INTERNATIONAL TAXATION

Case Law Update

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Tribunal

1 ***First credit ITES (P.) Ltd vs. ADCIT [2022] 138 taxmann.com 353 (Mum - Trib.)***

Where assessee-company rendered call center services to its AE and charged on basis of login hour rate of USD 10 which was higher than 3rd party quotations received by the AE, the Tribunal held the said transaction to be at ALP under "other method" notwithstanding that the assessee had applied TNMM in its TP study

Facts

i) The assessee, a company engaged in the business process outsourcing had entered into an agreement for provision of call center and BPO services. It charged to its AE on the basis of login hour rate of USD 10.

ii) The assessee had adopted TNMM as the most appropriate method and had earned margin of 4.8% (OP/OC) which was claimed to be at arm's length.

iii) The learned TPO examined the transactions and found that assessee did not take into account any comparability study despite stating that TNMM was the most appropriate method. Further the learned TPO noted that assessee had merely stated that login hour rate charged to its AE of USD10 was at arm's length. The TPO held that rule 10(1)(e) of the Act requires comparability analysis. Therefore, the TPO carried out fresh search, selected seven comparable companies whose arm's length margin was computed at 19.81% & made the consequent adjustment.

iv) Aggrieved, the assessee filed objections before the DRP & requested the use of other method as the most appropriate method of benchmarking the transaction and filed additional evidence in the form of 3rd party quotations received by the AE for carrying out similar activity as the assessee.

v) In regard to use other method ,the learned DRP rejected the same for the

reason that assessee had chosen TNMM as the most appropriate method in the TP study .The DRP upheld the order of TPO and held that other method could not be used to replace it, just because the results were unfavourable to the assessee.

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

Decision

i) The Tribunal noted that while the net margin of assessee was 4.8% login hour rate charged to its US AE USD was 10$ which was claimed to be at ALP. It held that TP study report by assessee did not give any idea about the comparability of the international transaction to hold that the same were at ALP and dismissed the TP study as bald, devoid of any substance and reasoning.

ii) The Tribunal noted, assessee's contention that DRP had not considered 'Other Method' prescribed under Rule 10AB as MAM to benchmark assessee's call center and BPO services rendered to its AE and had ignored the additional evidence assessee placed in the form of comparable quotes obtained from third-party service providers which were lower than hourly rate of USD 10 charged by assessee to its AE.

iii) The Tribunal further relied on Mattel Toys Limited-TS-159-ITAT-2013 (Mum)-TP and Sudarshan Chemicals Limited-TS-1078-ITAT-2016(Pun)-TP, wherein change of method resulting from better appreciation of facts and for precise determination of ALP was permitted. Consequently, it allowed assessee to change MAM from TNMM to 'Other method'.

iv) The Tribunal further relied on ***Toll Global Forwarding Limited- 66 Taxmann.com 53 (Del-Trib)*** and ***Gulf Energy Maritime- TS-74-ITAT-2016 (Mum) (TP),*** wherein it was held that third party quotations could be considered for computing the arm's length price while applying other method. Since the third party quotations received by the AE (i.e. 8$ to 10$ per hour) was higher than the rate of USD 10 per hour charged by assessee to its AE, the Tribunal held international transaction to be at ALP.

2 *DY.CIT vs. Michelin ROH Co. Ltd [2022] 138 taxmann.com 497 (Del - Trib.)*

In the absence of FTS article in the India-Thailand DTAA, receipts from engineering services were held to be business income & not taxable in India as the Thai co had no PE in India. The said receipts could not be taxed as other income under Article 22

Facts

i) The assessee, a company incorporated in Thailand had offered a number of services such as business planning and coordination, engineering services, product research and development etc. to its Indian subsidiary. The engineering services were claimed to be business income in the absence of the FTS article in the India-Thailand DTAA and the said income was claimed to be non-taxable as the assessee did not have a PE in India.

ii) The AO held the same to be taxable as other income under Article 22 of the treaty.

iii) The learned CIT(A) accepted the assessee above plea.

iv) Aggrieved, the Revenue filed appeal before the Hon'ble Tribunal.

Decision

i) The Tribunal dismissed the Revenue's appeal & held that there was no infirmity in the order of the learned CIT(A).

ii) The Tribunal further relied on the case laws submitted by assessee before the lower authorities viz

a) ***Paradigm Geophysical Pty. Ltd- [2008] 25 SOT 94 (Del-Trib) wherein it was held***

".... Fees for technical services is essentially business profit, since the rendering of such services is the business of the non-resident. In order to take out an item of income from the business profits, it is necessary under article 7(7) that there should be some other provision in the treaty dealing specifically with the item of income sought to be taken out from the business profits. If there is no other provision in the treaty or if the provision made in the treaty is not found applicable or to cover the item of income sought to be taken out from the business profits, for whatever reason, then it follows that the particular item of income should continue to remain under article 7 ... "

b) ***Bharti Airtel Ltd. [2016] 67 taxmann.com 223 (Del-Trib) wherein it was held***

"44. In view of the above reasons, we hold that wherever under the DTAA's. Make available clause is found, then as there is no imparting, the payment in question is not 'FTS' under the Treaty and when there is no 'FTS' clause in the treaties, the payment falls under Article 7 of the Treaty and is business income."

c) Bangkok Glass Industry Co. Ltd. [2013] 34 Taxmann.com 77(Mad) wherein it was held

" *.... 20. As far as the order in art. 22 is concerned, we do not find any justifiable ground to uphold this portion of the order after the discussion on the extent of income falling for consideration under royalty as defined under art. 12 and the amount paid as towards technical services falling for consideration under art. 7. Since the said income does not fall as miscellaneous income, the same cannot be brought under art. 22 ... "*

iii) The Tribunal held that the aforesaid expositions were fully applicable & that the income which had been earned in the instant case in absence of FTS clause in the DTAA, would be business income & not taxable in India in absence of a PE.

3 *Blackstone FP Capital Partners Mauritius V Ltd. vs. DY. CIT, International tax [2022] 138 taxmann.com 328 (Mum - Trib.)*

ITAT remands to AO with direction to decide by speaking order whether only "beneficial owner" could avail benefit of Article 13 of the Indo-Mauritius treaty DTAA

Facts

i) The assessee was a company incorporated in, and fiscally domiciled in, the Republic of Mauritius. It was incorporated on 8th June 2006 and it held a global business licence (GBL) issued by the Financial Services Commission, Mauritius. The assessee was also registered as a foreign venture capital investor (FVCI) with the Securities and Exchange Board of India & had also been issued a 'tax residency certificate' by the Mauritian Revenue Authority.

ii) During the relevant previous year, the assessee had sold equity shares of an Indian company and claimed the same to be non-taxable in India in terms of of the provisions of Article 13(4) of the Indo Mauritius tax treaty which provides that, capital "gains derived by the resident of one of the contracting states from alienation of any property, other than that referred to in paragraphs (1), (2) and (3) of this article, shall be taxed only in that State".

iii) The AO called for information from FT &TR (Foreign tax and Tax Research Division, Central Board of Direct Taxes) and from the respective authority of Mauritius and Cayman Islands. On examination of the same, he held that the effective ownership of the said shares was not with the assessee company inasmuch as source of investment in the shares in question was remittance from the entities owning the assessee company which were based in Cayman Islands, inasmuch as the trail of transactions of sale and purchase lead to dominant involvement of these Cayman Island based entities, and inasmuch as the directions to carry out the transactions in question were issued by the Cayman Island based entities owning the assessee company. The AO then interalia elaborately discussed the law the law laid down by Hon'ble Supreme Court in the case of ***McDowell & Co Ltd vs. CTO [(1985) 154 ITR 148 (SC)]*** and and the judgment of Hon'ble jurisdictional High Court in the case of ***Aditya Birla Nuvo Limited vs. DDIT [(2011) 12 taxmann.com 141 (Bom)]*** and concluded that it was a fit case to lift corporate veil & deny the treaty benefit. This stand of the Assessing Officer was confirmed by the Dispute Resolution Panel.

iv) Aggrieved, the assessee filed appeal to the Hon'ble Tribunal.

Decision

i) The Tribunal held that unlike in article 10 or article 11 of the Indo-Mauritius tax treaty, which specifically provides for beneficial ownership of interest or dividend in order to be entitled for a treaty protection, there is no such provision in article 13 of the Indo Mauritius tax treaty. It would appear that the concept of beneficial ownership

being a sine qua non to entitlement to treaty benefits cannot, in the absence of specific provision to that effect, cannot be inferred or assumed. It would thus seem possible that reading a beneficial ownership test, when such a test is not embedded in the treaty provision itself, is rather than a permissible interpretation of the treaty provisions, a rewriting the treaty provision itself.

ii) The decision of the Jurisdictional High Court in ***Aditya Birla Nuvo Limited vs. DDIT [(2011) 12 taxmann.com 141 (Bom)***] cannot be authority for the proposition that only a beneficial owner can avail protection of Article 13 as taxpayer had pleaded that he was beneficial owner in that case and Court was not called upon to decide whether being a beneficial owner was sine qua non to avail protection of Article Both of these foundational issues, i.e. whether the concept of "beneficial ownership" is inbuilt in the scheme of Article 13 and, if so, what are the connotations of "beneficial ownership" in this context, need to be adjudicated upon by the Assessing Officer.

iii) The Tribunal concluded that the aforesaid foundational issues should be dealt with by the Assessing Officer first- and he must do so by a speaking order, in accordance with the law and after giving a fair and reasonable opportunity of hearing to the assessee in this regard. With these observations, the it restored the matter to the file of the Assessing Officer.

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"Remember that all through history, there have been tyrants and murderers, and for a time, they seem invincible. But in the end, they always fall. Always."

— *Mahatma Gandhi*

"The knowing ones must have pity on the ignorant.
One who knows is willing to give up his body even for an ant,
because he knows that the body is nothing."

— *Swami Vivekananda*

"God has not promised Skies always blue, Flower-strewn pathways All our life through; God has not promised Sun without rain, Joy without sorrow, Peace without pain."

— *A.P.J. Abdul Kalam*