


INTERNATIONAL TAXATION

Case Law Update

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A. High Court

1 *Roca Bathroom Products Private Limited [TS-764-HC-2020(MAD)-TP]*

Provisions of section 144C of the Act is subject to the overall time limits prescribed u/s 153 of the Act and therefore an order of fresh assessment in pursuance of order u/s 254 of the Act setting aside or cancelling an assessment is to be passed in terms of the time limits prescribed u/s 153 of the Act

Facts

i) The assessee, a domestic company, filed its return of income for AY 2009-10. The case of the assessee was selected for scrutiny assessment and during the course of assessment proceedings, the case of the assessee was referred to the TPO. The TPO proposed certain TP adjustments, which were objected before the DRP by the assessee. The said TP additions were confirmed by the DRP and thereafter the assessee preferred an appeal before the Tribunal. The Tribunal disposed the appeal for AY 2009-10, by remanding the matter to the file of the DRP for fresh examination of the TP adjustments, vide its order dated 18th December, 2015. Similarly, for AY 2010-11 the sequence of events were similar to that of AY 2009-10, wherein the Tribunal disposed the appeal for AY 2010-11, by remanding the matter to the file of the DRP for fresh examination of the TP adjustments, vide its order dated 23rd September, 2016.

ii) Subsequent to the orders of the Tribunal, no further proceedings were initiated by the DRP. On 21st August, 2019, the assessee filed letters before the jurisdictional AO seeking refund of tax paid for AY 2009-10 and AY 2010-11. Consequent to the filing of said letters, vide notice dated 6th January, 2020 (i.e. the impugned notice) the DRP called upon the assessee to appear for a hearing.

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iii) Pursuant to the said action of the DRP, the assessee filed writ petitions before the Madras HC challenging that the said proceedings were barred by limitation in as much as that as per section 153(2A) of the Act [un-amended provisions applicable for AY 2009-10] an order of fresh assessment in pursuance of order u/s 254 of the Act setting aside or cancelling an assessment was to be passed at any time before the expiry of one year from the end of the financial year in which the order u/s 254 was received by the Principal CIT (i.e. for AY 2009-10 the order of the Tribunal was received in FY 2015-16 and therefore the order giving effect to the Tribunal order should have been passed on or before 31st March, 2017. Similarly pursuant to the amendments by Finance Act, 2016, u/s 153(3) of the Act, for AY 2010-11 an order of fresh assessment in pursuance of order u/s 254 of the Act setting aside or cancelling an assessment was to be passed at any time before the expiry of nine months from the end of the financial year in which the order u/s 254 was received by the Principal CIT (i.e. for AY 2010-11 the order of the Tribunal was received in FY 2016-17 and therefore the order giving effect to the Tribunal order should have been passed on or before 31st December, 2017.

iv) Before HC, the Revenue argued that section 144C of the Act is a standalone provision which contemplates a unique procedure un-impacted by any of the other provisions in the Act and therefore the present proceedings were not governed by the time lines set out under section 153 of the Act

v) The Madras HC held as under.

Decision

i) Considering the arguments of the Revenue, the Madras HC observed that the question to be decided was whether the proceedings before the DRP were circumscribed by the limits of time imposed by Section 153 or not.

ii) The HC observed that though the purpose of section 144C of the Act is to fast-track a specific type of assessment, the same does not lead to a conclusion that overall time limits under section 153 of the Act have been eschewed in the process.

iii) The HC further observed that barring section 144C(13) of the Act, which imposes a restriction on the AO and denies him the benefit of the more expansive time limit prescribed u/s 153 of the Act, nothing in the language of section 144C or section 153 of the Act leads to a conclusion that the latter is operated from the operation of the former.

iv) The Madras HC also relied on the decision of Bombay HC in PCIT v. Lion Bridge Technologies Pvt. Ltd. 260 Taxman 273, wherein the Bombay HC has held that a draft assessment order passed u/s 144C of the Act ought to have been passed within the time frame stipulated under section 153(2A) of the Act. Further, the Madras HC also relied on Delhi HC decision in ***Nokia India Private Ltd. vs. DCIT 298 CTR 334,*** wherein it was held that where the matter had been remanded to be re-done, it would hardly make a difference as to whether the remand had been to the TPO or the DRP, thus indicating that the provisions of section 144C of the Act were also governed by the limitation of time set out under section 153 of the Act.

v) In light of the above, the Madras HC allowed the writ petitions by holding that the impugned notices issued by the DRP were barred by limitation in view of the provisions of section 153(2A) of the Act.

(***Note***: Similar view has been upheld by the Madras HC in ***Freight Systems (India) Pvt. Ltd [TS-143-HC-2021(MAD)-TP]***).

B. Tribunal

2 ***International Air Transport Association (CANADA) [TS-42-ITAT-2021 (Mum)]***

Accredited Training Centres providing courses related to aviation industry in India and who were not exclusively into providing of courses designed by the assessee but were also providing a host of other self-designed/ third party courses, were independent agents, acting in the ordinary course of their business and thus would not be DAPE of an assessee, a Canadian tax resident

Facts

i) The assessee, a tax resident of Canada, was a non-profit organisation engaged in the business of carrying out activities with an object to promote safe, reliable, secure and economical services for the benefit of the stakeholders of the world commercial aviation industry. The assessee provided distance learning courses across the globe including India and allowed students to avail various distance learning courses pertaining to aviation sector for which the interested students could either directly register/ enroll on the website of the assessee or approach an Authorised Training Centers (ATCs) in India. The assessee had opened a branch office (IATA Branch) in India duly approved by the Reserve Bank of India (RBI).

ii) During the year under consideration i.e. AY 2012-13, the assessee offered income on account of classroom training, royalty, annual fee received from ATCs. However, it had not offered certain receipts i.e. sale of distance learning materials (i.e. books/ manuals shipped from Canada to third party training centres), provision of e-services related to billing and settlement functions (i.e. for the use of the billing and settlement portal by various airlines and referred as BSP link charges), collection of membership dues (i.e. membership fees from various airlines), sale of publications related to DGR (sale of manual related to dangerous goods directly to customers), provisions of advertising space (fees for display of customers logo on IATA publications), accredited training centre fees (i.e. income received from independent schools to provide IATA course to its students) and clearing house facility (i.e. clearing house facility provided by assessee outside India); on the ground that the said fees were neither taxable as royalty nor taxable as FTS.

iii) The Assessing Officer (AO) held that the ATCs were to be treated as the dependent agent PE (DAPE) of the assessee and hence the consideration received on the distance learning courses/materials was held to be business income. Further, the AO attributed 40 per cent of the gross receipts to the Indian Branch Office (PE) on account of provision of e-services related to BSP link, membership dues and clearing house facility as business income of the assessee taxable in India. Further, income from sale of publications (DGR), accredited training centre fees and provision of advertising space on websites and publications were taxable as royalty. The Dispute Resolution Panel (DRP) upheld the order of the AO, however w.r.t consideration received on the distance learning courses/materials directed the AO to attribute only 40% of the gross receipts to the DAPE.

iv) The assessee filed an appeal before the Tribunal:

Decision

i) W.r.t the constitution of the DAPE, the Tribunal held that the ATCs were not exclusively into providing of courses designed by the assessee but were also providing a host of other self-designed/ third party courses and therefore the activities of the ATC's in India could not be held to be devoted wholly or almost wholly on behalf of the assessee in as much as that the ATC's were independent agents, acting in the ordinary course of their business.

ii) The Tribunal relied on the decision of Mumbai Tribunal in ***Delmas France SA vs. ACIT [2013] 141 ITD 67 (Mum),*** which was further affirmed by the Hon'ble Bombay HC in ***DIT vs. Delmas France [2015] 232 Taxman 401 (Bom)***, to hold that since the transactions between the assessee and ATCs were are arm's length, in view of Article 5(4) read with Article 5(5) of the India-Canada DTAA, ATCs, being independent agent, were not the DAPE of the assessee in India. Therefore, the addition of 40 per cent of the revenue generated from sale of distance learning material, attributed to them in their status as that of DAPE of the assessee was to be deleted.

iii) W.r.t the provision of e-services related to BSP link, the Tribunal observed that the assessee had merely acted as a facilitator/intermediary in recovering BSP Link charges from the airlines and agents (through IATA India branch) and had remitted the same to Spain entity without any mark-up. Accordingly, the collection of the BSP charges by the assessee from the airlines could not be held to be its 'business income'. Since the said aspect was not looked into by the AO/DRP, the Tribunal remanded the said issue to the AO for proper adjudication.

iv) W.r.t the provision of clearing house facility, the Tribunal remanded the matter to the AO for proper adjudication, by observing that the amount of profit that would be attributable to a Branch Office PE would be on the basis of role played by the PE in those transactions and in a case where the transactions had taken place outside India, the same could not be attributed to the PE, because the PE had no role to play in such transactions.

v) W.r.t the membership dues, the Tribunal held that the collection of the membership dues by the assessee was carried out directly outside India and therefore, the same could not have been attributed to the Branch Office.

vi) W.r.t accredited training centres fees, the Tribunal observed that only the course material providing knowledge, information and training about the aviation and travel and tourism industry in general was sold to the students/ATC's, but no 'use' or 'right to use' any copyright in relation to such study material was granted to them in as much as that the student's/ATC's did not have any right to reproduce/ sell the contents of the study material in any form or media. Further, the course material providing knowledge, information and training about the aviation and tourism industry in general was merely a sale of book/ CD, which did not involve transfer of intellectual property, and also did not contain any undivulged technical information which was not available in the public domain and/or knowhow, it thus fall outside the scope of the term 'information concerning technical, industrial, commercial or scientific experience' under Article 12(3) of the DTAA. As the consideration received by the assessee was towards a simplicitor sale of training material/books, the same could not be treated as 'royalty' under the DTAA.

vii) W.r.t income from sale of DGR publications, the Tribunal observed that the sale of DGR manuals was a simplicitor sale of a manual/book and did not involve any transfer of intellectual property. Further, the DGR manuals were a comprehensive and a user friendly compilation of instructions for safe transport of dangerous goods, which did not contain any such undivulged technical information that was not available in the public domain, and/or know-how, therefore, the same could not be said to be as 'information concerning technical, industrial, commercial or scientific experience' under Article 12(3) of the DTAA. The consideration received on sale of DGR manuals could not be characterised as 'royalty' within the meaning of Article 12(3) of the DTAA for the following reasons:

a. The publications were outright sales to the customers, and no 'use' or 'right to use' any copyright in relation to the publication was granted to the customer

b. The customers did not get vested with any right to reproduce/sell the content of the publication in any form or media

c. The customers also did not get any right to use the patent, trademark, design or model, plan, secret formula or process on supply of such physical publications.

d. The assessee by compiling the instructions for safe transport of dangerous goods as laid down by International Civil Aviation Organisation (ICAO) did not share its experience, techniques or methodology.

e. Further, the information concerning any industrial, commercial or scientific experience (i.e., know- how) generally implies undivulged technical information in the areas of industry, commerce or science, which however, was not so in so far the information published in the DGR manuals was concerned.

viii) W.r.t income from advertising space, the Tribunal held that the provision of advertising space by the assessee to its customers, either on its website or publications/manuals did not result in vesting of any right to use, display, exploit or modification of the assessee's brand or logo, in any manner and therefore as such, the consideration received by the assessee from provision of advertisement space in its publications/manuals or website would not fall within the realm of the definition of 'royalty' as provided in Article 12(3) of the DTAA.

3 ***Interworld Shipping Agency LLC [2021] 127 taxmann.com 132 (Mumbai - Trib.)***

Merely because 80% of the assessee's (a limited company incorporated in UAE) profits went to Mr. A, a Greek national, it could not be inferred that the assessee's business was not managed or controlled wholly from the UAE and that the assessee was incorporated merely with a purpose to obtain benefits under India-UAE DTAA (i.e. protection under Article 8 qua its shipping income)

Facts

i) The assessee, a limited company, incorporated in and tax resident of the UAE, was engaged in the business of rendering services like ship chartering, freight forwarding, sea cargo services and shipping line agents. The assessee chartered ships for use in transportation of goods and containers in international waters, including to Kandla and Mundra ports in India and other ports elsewhere.

ii) During the year under consideration i.e. AY 2016-17, the assessee had received income towards freight collections and was of the view that its income was not taxable in India under the India-UAE DTAA, since: It was a tax resident of the UAE; and in view of Article 8 of the DTAA (relating to shipping income), profits derived by an UAE enterprise from the operation of ships in international traffic, is taxable only in UAE.

iii) During the course of the assessment proceedings, the AO rejected the said plea of the assessee and concluded that the assessee was not entitled to the benefits of the DTAA for the following reasons:

a. 80% of the assessee's profits went to Mr. A, a Greek national and hence, the assessee's business was not managed or controlled wholly from the UAE and it was thus not a tax resident of UAE.

b. The assessee was a partnership firm and not a company.

c. The Tax Residency Certificate (TRC) obtained by the assessee from the UAE tax authorities, was based on misrepresentation of facts.

d. The only purpose of the assessee was to avail the benefits of the DTAA and therefore it was a clear case of abuse as the owner of the entity was a Greek national. The assessee was a colourable device for avoidance of taxes.

e. The assessee had not submitted details of the actual beneficiaries of TRCs of the partners, and such non-furnishing of details was to escape from expositing the true structure and taking undue benefits of the DTAA as per Article 29 of the DTAA.

iv) The action of the AO was upheld by the DRP. The assessee filed an appeal before the Tribunal:

Decision

i) W.r.t the status of the assessee, the Tribunal observed that at the stage of proceedings before the DRP, it was pointed out by the assessee that (i) it was a limited liability company under the UAE laws, (ii) it had duly obtained the requisite licence from the Department of Economic Development, and (iii) its annual accounts and audits were in accordance with the UAE laws, and its memorandum and articles of association were also placed on record. Since the tax authorities has not disputed the said factual evidences, the status of the assessee was that of the company.

ii) W.r.t the residential status of the assessee, the Tribunal held that the assessee was incorporated in the UAE, managed and controlled wholly in the UAE and thus tax resident of UAE, by observing as follows:

a. As per Article 4(1) of the DTAA resident was defined, inter alia, as "in the case of the United Arab Emirates: ...a company which is incorporated in the UAE and which is managed and controlled wholly in the UAE".

b. The assessee had 14 expatriate employees who were issued work permits by the UAE Government for working in the assessee's company. Thus, the company was being run from the UAE itself.

c. As per relevant pages of the passport with clear entry and exit stamps of the immigration authorities, Mr. A was in UAE for 300 days during the year under consideration.

d. With regards to Mr. A being a non-UAE national, nothing really turned on his being a national of a country other than UAE, because UAE was a major financial center in which not only a large number of foreigners work, but also from where a large number of foreigners conduct their business. When a person lived in a country for 300 days, it was reasonable to assume that he would be running a business from that country.

e. When a person had a resident permit for the UAE and his company was incorporated in and doing business from the UAE, there was no reason to doubt the position that business was being controlled and managed from the UAE.

f. The assessee had its office in UAE, it was in business there since 2000, it had expatriate employees who were given a work permit to work in UAE for the assessee, the main driving force for the assessee and its director was an expatriate resident in the UAE.

g. The assessee had provided reasonable evidence in support of its stand that the business was wholly and mainly controlled from the UAE. The fact that the assessee could not submit the documents, which he was not required to maintain statutorily anyway (the assessee had claimed that UAE law did not mandate keeping of board of directors resolutions) could not be put against the assessee.

h. The Tribunal also held that the assessee could not be asked to prove a negative (i.e. to prove that it was "not managed from outside UAE"), by placing reliance on the decision of SC in ***KP Varghese vs. ITO [1981] 131 ITR 587 (SC)***.

iii) W.r.t the claim of the AO that the assessee was created with a view to claim DTAA benefits, the Tribunal rejected the said claim by observing as follows:

a. As per Article 29 of the DTAA, an entity which was a resident of a Contracting State (UAE in the current case) would not be entitled to the DTAA benefits if the main purpose or one of the main purposes of the creation of such entity was to obtain the benefits of the DTAA that would not be otherwise available. The cases of entities not having *bona fide* business activities were covered under Article 29 of the DTAA.

b. The assessee was in the business since 2000, and the operations of ships for transportation of goods to and from India had started much later in 2015. It could not, therefore, be said that the assessee was formed for the purpose of availing benefits under the DTAA, which came into play only in 2015.

c. When an entity was established in 2000, and the relevance of the DTAA came into play only in 2015, it could not be said that the main purpose of creation of such an entity was to obtain the benefits of the DTAA.

d. Unless, the purpose of creating the assessee entity was to avail the DTAA benefits, the Limitation of Benefit (LOB) clause in Article 29 of the DTAA could not come into play.

e. There was nothing to suggest that the assessee's business activities were not bonafide. There was reasonable evidence that the assessee was having *bonafide* business in the UAE, and, as such, the lack of bonafides could not be inferred.

f. Once the assessee submitted reasonable evidence, including the evidence in support of the existence of an office and dedicated employees in UAE, and the business being carried on from there as also the financial statements showing the business being carried on from the UAE on a regular and commercial basis, unless the tax authorities brought on record some material to dispute the said position, one could not proceed to conclude that the business activities of the assessee lacked *bonafides*.

iv) In light of the above, the Tribunal concluded that the assesse was protected from taxation in India in respect of its shipping income, as per Article 8(1) of the DTAA, which provides that "profits derived by an enterprise of a Contracting State from the operation by that enterprise of ships in international traffic shall be taxable only in that State".

4 *Jyoti Limited [TS-198-ITAT-2021 (Ahd)]*

Provisions of section 206AA of the Act (which provide for a higher withholding tax rate) could not override the beneficial rates provided under the DTAA

Facts

i) The assessee, a domestic company, engaged in the business of manufacturing and sale of pumps, rotating electric machines, hydro generating sets, etc. made certain payments to a Czech Republic company (F Co) towards services after withholding tax at the rate of 10% as per Article 12 (relating to taxation of royalties and fees for technical services) of the India-Czech Republic DTAA. The F Co. did not had a Permanent Account Number (PAN).

ii) During the course of assessment, the AO observed that since the F Co. did not had a PAN, the tax withholding should have been made @ 20% in view of the provisions of section 206AA of the Act and accordingly, the AO made additions to the returned income of the assessee. The action of the AO was upheld by the CIT(A).

iii) The assessee filed an appeal before the Tribunal:

Decision

i) The Tribunal noted the following with respect to the interplay between the Act and the DTAAs:

a. Central Board of Direct Taxes (CBDT) circular no. 333 (dated 2 April 1982) provides that specific provisions of the DTAA would prevail over general provisions contained in the Act.

b. Section 90(2) of the Act provides that the DTAA provision would override the provisions of the Act, in case where the DTAA provisions are more beneficial to the assessee.

c. Justice Easwar's Committee had made a specific recommendation in connection with section 206AA of the Act as per which, inter alia, the said provision had proved to be an impediment in terms of ease of business, as many non-residents preferred not to do business with Indian residents, if obtaining of PAN was insisted from them. The Committee was of the view that it should suffice if the concerned non-resident furnished to the deductor, in lieu of such PAN, his tax identification number in the country or the specified territory of residence and in case there is no such number, then, a unique number on the basis of which the person is identified by the Government of the country or the specified territory of which such person claims to be a resident.

d. The SC in ***UOI vs. Azadi Bachao Andolan [2003] 263 ITR 706 (SC)*** had upheld the proposition that the provision of a DTAA would prevail over the general provision contained in the Act, to the extent they were beneficial to the assessee. Further, the charging provisions i.e. sections 4 and 5 of the Act, dealing with the principle of ascertainment of total income under the Act, were also subordinate to the principle enshrined in section 90(2) of the Act.

e. Further the co-ordinate bench of the Ahmedabad ITAT in ***Uniphos Environtronic (P.) Ltd. vs. DCIT [2017] 79 taxmann.com 75 (Ahmedabad ITAT)*** had held that section 206AA of the Act could not be pressed into service where applicable DTAA rate was beneficial to the assessee.

ii) In view of the above, the ITAT held that:

a. It was a cardinal principle of law that when there is a DTAA between two sovereign states then, the provision more beneficial to the assessee as per the said sovereign agreement becomes applicable and the Act provision is given a go by.

b. In the case under consideration, having regard to the provisions of section 90(2) of the Act, the tax liability of F Co was at the beneficial rate of 10% as per Article 12 of the India-Czech Republic DTAA. Accordingly, in so far as the applicability of the scope/rate of taxation with respect to the impugned payments made to the non-resident was concerned, no fault could be found with the rate of taxation invoked by the assessee and the AO could not insist tax deduction at 20%, having regard to the overriding nature of the provision of section 90(2) of the Act.

[***Note*** : Similar view has been upheld by the Delhi Tribunal in ***Air India Limited - [2021] 127 taxmann.com 155 (Delhi - Trib.)***]

5 ***Airports Authority of India v. ITO [2021] 127 taxmann.com 182 (Delhi - Trib.)***

Technical assistance received from a US-based Government Organization would be outside the purview of Article 12(4)(b) of the India-USA DTAA as it did not satisfy the make available clause and further payments made on cost-to-cost basis not involving any profit element, would not be liable for withholding tax

Facts

i) The assessee was an organisation under the Ministry of Civil Aviation, Government of India. It entered into a Memorandum of Agreement (MoA) with the Federal Aviation Administration, USA (FAA) [Department of Transportation, USA] for:

   a. Providing technical assistance to the assessee by way of providing its personnel and meeting air traffic flow management (ATFM) requirements; and

   b. Assisting the assessee in connection with ATFM by development of detailed quantitative requirements (QRs), detailed ATFM system architecture and draft ATFM implementation plan.

ii) The assessee made payments to the FAA, without deducting tax at source u/s 195 of the Act. During the course of assessment proceedings, the AO treated the sum paid to FAA as fees for technical services (FTS) chargeable to tax at 10% (plus applicable surcharge and cess) on the gross amount as per section 115A of the Income-tax Act, 1961 (ITA) and held that the assessee was liable to withhold tax (TDS) from the payment made to FAA. The action of the AO was upheld by the CIT(A).

iii) The assessee filed an appeal before the Tribunal. Before the Tribunal, the assessee contended that:

   a. The payment was made to a sovereign state (FAA) by another sovereign state (AAI) and therefore the same was not taxable (i.e. sovereign immunity) and thus TDS provisions were not applicable

   b. As per the agreement certain payments were in the nature of reimbursement (based on the agreements) and thus TDS provisions were not applicable

   c. The services rendered by the FAA did not satisfy the 'make available' clause as per Article 12 of the India-USA DTAA and thus the services were not taxable in India.

Decision

i) W.r.t the plea of the assessee regarding the sovereign immunity, the Tribunal held that the payments made by assessee to FAA were not excluded from the purview of section 196 of the Act (which interalia provides that no deduction of tax at source shall be made by any person from any sums payable to Government, RBI, a corporation established by or under a Central Act etc.) and thus the transactions between the assessee and FAA and the profits thereof were subjected to the provisions of the Act. It observed as under:

a. The assessee was a government organisation under Ministry of Civil Aviation, public sector undertaking running on commercial terms, earning profit and paying taxes to the Government of India. Further, FAA was an organisation involved in airport management, aircraft certification, advisory and consultancy [main sources of income are grants, Airport and Airways Trust Fund (AATF)]. Thus, it was also an organisation under the government with budgetary support of the state and recourses of its own but not a government.

b. The employees of both FAA and assessee were called government employees for the convenience of implementation agreements. The agreement between the assessee and FAA was of a commercial character and state was not liable for the actions or contracts entered between the parties.

c. There was no general immunity from taxation unless specified, which was absent in the agreements entered between the two organisations.

d. Wherever the legislature intended to accord exemption, they had been specifically provided for in the Act [such as in section 10(15A) of the Act wherein payments made to foreign government are exempt].

ii) W.r.t the plea of the assessee regarding non-application of provisions of tax deduction at source on certain reimbursements, the Tribunal held that since the said payments were on cost-to-cost basis which did not involve any profit element, the reimbursement was not liable for the withholding/TDS provisions, by observing as follows

a. As per the agreement, FAA was providing assistance in developing and modernising civil aviation infrastructure in India in the managerial, operational and technical areas. It did not specify any mark-up amounts or percentage or service charges but it only talked about reimbursement of expenses incurred by FAA. The agreement mainly revolved around specification of assistance, it's costing and reimbursement thereof.

b. AAI had to incur the travelling, salary expenses to the three employees deputed by FAA for assisting the AAI. The payments received by FAA did not involve any element of profit which made it liable to pay tax in India. Reimbursement was neither reward nor compensation nor income for income-tax purpose.

c. The provisions relating to TDS applied only to those sums which were "chargeable to tax" under the Act. A concurrent reading of sections 4(2) and 195(1) of the Act, denoted that the liability to deduct tax arose only when the payee was a non-resident and the amount payable to him was chargeable to tax in India. The Tribunal placed reliance on co-ordinate bench ruling in case of ***CIT vs. Dunlop Rubber Company Ltd. (1983) 142 ITR 493 (Cal) a***nd ***CIT vs. Industrial Engineering Projects 202 ITR 1014 (Del),*** wherein it was held that reimbursement of actual expenditure from an Indian company could not be treated as taxable and that the reimbursement of expenses could not be regarded as revenue receipt, hence, no TDS was deductible.

iii) W.r.t to the plea of the assessee that the services rendered by the FAA did not satisfy the 'make available' clause as per Article 12 of the India-USA DTAA and thus the services were not taxable in India, the Tribunal accepted the said plea by observing as follows:

a. The Tribunal noted that the FAA had rendered the following services under the agreement:

i. Providing necessary resources, personal and related services to assist the AAI.

ii. Assist AAI by participating in INAT requirements, meeting on ATFM requirements.

iii. Assist in development of: (i) detailed qualitative requirements for the proposed ATFM capacity; (ii) Detailed ATFM system architecture and specifications; and (iii) Draft ATFM implementation plan.

iv. Review US ATFM capability vis-à-vis India ATFM plan and documentation of qualitative requirement (QR).

v. Preparation of detailed system architecture with the regard to QRs.

vi. Preparation of road map for draft implementation

b. The concept of 'make available' required that the fruits of the services should remain available to the service recipient in some concrete shape such as technical knowledge, experience, skills, etc. The assistance provided by FAA in preparation of QRs and development of ATFM system were neither any licensed product of FAA nor exclusive patents of FAA.

c. The ATFM technology per se had not been made available to the assessee for any perpetual use. The provision of assistance to Ministry of Civil Aviation in developing and modernisation of civil aviation structure, review analysis and documentation of traffic flow management system was a dynamic process requiring further development of the process by Ministry of Civil Aviation. It was a case of assistance and technical cooperation between FAA and assessee sans any commercial interest by the rendering party.

iv) Thus, the Tribunal concluded that no taxes were required to be withheld at the time of making payments to FAA

6 ***Morgan Stanley Mauritius Co. Ltd.v. DCIT [2021] 127 taxmann.com 506 (Mumbai - Trib.)***

Dividend income received by a Mauritius resident, on account of its investment in an Indian Depository Receipt, from a UK resident having a PE in India could not be taxed under Article 10 and Article 22 of the India-Mauritius DTAA

Facts

i) The assessee, a tax resident of Mauritius, was an investor in the Indian Depository Receipts (IDR) issued by Standard Charted Bank – India Branch (SCB India or domestic depository), with the underlying asset in the form of shares in a UK based company i.e. Standard Charted Bank Plc (SCB UK). The said shares were held by the domestic depository's custodian i.e. Bank of New York Mellon, USA (BNY-US). SCB-UK was a company listed on the London Stock Exchange, and the IDRs so issued, (i.e. in respect of the shares of SCB-UK) were listed in India. The IDRs were issued in terms of Companies (Issue of Indian Depository Receipts) Rule, 2004, and that listing of IDRs were listed in India in terms of SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009.

ii) During the year under consideration i.e. AY 2015-16 the assessee had received dividends from SCB-India, in respect of dividends for the underlying shares relatable to the IDRs in which the assessee had invested. The assessee contended that the said receipt was not taxable in India in as much as the dividends were in respect of a foreign company, namely SCB-UK, the dividends were received abroad by BNY-US, and, as such, these dividends neither accrued nor arose in India nor were the same received or deemed to be received in India. The assessee also contended that that "SCB India was a bare trustee (i.e., akin to a nominee) under the English law for the IDR holders" and that the dividends were first received outside India, and, accordingly, such dividend could not be regarded as received/ deemed to be received in India. Without prejudice to this contention about non-taxability of this receipt under the Act, it was further contended that, as per India-Mauritius DTAA, the said receipts did not meet the requirements of Article 10 dealing with dividends and thus such receipts could only be subjected to tax under Article 22 which is in the domain of exclusive taxation in the residence jurisdiction, i.e., Mauritius.

iii) The AO and DRP rejected the aforesaid plea of the assessee, by holding that the first point of receipt of dividend was when it was deposited in the bank accounts of the IDR holders in India, and, therefore, it could not be said that the income in question was received outside India. Further, it was also observed that the money continued to be in the possession of the person who was to pay the same, i.e. SCB-UK, and that, in reality as also in substance, the payment was made in India in the Indian bank accounts of the IDR holders including the assessee.

iv) The assessee filed appeal before the Tribunal.

Decision

i) At the outset the Tribunal discussed the basic understanding of the entire structure of the IDR and observed as follows:

a. An Indian Depository Receipt (IDR) is an instrument issued by a custodian of underlying shares of a foreign company, registered with the SEBI, and authorised by the foreign company in this respect. This instrument is required to be denominated in INRs, listed on one or more recognized stock exchanges, the funds so raised through the IDRs can be remitted to the foreign company, as may be permissible under the foreign exchange law from time to time, and that such IDRs are freely transferable by residents as well.

b. In effect thus, the IDRs are means of tapping the Indian investor market by the foreign companies. However, it is not the same thing as subscribing to the share capital of a foreign company, and the IDR holders are not shareholders in the foreign company.

c. While technically the foreign company issues the equity shares to the domestic depository on the strength of which the domestic depository issues the IDRs, these shares never come to the possession of the domestic depository. There is a custodian involved, Bank of New York Mellon in this case, which actually holds custody of these shares- though technically on behalf of the domestic depository, which itself is a trustee of the issuing company. The physical movement of shares is thus between the issuing company, i.e., Standard Chartered Bank plc, the custodian, Bank of New York Mellon, while the constructive movement is from the Standard Chartered Bank plc (i.e., issuing company) to the Standard Chartered Bank-India (domestic depository) to the Bank of New York Mellon (the custodian).

ii) W.r.t the plea of the assessee that the dividends are not received in India, the Tribunal rejected the said plea by observing as follows:

a. The dividend physically flows from SCB-UK to BNY Mellon but then BNY Mellon was only a custodian and the actual recipient is SCB India because the shares are held by SCB India though through a custodian, i.e. BNY.

b. The shares were held by the SCB-India, and as SCB-India had issued IDRs on the basis of this underlying asset, the benefits of this asset, in the manner in which the relationship between the SCB India and the IDR holders was governed, go to the IDR holders.

iii) The Tribunal also held that the divided income deemed to accrue in India u/s 9(1)(i) of the Act, by observing as follows:

a. The shares may be held by an overseas custodian but these shares constituted property of the Indian depository, i.e. SCB-

India i.e. the assets were held by the SCB-India as property of the SCB-India, though through a custodian abroad, i.e., BNY-Mellon and though the source of income is equity shares of the foreign company and shares are held by an Indian depository and constitute assets of the SCB-India, the dividend income had a clear, significant, and crucial business connection with India.

b. The Tribunal also rejected reliance placed by the assessee on CBDT circular No 4/2015, by holding that the situation envisaged in the said circular was materially different as compared to the present case in the sense that in the present case the domestic depository held the IDRs with underlying assets abroad, the IDRs are listed in India as a derivative financial instrument, and the central point of the investment-related activity was in India.

c. Dividend income received from a company other than an Indian company which could not be taxed u/s 9(1)(iv) of the Act, could be taxed u/s 9(1)(i) of the Act

iv) W.r.t the plea of the assessee that the dividend income would not be taxed under the DTAA, the Tribunal held as under:

a. Article 10(1) of the DTAA, provides that "dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State" and therefore the fact of dividend being paid "by a company which is resident of a Contracting State" to the resident of the other Contracting State is a sine qua non for application of article 10, which deals with taxability of dividends under the DTAA. Since none of entities under consideration, i.e., the foreign company or the Indian depository, could be thus be treated as 'residents of a Contracting State' for the purpose of the DTAA, the dividend income in question, therefore, could not be brought to tax in India under Article 10 of the DTAA.

b. As per Article 22 of the DTAA, the residuary income, which was not specifically covered by any of the specific treaty provisions and not covered by the exclusion clause in Article 22(2), could only be taxed in the residence jurisdiction to the exclusion of the powers of the source jurisdiction to tax the same and therefore the said dividend income could not be taxed in the source jurisdiction, i.e. India, either.

v) In light of the above, the Tribunal held that dividend income could not be taxed in India in the hands of the assessee on the facts of this case.