Also that the main income from the CLT20 Tournament arose from the sale of media rights.

iii. The Hon'ble Tribunal observed that payment made to CSA by the assessee under the Termination Agreement dated 25/06/2015 was not only for the premature termination of the arrangement amongst them, whereby CSA was required to ensure the participation of teams from South Africa in the CLT20 Tournament each year, but the compensation was also for the non-compete clause as provided in clause 6 of the agreement.

iv. The Hon'ble Tribunal mentioned that as per the records, in the year under consideration, no services, as alleged by the Revenue, by facilitating two domestic teams for participation in the CLT20 Tournament were rendered.

v. With respect to the non-compete clause, the Hon'ble Tribunal concluded that the contention of the assessee that the place where the non-compete clause would apply is outside India because if any tournament took place in India the same would be organised by the assessee, being the national body for cricket in India, and CSA would not be restrained from participating in such tournament, by virtue of clause 5 of the Termination Agreement - was correct.

vi. The Hon'ble Tribunal thus concluded that the the payment to CSA was not arising from any operations carried out in India in the year under consideration and thus the same was not taxable under section 9(1) of the Act.

vii. It also added that the place where the agreements were signed was relevant only to decide the jurisdiction and not the taxability unless there were some operations carried out in India and the payment was 'reasonably attributable' to the same, which was not the case here.

viii. The Hon'ble Tribunal added that the payment of compensation to CSA was for the termination of the arrangement, which was a profit-making apparatus, and thus was in the nature of capital receipt and hence not taxable.

ix. The Hon'ble Tribunal held that when the payment is not taxable under the Act, there was no need to check its taxability as per the treaty. Irrespective, as per the provisions of the DTAA the same was not taxable even as per the treaty as the Revenue apart from alleging that the assessee was the agent of CSA did not bring anything on record to show that the assessee had the authority to conclude contracts in the name of CSA and that it had habitually exercised the said authority which was a perquisite for taxability under Article 5(5) of the

DTAA. It added that since the payment was not taxable, there was no obligation on the assessee to deduct TDS under section 195 of the Act.

x. W.r.t to the DAPE issue, the Hon'ble Tribunal concluded that the Revenue apart from alleging that the assessee was the agent of CSA did not bring anything on record to show that the assessee had the authority to conclude contracts in the name of CSA and had habitually exercised the said authority, which was a requirement as per Article 5 of the India-South Africa DTAA. It also relied upon the decision of the apex court in the case of ***ACIT vs. E-Funds IT Solution Inc [(2017) 399 ITR 34 (SC)***].

xi. Further, relying on the observations of the Special Bench of the Tribunal in ***Mahindra and Mahindra Ltd vs DCIT, [[2009] 30 SOT 374 (Mumbai) (SB)***], it dismissed the contention of the Revenue w.r.t the applicability of the Section 115BBA r.w.s 194E on the said receipt as the payment to CSA was compensation for the termination of the CLT20 Tournament, which cannot by any interpretation be said to be 'in relation to any game or sport played in India'.

xii. Thus, the said appeal was allowed by the Hon'ble Tribunal.

5 ***DCIT vs. Apollo Gleneagles Hospital Ltd - [(2023) 150 taxmann.com 210 (ITAT - Kolkata)]***

TPO was not justified in making downward adjustment by taking management fee expense at 'Nil' under CUP method disregarding TNMM employed by assessee as most appropriate method without pointing any defects in application or relevance of TNMM in this case. Payment of management fee for advisory services and use of brand name could not be labeled as shareholder/ stewardship services.

Facts

i. The assessee was a multi-specialty hospital providing latest generation diagnostic and treatment facilities. It was jointly promoted by Asian Healthcare giants 'Apollo Hospitals Group' and the Singapore based 'Parkways Healthcare Group'.

ii. In the year 2002, Apollo Hospitals Enterprises Limited ("AHEL") and Gleneagles Development Pvt Ltd ("GDPL") had entered into a joint venture agreement. Since, AHEL and GDPL both renowned hospital chains, they agreed to continue their operation in cohesion with each other as per the agreement dated 13.07.2002 to grow up a hospital in the name of Apollo Gleneagles Hospitals Ltd i.e. the assessee.

iii. As per clause 18 of this agreement, it was agreed between the parties that 5%of gross revenue generated from the hospital and diagnostic center shall be paid to AHEL and GDPL in equal proportion (i.e. 2.5% to each) by the Hospital Company as management fee.

iv. A tripartite agreement was entered into, effective from 01.07.2011 between the assessee, AHEL and Gleneagles Management Services Pte Ltd ("GMSPL"). As per the terms of the tripartite agreement:- a) assessee was granted a non-exclusive right to use and display licensed trademarks "Apollo" and "Gleneagles" respectively, together i.e. right to use "Apollo Gleneagles" upon or in relation to the name of Hospital. During assessment year2012-13, assessee entered into the international transactions with its Associated Enterprise (AE), GMSPL.

v. The assessee made payment of management fee for advisory services and use of brand name "Gleneagles" at 2.5% of gross operating revenue. Arm's length bench-marking exercise of above international transaction was carried out by assessee contained in its Transfer Pricing Study Report (TPSR).

vi. Assessee applied Transaction Net Margin Method (TNMM) as the Most Appropriate Method (MAM), using Profit Level Indicator of Operating Profit/ Operating Cost i.e. PLI of OP/OC. Assessee identified eight independent comparable companies for bench-marking. The OP/OC of assessee was 15.23% against industry average of 11.23%.

vii. However, TPO concluded that the transaction with GMSPL was not at arm's length and that there was no evidence for receipt of any services and consequent benefits and that no pricing analysis had been produced to substantiate payment of management fee @ 2.5%.It thus made a downward adjustment of Rs.5,14,96,223/- by taking the management fee expense at 'Nil' under CUP method.

viii. The CIT(A) deleted the addition and held that the TPO had exceeded his jurisdiction by disallowing entire management fee/brand royalty on the ground that no service was rendered/or no benefit was received.

ix. The CIT(A) had also noted that the assessee had submitted the required documents and evidences and clarifications for the same.

x. Aggrieved, the Revenue filed an appeal before the Hon'ble Tribunal. Also, the Department had challenged that the services received by the assessee were shareholder activity/stewardship services.

Decision

i. The Hon'ble Tribunal observed that the TPO exceeded his jurisdiction by questioning whether or not services were received and whether or not assessee derived benefit from the said management services because it is the domain of the Assessing Officer to assess whether or not expense is genuine and whether or not expense is incurred for the business purposes. Also it added that it was not the domain of the TPO to question the commercial expediency of the expense and his role was limited to determining the ALP for international transactions/specified domain transactions.

ii. The Hon'ble Tribunal added that as per the provisions of the Act, the TPO was responsible for determination and computation of the arms length price in relation to the International transaction/ SDT.

iii. The Hon'ble Tribunal further mentioned that the assessee had established the rendition of service by it's AE and also that there was contradiction in the findings of the authority. On one hand, it was held that arm's length price of these services was 'Nil' since no evidence of services received and benefits derived therefrom had been furnished by the assessee and on the other hand, a ground was raised that the services received by the assessee were in the nature of shareholder activity/ stewardship. It also added that even the benefit test did not have much relevance.

iv. The Hon'ble Tribunal held that when evaluating the ALP of a service, it was wholly irrelevant as to whether the assessee benefits from it or not; the real question which was to be determined in such cases was whether the price of this service is what an independent enterprise would have paid for the same and the TPO failed to do the same.

v. The Hon'ble Tribunal added that assessee had bench-marked the transaction on TNMM basis, and unless the revenue authorities could demonstrate that some other method of ascertaining the arm's length price on the facts of this case would be more appropriate method of ascertaining the arm's length price, the TNMM could not be discarded.

vi. The Hon'ble Tribunal observed that the Assessee had established the arm's length nature of the management fee transaction by bench-marking its OP/OC by taking TNMM as the MAM against average industry mark-up of eight independent comparable companies. On this bench-marking exercise of the assessee duly furnished before the TPO, he had not pointed out any defect in the said bench-marking exercise forming part of the Transfer Pricing document.

vii. The Hon'ble Tribunal added that the TPO resorted to CUP method without applying the process of arriving at the same as the 'most appropriate method' by showing any independent comparable transaction in order to apply CUP. It added that TPO could not bring any uncontrolled comparable on record to substantiate the CUP method adopted by him to treat the management fee expenses at 'Nil'.

viii. The Hon'ble Tribunal further added that no justification by the TPO had been provided based on comparable data analysis to discard the TNMM arrived at by the assessee as MAM for bench-marking its international transaction with AE and adopt CUP method based on comparable data and also that the ALP could not be a hypothetical or imaginary value but a real value on which similar transactions had taken place.

ix. The Hon'ble Tribunal observed that management fee expense @ 2.5% of Gross Operating Revenue paid by the assessee to AHEL under the same tripartite agreement was accepted by the department during the year for the similar nature of services received from AHEL. It was also on record that claim of management fee expenses was accepted by the department and no addition was made for the same in assessment year 2014-15 and AY 2015-16.The Hon'ble Tribunal also added that the services received by the assessee were in no way akin to shareholder/ stewardship services.

x. The Hon'ble Tribunal thus dismissed the appeal of the Revenue and upheld the order of the CIT(A).