INTERNATIONAL TAXATION
Case Law Update

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A. HIGH COURT

1 *PCIT vs. Sarens Heavy Lift India (P.) Ltd. [2024] 163 taxmann.com 447 (Delhi)*

Where the assessee procured cranes from its AE, adoption of WDV of the said cranes as reflected in the books of the AE, by the TPO while computing ALP was liable to be rejected in view of the provisions of rule 10B which requires identification of ALP from point of view of uncontrolled price method as being referable to a comparable uncontrolled transaction. The Hon'ble HC upheld the orders of the Hon'ble ITAT/DRP directing the TPO to accept the valuation report of the assessee company supporting its transaction of procurement of cranes to be at ALP

Facts

i. The assessee had procured cranes from its associated enterprise.

ii. The Transfer Pricing Officer (TPO) while computing the ALP, took into consideration the Written Down Value (WDV) of the assets as reflected in the books of the AE.

iii. The DRP observed that the WDV of cranes in the books of the AE could not be considered as ALP as it was not derived from the transactions between enterprises other than associated enterprises. The DRP directed the TPO to accept the valuation report of the assessee company and to delete the addition made on account of the ALP of cranes.

iv. On appeal, the Tribunal upheld the order of the DRP.

v. Aggrieved, the Revenue filed appeal before the Hon'ble HC.

Decision

i. The Hon'ble HC noted that the TPO had while computing the ALP, taken into consideration the WDV of the assets as reflected in the books of the AE and the said decision was neither accepted by the DRP nor by the ITAT.

ii. The WDV methodology appeared to have been rejected bearing in mind the undisputed mandate of rule 10B which requires the identification of ALP from the point of view of the uncontrolled price method as being referable to a comparable uncontrolled transaction.

iii. It held that the expression "uncontrolled transaction" has been defined in rule 10A(ab) as being a transaction between enterprises other than associate enterprises and that admittedly, the equipment had been purchased from the AE of the assessee. Resort to WDV

would have thus fallen foul of this fundamental precept.

iv. In any case, the WDV as may be reflected in the books would clearly not be liable to be taken into consideration while answering the issue of ALP.

vi. It noted that the Hon'ble ITAT while dealing with the aforesaid aspect had ultimately held that the ALP was to be determined on the basis of transaction value

vii. Although, it was vehemently argued on behalf of the Revenue that the methodologies which were taken into consideration by the assessee were wholly alien to the scheme of rule 10B of the Rules, it noted that ultimately the Hon'ble ITAT had on an overall consideration taken into account the transaction value as identified.

viii. Since there was an apparent failure on part of the Revenue to bring forth any other comparable or any other methodology which may have been examined by the TPO, the Hon'ble HC upheld the order of the Hon'ble ITAT and dismissed the Revenue's appeal.

B. TRIBUNAL

2 *Denso (Thailand) Co. Ltd. vs. ACIT (International Taxation) [2024] 163 taxmann.com 257 (Delhi-Trib)*

The Hon'ble Tribunal held that where a Double Taxation Avoidance Agreement (India-Thailand DTAA, in the instant case) does not make a reference for taxability of Fees for Technical Services (FTS) as a separate item, then Article 22 which vests residuary powers, cannot be invoked. The amount of FTS would be governed by the provisions of Article 7 dealing with business profits and the same would not be taxable in the absence of a PE.

3 *BNP Paribas vs. ACIT (International Taxation) [2024] 163 taxmann.com 601 (Mumbai-Trib.)*

i. Higher rate of tax prescribed for foreign company is not to be regarded as violation of non-discriminatory clause, i.e., article 26 of DTAA between India – France, in light of the explanation in the Section 90, inserted in the IT Act with retrospective effect from 01-04-1962 which provides that the higher tax rate in case of foreign company, should not be regarded as violation of the Non-discrimination clause.

ii. Where Indian branches of assessee, a French bank, paid data processing charges to its Singapore branch office, the Hon'ble Tribunal held that said payment could not be taxed as fees for technical services under Article 13 of the India-Singapore DTAA

iii. The Hon'ble Tribunal held that interest paid by Indian branch/PE of assessee, a French bank, to its head office (a foreign company) would not be taxable in India under the India-France DTAA - since branch had borrowed from overseas head office and the debt claim of head office was connected to PE branch in India. It was held that Article 7 provides that the profit of an enterprise shall be taxable only in that contracting state unless the enterprise carries on business in the other contracting state through a PE situated therein. Further Article 7(3) provides for deduction of expenses to the PE and para 7(3)(b) provides that in the case of banking enterprises, if the head office provides any money on interest, then to determine the profit of a PE, interest on such money paid to the head office can be reduced from the income attributable to the PE. Thus,

the provisions of Article 12 and 7 of the India-France DTAA demonstrate that interest payment made by the PE to the head office would not be taxable in the hands of the head office as provided in Article 12(5) of the treaty.

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4 *Huwaei International Co. Ltd. vs. ACIT (International Taxation [2024] 163 taxmann.com 633 (Mumbai-Trib.)*

Where assessee, a Hong Kong based company, received reimbursement from AE, its Indian subsidiary, for provision of connectivity services for international communication, the Hon'ble Tribunal held that since assessee paid for connectivity services which were ancillary to enabling provision of inter-connect services and part of processing product, same could not be taxed as FTS under section 9(1)(vii)

Facts

i. The assessee, a company incorporated under the laws of Hong Kong was engaged in the business of distribution of telecommunication products.

ii. During the year under consideration, the assessee received reimbursement of connectivity charges from its AE i.e. Huawei Telecommunications (India) Company Pvt. Ltd ('Huawei India') for provision of connectivity services for international communication.

iii. As India and Hong Kong did not have any DTAA during the concerned assessment year, the AO held that the international services rendered by the assessee fell within the ambit of 'Consultancy' or 'Managerial Services' and was taxable as fee for technical services u/s 9(1) (vii) of the Act.

iv. The DRP upheld the order of the AO.

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

Decision

i. The Hon'ble Tribunal noted the contention of the assessee before the A.O. that the services provided neither constituted managerial services, nor consultancy services as there was no human intervention involved in provision of connectivity services and thus, the services rendered did not constitute technical services.

ii. It went through the Reimbursement of the connectivity charges placed in the Paper Book, Invoices produced and the statement showing computation of income and the agreement containing the Responsibilities as per the purchasing service agreement between the assessee and Huawei India and the clauses mentioned therein w.r.t services rendered.

iii. It noted that the Revenue treated the said services as not only technical in nature but also managerial and consultancy services against the fact that assessee had only paid for connectivity services and the services were merely ancillary to enabling the provision of inter-connect services and part of processing the product. Accordingly, it held that, the amounts could not be treated as technical or managerial or consultancy services by placing reliance on the judgment of the Hon'ble Apex Court in the case of ***CIT vs. Bharti Airtel Ltd. 159 taxman 315***.

iv. Further, it noted that the assessee had earned 1% markup on the reimbursement of connectivity charges which was the amount earned by the assessee in the entire transaction. Accordingly, it directed that the AO may invoke relevant provisions of the Income Tax Act and the DTAA for taxing of the said income earned.

v. Thus, appeal filed by the assessee was partly allowed for statistical purposes.

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