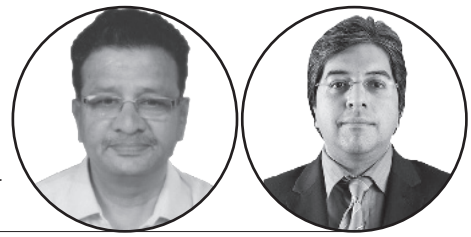

INTERNATIONAL TAXATION

Case Law Update

CA Tarunkumar Singhal & Dr. Sunil Moti Lala

A. SUPREME COURT

1 *UOI v. U.A.E. Exchange Center*

[2020] 116 taxmann.com 379 (SC) Civil Appeal No. 9775 OF 2011

Activities in nature of dispatching cheques/ drafts to beneficiaries in India, by a LO in India of a foreign company (rendering remittance services), would be in nature of 'preparatory or auxiliary' as per Article 5(3)(e) of India-UAE DTAA and thus the said LO would not constitute a PE

Facts

i) The Appellant (i.e. assessee), a tax resident of UAE, was engaged in the provision of remittance services for transferring funds from UAE to beneficiaries in India.

ii) The assessee opened four liaison office ('LO') in India and carried activities in accordance with the conditions imposed by the RBI. The expenses for maintaining the LO were met out of the funds received by the LO from its Head Office in UAE and the LO did not charge any fee/commission for the services rendered in India, in compliance with the conditions imposed by the RBI.

iii) The assessee entered into contracts with customers in UAE for provision of remittance services pursuant to which the customers handed over the funds to the assessee in lieu of one-time fees. The funds received from the customers were transferred to the beneficiaries in India, in the following two ways:-

a. By telegraphic transfer through bank channels; or

b. On request of the customer, the assessee dispatched instruments/ drafts/cheques through its LO to beneficiaries in India. (while doing so, the LO remained connected with the main server in UAE for retrieving information related to the beneficiaries and the customer)

iv) The assessee filed an application before the AAR for determining, whether the activity in the second mode of transfer would result in a taxable presence of the assessee in India.

v) The assessee contended that the activities undertaken by the LO, such as printing instruments/drafts and dispatching the same through courier to beneficiaries in India, were only supportive and auxiliary

in nature to the main work undertaken by the assessee in UAE, and accordingly, the said activities would not constitute a PE in India in view of Article 5(3)(e) of the India-UAE DTAA (hereinafter referred as 'DTAA').

vi) The Revenue contended that the LO assisted the assessee to extend its volume of business in India and the services rendered by the LO were connected to the main services rendered by the assessee in UAE, accordingly some portion of the fees/ commission would be deemed to accrue or arise in India.

vii) The AAR held that activities undertaken by the LO would constitute a taxable presence in India by observing that without the services of the LO, the assessee would not be able to render the remittance services to its customers in UAE.

viii) The AAR further held that the activities undertaken by the LO constituted a main function of the business of the assessee and hence could not be termed as preparatory or auxiliary in nature.

ix) The HC reversed the decision of the AAR, by relying on the decision of Supreme Court in case of ***Morgan Stanley & Co. [2007] 162 Taxman 165 (SC)***, and held that the activities undertaken by the LO were auxiliary in nature since it supported/ aided the execution of the main activity undertaken by the assessee in UAE and hence the LO would not be considered as a PE of the assessee in India.

x) On further appeal, the SC held as under.

Decision

i) The SC placed reliance on the approval given by the RBI for establishing the LO in India and observed that the LO was not allowed to enter into any contract with any person in India nor the LO was allowed to charge any fees/commission in respect of the services rendered in India.

ii) The SC observed that Article 5(3) of the DTAA, opens with a non-obstante clause, which indicates that notwithstanding the fact that a PE is constituted under Article 5(1) or 5(2), if the nature of activities carried by the assessee fall within the purview of Article 5(3), it would be deemed that the assessee does not have a PE in the Contracting State.

iii) The SC referred Black's Law and Oxford Dictionaries to interpret the expression 'preparatory' and 'auxiliary', and observed that the expression 'preparatory' has been defined as 'Materials used in preparing the ultimate form of an agreement or statute' and the expression 'auxiliary' has been defined as 'aiding or supporting or subsidiary or supplementary'.

iv) The SC observed that the LO was conducting a combination of virtual and physical activities i.e. downloading the particulars of remittances through remaining connected to the main servers of the assessee in UAE and then printing cheques/drafts drawn on the banks in India, which, in turn, were couriered or dispatched to the beneficiaries in India, in accordance with the instructions of the NRI remitter.

v) The SC observed that the RBI had given permission to the assessee to open a LO for conducting activities such as responding to enquiries from correspondent banks, reconciliation of bank accounts, act as a communication center, printing INR drafts etc.

vi) The SC observed that the above mentioned conditions implied that the LO would not be able to undertake any commercial activities (such as charging fees/commission for its services or entering into commercial

contracts) and hence the activities carried by the LO were in nature of preparatory or auxiliary character.

vii) In view of the above observations, the SC held that the LO was not carrying on any business activity in India as such, but only dispensing with the remittances by downloading information from the main server of the respondent in UAE and printing cheques/drafts drawn in India and accordingly, no income u/s 2(24) was earned by the LO in India.

viii) The SC also relied on the decision of co-ordinate bench in case of ***E-Funds IT Solutions Inc, [2017] 86 taxmann.com 240 (SC),*** wherein the SC held that when the Indian subsidiary company only rendered support services which enabled assessee (two American companies) to render services to their respective clients abroad, this outsourcing work to India, in nature of auxiliary operations, would not give rise to a fixed place PE in India.

ix) Accordingly, the SC upheld the order of the HC and held that the LO was not allowed to undertake any commercial activities and hence the activities were preparatory or auxiliary in nature, which did not result in constitution of a PE of the assessee in India. Thus, no part of the income of the assessee could be taxed in India.

2 *PILCOM v. Commissioner of Income-tax*

[2020] 116 taxmann.com 394 (SC) Civil Appeal No. 5749 of 2012 for AY 1995-96

Guarantee money, in relation to a tournament conducted in India, paid to a non-resident cricket association/board (participating in the said tournament) would be subject to tax withholding u/s 194E

Facts

i) The Appellant/assessee, a joint management committee of India, Pakistan and Sri Lanka was formed by the cricket boards/associations of the respective countries, to co-host/conduct the cricket world cup 1996 tournament, under the aegis of International Cricket Council (hereinafter referred as 'ICC'), a non-profit making organisation having its headquarter at London.

ii) Two Bank accounts were opened by the assessee in London, wherein the receipts from sponsorship, T.V. rights, etc. were deposited and expenses were met.

iii) From the said bank account, the assessee paid certain amounts towards administrative expenses to ICC and prize money and guarantee money to the non-resident cricket associations/ boards (guarantee money was paid notwithstanding whether the said country would be participating in the tournament or not), without withholding any taxes under the I.T. Act.

iv) The AO passed an order u/s 201(1), by holding the assessee to be an 'assessee in default' for not withholding taxes u/s 194E at the time of making payments to the ICC and the non-resident cricket associations/ boards.

v) On appeal, the CIT(A) held that out of the total payments, payments for prize money were for matches conducted outside India and were thus not taxable in India u/s 115BBA. Further, with respect to the balance payments (which inter alia included the guarantee money and administrative expenses), the CIT(A) held that since out of the total 37 matches of the tournament, only 17 matches were to be played in India, only the said proportion (i.e. 17/37th portion or 45.94%) of the said balance payment (which inter alia included

the guarantee money) could be considered to be deemed to accrue in income in India and accordingly the assessee would be considered as an 'assessee in default' only with respect to the said proportion.

vi) On further appeal, the Tribunal observed that the source of income of the guarantee money received by the non-resident cricket associations/boards of countries which had not played participated in the tournament, could not be said to be the tournament per se which is played in India and in view of the same, the guarantee money (not in relation to the matches played in India) received by such cricket associations/boards could not be taxed in India in absence of a business connection or a source of income in India. Further, with respect to the guarantee money paid to cricket associations/boards whose country participated in the tournament, the payments would be taxable in India in the proportion of the matches played in India by the respective countries. The Tribunal also rejected the plea of the assessee that the above mentioned payment would not be taxable in India under the respective DTAA (i.e. as per Article dealing with 'Other Income'), by holding that the payments would be taxable in India as per Article dealing with taxation of Athletes since the players (representing their respective countries) had played matches in India. As regards the payments for administrative expenses paid to ICC, the Tribunal held that the said payments were not in relation to any matches played in India and were thus not taxable in India.

vii) The HC observed that unlike section 195, section 194E does not consider whether the income is chargeable to tax or not. Hence, once the income accrued, the withholding tax provisions would be applicable. Further, the HC also held that the withholding obligation u/s 194E is not affected by the DTAA provisions as withholding of tax is neither a final payment of tax nor an assessment of tax and the payee can always claim the benefit of DTAA at the time of filing the return of income.

viii) The assessee filed further appeal before the Hon'ble Supreme Court w.r.t the guarantee money paid to cricket association/ boards whose country participated in the tournament.

Decision

i) The SC upheld the judgement of the High Court. It held that source of income, though described as guarantee money, was intricately connected with the playing of matches in India and accordingly the assessee was liable to withhold taxes u/s 194E read with section 115BBA(1)(b) since the payments were in relation to the matches played in India.

ii) The SC distinguished the decision of co-ordinate bench in case of ***GE India Technology Center Pvt. Ltd. (2010) 327 ITR (SC),*** by observing that the said decision dealt with the expression "chargeable under the provisions of the Act" occurring in section 195(1) (unlike section 194E) wherein it was held that the obligation to deduct tax, is limited to the appropriate proportion of the income chargeable under the Act forming part of the gross sum of money payable to the non-resident.

iii) The SC also affirmed the decision of the HC with respect to the withholding obligation u/s 194E by holding that section 194E is not affected by the DTAA provisions as withholding of tax is neither a final payment of tax nor an assessment of tax and the payee could always claim the benefit of DTAA at the time of filing the return of income.

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