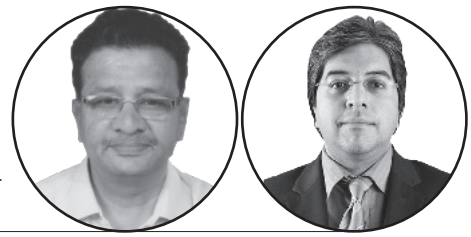

INTERNATIONAL TAXATION

Case Law Update

CA Tarunkumar Singhal & Dr. Sunil Moti Lala

A. HIGH COURT

1 ***Pr. CIT vs. Texport Overseas Pvt. Ltd.*** *[TS-1222-HC-2019] (Karnataka) - ITA No. 392 of 2018 and ITA No. 170 of 2019 for Assessment Year 2013-14 and 2014-15 respectively.*

Clause (i) of section 92BA (dealing with Specified Domestic Transaction (SDT) of expenditure in respect of payment made to persons referred to in section 40A(2)(b)) deleted *vide* Finance Act, 2017 is to be interpreted as being deleted retrospectively and thus any reference made to the TPO for determining the ALP under the said clause would be invalid

Facts

i) The AO made a reference to the TPO for determining the ALP of certain transactions covered under clause (i) to section 92BA. The AO passed an order under section 143(3) r.w.s 144C(13) on 30th June, 2017 for AY 2013-14 and AY 2014-15 after taking into consideration the adjustments proposed by the TPO and the directions of the DRP. In the interim clause (i) to section 92BA was deleted *vide* the Finance Act, 2017 w.e.f. 1st April, 2017.

ii) Before the ITAT, the Petitioner, by way of an additional ground, contended that since clause (i) to section 92BA was deleted *vide* Finance Act, 2017 it should be understood that the said clause had never existed in the statute itself and hence reference to the TPO for determining the ALP under the said clause is bad in law.

iii) The Revenue argued that the clause (i) to section 92BA has been deleted w.e.f. 1st April, 2017 (i.e. applicable for AY 2017-18 and onwards) therefore it has a prospective effect and should not be interpreted retrospectively.

iv) The ITAT observed that once a provision is omitted from the statute, it shall be deemed to be omitted from its inception unless the legislature have enacted some saving clause to make it clear that any pending proceedings under that provision would continue. Accordingly, the ITAT held that the orders passed by the AO, TPO and DRP were not sustainable in the eyes of law.

v) Aggrieved, the Revenue filed an appeal before the High Court.

Decision

i) The High Court relied on the decisions of the Hon'ble Supreme Court in the case of ***Kolhapur Canesugar Works Ltd. vs. Union of India (AIR 2000 SC 811)*** and in case of ***General Finance Co. vs. ACIT [176 CTR 569 2002 (SC)***], and upheld the observation of the ITAT that when a provision is omitted from the statute, it shall be deemed to be omitted from its inception unless the legislature have enacted some saving clause to make it clear that any pending proceedings under that provision would continue.

ii) Further, the High Court also relied upon the decision of the co-ordinate bench in case of ***CIT vs. GE Thermometrics India Pvt. Ltd. (ITA 424/2009 decided on 22nd March, 2018)***, wherein it was held that omission of sub-section (9) to section 10B with effect from 1st April, 2004 should be understood that the said section had never existed in the statute itself.

iii) Accordingly the Court held that no question of law arose for the High Court's consideration and the ITAT order was affirmed.

B. AUTHORITY FOR ADVANCE RULINGS

2 ***Bid Services Division (Mauritius) Ltd.***
In re (AAR No. 1270/2011) [2020] 114 taxmann.com 434 (AAR-Mumbai).

Benefit under Article 13(4) of the India-Mauritius DTAA (i.e., exemption from taxation on capital gains accrued in India) shall not be available if the transaction/arrangement lacks commercial substance and its dominant purpose is to avoid taxes.

Facts

i) The Applicant was incorporated in Mauritius and was a wholly owned subsidiary of Bid Services Division (Proprietary) Limited, a company incorporated in South Africa (both the entities are part of the Bidvest Group). The Applicant held a valid Tax Residency Certificate ('TRC') and did not have a business connection or a permanent establishment in India.

ii) Airports Authority of India ('AAI') floated tender inviting bids for undertaking development, operation and maintenance of Mumbai Airport. Initially, a consortium consisting of GVK Industries Limited, Airports Company South Africa (ACSA) Limited, Old Mutual Life Assurance Company and Bidvest Group Limited made a joint bid against the said tender.

iii) Subsequently the Applicant was incorporated in Mauritius and two weeks thereafter, a final binding bid was submitted by the Applicant in consortium with GVK Airports Holding Pvt. Ltd. ('GAHPL') and ACSA Global Limited ('AGL').

iv) After the final bidding process, AAI selected the Applicant in consortium with GAHPL and AGL as joint venture partners for the purpose of the said tender.

v) A shareholders agreement dated 4th April, 2006 was entered between the Applicant, AAI, GAHPL and AGL for the purpose of governing the respective rights, obligations and the shareholding pattern in the JV i.e., namely Mumbai International Airport Private Limited (MIAL). The Applicant agreed to subscribe and acquire 27% of the paid up share capital of MIAL.

vi) Subsequently, the Applicant entered into a Share Purchase Agreement with GAHPL for transferring its shares, held in the JV, to GAHPL in AY 2012-13. The Applicant sought ruling from the AAR in respect of its tax exemption claim on capital gains

arising on transfer of shares held in the JV (i.e., MIAL, an Indian Company), in light of the provisions of Article 13(4) of the India-Mauritius DTAA ('DTAA'), since it was a tax resident of Mauritius and held a valid TRC.

vii) The Applicant placed reliance on Circular No. 789 dated 13th April, 2000 issued by the Central Board of Direct Taxes ('CBDT') which clarified that companies resident of Mauritius would not be taxable on income arising from transfer of capital assets, being shares of a domestic company, in India as per Article 13(4) of the DTAA.

viii) The Applicant also placed reliance on the decision of the Apex Court in case of ***Vodafone International Holdings B.V vs. Union of India & Anr. [2012] 17 taxmann.com 202 (SC)*** wherein it was held that a TRC can be accepted as a conclusive evidence for accepting the residential status as well as the beneficial ownership of income for the purpose of applying the DTAA.

ix) The Revenue contended that at the time of bidding for the tender, the consortium did not include the Applicant as a joint venture partner and further the Applicant was incorporated just two weeks prior to the submission of the final binding bid by the consortium (i.e., after the final screening of all the bidders to the tender). The Revenue further contended that the only reason as to why the Applicant was included in the consortium was for the purpose of obtaining a tax benefit under Article 13(4) of the DTAA and since the arrangement lacked commercial substance the benefit under the Article 13(4) of the DTAA should not be granted to the Applicant.

Decision

i) The AAR held that the Applicant was not entitled to the benefit under Article 13(4) of the India-Mauritius DTAA since the entire arrangement lacked commercial substance and its dominant purpose was to avoid taxes.

ii) The AAR relied on the following factual matrix, while coming to the above conclusion:–

a. The Applicant was incorporated just two weeks before the final bid was submitted to the AAI.

b. All the pre-bidding activities such as site visits, discussion with Government agencies, filing of technical and financial bids etc. were done by the consortium (the Applicant was not in existence at that point in time).

c. The Applicant was not able to provide any cogent reasons or commercial rationale for incorporating it in Mauritius.

d. The Applicant was a shell company without any tangible assets, employees, office space, financial background, experience or other skills to facilitate the business venture of the JV.

e. The Applicant was used as a conduit for routing the funds for its holding company (i.e., company incorporated in South Africa) and the beneficial owner of the shares of the JV was the holding company of the Applicant.

C. TRIBUNAL DECISIONS

3 ***Roche Diagnostics India Pvt. Ltd. vs. ACIT***
[TS-38-ITAT-2020 (Mum)]
Assessment Year: 2011-12

I) **No TDS u/s. 195 on employees' participation fees for foreign conferences /seminars.**

Facts

i) Roche Diagnostics India (assessee) is a private limited company, engaged in distribution of biomedical equipment, reagents and spares for such equipment in India. The main products for the critical care segment are Blood Gas and Electrolyte Analyzers. It also provides marketing support services for diagnostic equipments distributed by Roche Diagnostics Asia Pacific Pte. Limited ('RDAP').

ii) During the course of assessment proceedings, the AO provided details of Form 15CA for foreign remittances reflected in Annual Information Report (AIR) downloaded from Income Tax System for the financial year (FY) 2010- 11, wherein tax was not deducted on certain payments.

iii) In response to a query raised by the AO to show cause as to why payments on which tax was not deducted shall not be disallowed u/s. 40(a)(i), the assessee filed a reply submitting the details/documents. However, the AO was not convinced with the said reply of the assessee and proceeded with disallowing all payments of ₹ 2,88,76,050/- on which tax was not deducted.

iv) However, the DRP vide its direction u/s. 144C(5), granted relief of ₹ 24,67,023/- towards income tax disallowance u/s 40(a)(i). Consequently, the AO passed final assessment order u/s. 143(3) r.w.s. 144C(5), disallowing expenses of ₹ 2,64,09,027/- u/s. 40(a)(i) on the ground of non-deduction of tax at source u/s 195 of the Act.

Decision

On Appeal, the Tribunal held in favour of the assessee as follows:

i) The Tribunal noted that the assessee had made a remittance of ₹ 1,48,016/- to Duo Contrusting (Tax resident of Germany) and ₹ 1,97,529/- to Right Management (Tax Resident of Singapore) towards participation of its employees in conference/seminar held in Hong Kong and Singapore respectively. The Tribunal further noted that it had made payment to Duo Contrusting towards fees for its employees for participation in conference held in Hong Kong.

ii) Further, the tribunal observed that the assessee had paid participation fees to Rights Management towards participation of its employee in seminar held in Singapore. Also, the tribunal agreed with the contentions of the assessee that:

- no income can be said to be accrued or deemed to be accrued in India on account of remittance towards participation fees for a conference held outside India;
- the payment can be characterised as FTS u/s. 9(1)(vii), only when a person pays to another person a payment for rendering of services which is in the nature of consultancy, technical or managerial in nature; further, professional services are not covered by the definition of FTS u/s. 9(1)(vii).

iii) The Tribunal held that the payments in the instant case cannot be characterized as FTS u/s. 9(1)(vii) as no services in the nature of consultancy, technical or managerial was provided to the assessee. The Tribunal relied on the Pune Tribunal's judgement in the case of ***Bharat Forge Ltd (36 taxmann.com 574)*** and Delhi Tribunal's judgement in the case of ***M/s Utility Powertech Ltd [2008-TIOL-14-ITAT-Del].***

iv) The Tribunal held that Duo Constructing was a tax resident of Germany and as

such, provisions of India-Germany DTAA shall be applicable; the remittance towards participation in a conference did not specifically fall under any Article of India-Germany DTAA as the said remittance was not in the nature of royalty or FTS. The Tribunal also ruled that, the said remittance should be construed in the nature of business income of the payee and in absence of PE of the payee in India, the said sum should not be subject to tax in India.

v) Thus, the tribunal held that *"as per Article 21 of the India-Germany DTAA dealing with 'Other Income', any income not dealt with any of the Article of DTAA can be taxed only in Germany."* Accordingly, the Tribunal referred to the India-Germany DTAA, which stated that, items of income of a resident of a Contracting State, wherever, arising not dealt with in the foregoing Articles of this agreement shall be taxable only in that State.

vi) With respect to the payment to the Right Management Singapore Pte Ltd., the Tribunal agreed with the contentions of the assessee that it was a tax resident of Singapore eligible to claim benefit under the provisions of India-Singapore DTAA and that as per Article 7 of the DTAA, business profits of Right Management could be taxed only in Singapore unless Right Management was carrying its business through a PE situated in India.

vii) The Tribunal observed that, the Right Management did not have a PE in India in terms of Article 5 of the said DTAA and therefore, the business income of Right Management should not be subject to tax in India as per Article 7 r.w. Article 5 of the said DTAA. The Tribunal noted that, further, as per Article 12(4)(b) of the said DTAA, consideration towards technical knowledge, skill etc. would be considered as FTS only if the technical knowhow, skill etc. was made available to the recipient of the services.

viii) Thus, the tribunal ruled that, *"Right Management has not transferred or made available any technical knowledge or skills to the appellant and therefore, payments made to Right Management are not in the nature of FTS and not liable to tax in India having regard to the provisions of the said DTAA. Since participation fees for attending seminar is not taxable in India, the question of TDS on aforesaid payment does not arise."*

ix) With respect of payment to Roche Germany towards other reimbursement *viz*.. travel and stay, conference participation fees and web access charges of ₹ 5,01,969/-, the Tribunal observed that, in support of the reimbursement of expenses, the assessee had submitted copies of invoices, third parties transaction details, Form 15CA and Form 15CB which clearly showed that the payments were in the nature of reimbursements. Thus, the tribunal ruled that, *"it is a mere reimbursement of expenses and cannot be construed as a "fee" for services rendered since what is achieved by reimbursement is mere repayment of what has been already spent and is not a reward or compensation for services rendered."* Further, the tribunal held that, *"the transactions relating to reimbursement of expenses to AE have been subject matter of TP assessment and the fact that the reimbursement of various expenses are at actual cost, with no profit element has been accepted by the TPO."*

x) Further, regarding reimbursement of cost of manager of ₹ 10,24,284/-, the tribunal noted that, as per the arrangement between the assessee and *Sanofi*, the assessee would provide the technical, scientific and marketing support including training of engineers, salesmen to Sanofi for sale of its products. The Tribunal also

observed that, Mr. Mostafa Jamal Anwar ('Mr. Mostafa') had been appointed in Bangladesh exclusively for advertisement and promotion of the assessee's products and for providing various services to the new customers (end-user) like providing guidance on usage of the products, its benefits etc. and *Sanofi* had recovered the actual salary cost of Mr. Mostafa and other related costs incurred by Sanofi from the appellant. Thus, the Tribunal held that, *"even if the aforesaid payments are considered as FTS, the same should not be subject to tax in India in the absence of specific Article of FTS in India-Bangladesh DTAA."*

(***Note***: *The Tribunal also deleted various other additions made by the AO, being in the nature of Reimbursement of various kinds of expenses being Special Discount, promotional expenses, reimbursement of travel and hotel expenses, reimbursement of relocation expenses, salaries of foreign managers etc.)*

4 ***IRCON International Limited vs. DCIT***
[TS-60-ITAT-2020 (DEL)]
Assessment Years: 2004-05 and 2005-06

II) Computation of Book Profits u/s. 115JB – Income exempt under a Tax Treaty not entitled for reduction from 'book-profits' under MAT provisions

Facts

i) IRCON International (assessee) is a limited company for the subject Assessment Year 2004-05. The assessee excluded DTAA income earned from its project in Bangladesh, Malaysia and United Kingdom on the ground that, the DTAA income was not taxable in India and consequently, the company was not obliged to pay tax under MAT on the said income.

ii) The AO was of the view that the adjustment required to be done were specified in the provisions of section 115J and there was no provision under the said clauses to reduce book profit from DTAA.

iii) It was further observed that similar adjustments were made in AY 2001-02 to 2003-04 which were confirmed by the CIT(A). Accordingly, the AO, made an adjustment of ₹ 34.55 crore. On further appeal, CIT(A) upheld the AO's appeal.

Decision

On Appeal, the Tribunal held in favour of the Revenue as follows:

i) The Tribunal noted and observed as follows:

(a) The assessee had reduced the income of ₹ 21,94,13,814/- earned in Malaysia as per the DTAA while computing its book profit u/s. 115JA. The CIT(A) rejected the assessee's contention that, since the income earned in Malaysia was not taxable in India by virtue of the DTAA between India and Malaysia, it was not required to pay tax even under MAT on such income. The CIT(A) held that the provisions of Section 115JA override all other provisions of the Act, since sub-section (1) thereof begins with the non-obstante clause stating as 'notwithstanding anything contained in any other provisions of this Act '.

(b) The CIT(A) noted that none of the DTAAs provided for computation of 'Book Profit' under the provisions of Section 115JA and hence, the basic tax laws in force in the country (115JA) would get attracted since there was no specific provision in the DTAA as regards the computation of 'Book Profit' for the purpose of levy of Minimum Alternative Tax (MAT).

(c) Accordingly, the CIT(A) held that, there was no merit in the claim of

the assessee since section 115JA imposed tax on the Book Profit, which was computed for the purpose of Companies Act. Further, the plain reading of Section 115JA, made it obvious that none of the clauses (i) to (ix) of the Explanation thereto provided for reduction in respect of the income which may be exempt by virtue of the application of the DTAA.

(d) The CIT(A) noted that, the SC in the case of Apollo Tyres Limited, [TS-3-SC-2002], had held that the Book Profit as computed from the books of account maintained in accordance with the Companies Act was sacrosanct and it could be adjusted only for making increases and reductions as specifically provided in the *Explanation* to the said section and that, apart from the adjustment as provided in the *Explanation*, no adjustments could be made to the book profit as per the Companies Act.

(e) The CIT(A) noted that, the exclusion of income under the DTAA was nowhere provided in the said *Explanation*. If it were the intention of the legislature to provide reduction in respect of the income under the DTAA, it would have been specifically provided by way of another clause below the said *Explanation* to the section 115JA.

ii) Therefore, CIT(A) upheld AO's order and held that, the assessee was not entitled to claim reduction in respect of the income covered by DTAA (₹ 34,55,50,226/-). On perusal of facts and records, the tribunal agreed with the view of the CIT(A) and accordingly, held that, *"we do not find any error or infirmity which calls for our interference."*

5 *AGT International GmbH vs. DCIT*

[TS-57-ITAT-2020(Mum)]

Assessment year: 2015-16

III) India-Switzerland DTAA – Article 12(2) r/w Article 5(2)(l) and Article 7 of the DTAA and the Protocol to the Treaty - Tribunal accepts Non-Resident's FTS taxability on 'gross basis' @ 10% - Cites 'choice' under Indo-Swiss DTAA protocol – Held: In favour of the assessee.

Facts

i) The assessee, AGT International GmbH, a tax resident of Switzerland had received ₹ 1,00,14,582, on account of fees for technical services from an Indian company by the name of TAS-AGT Systems Limited, and had offered the said income to tax @ 10%, on gross basis, under article 12(2) of the Indo-Swiss tax treaty.

ii) It was noted by the AO that the Indian company had withheld tax @ 42.024% on the entire amount. The AO was also of the view that the services rendered by the assessee are such that they do not satisfy the criterion under Article 12(4) inasmuch as while Article 12(4) deals only with the "payments of any kind to any person in consideration for rendering of any managerial, technical or consultancy services, including the provision of such services by technical or other personnel", so far as these services are concerned, "the role of the assessee is akin to buying and selling of services".

iii) The AO also held that the assessee had, on account of rendition of these services in India, a PE in India under Article 5(2)(l) of the Indo-Swiss tax treaty, i.e. service PE, that the expenses are allowable, on an estimate basis, @ 40% of total revenues, and that the remaining amount is taxable at

the normal income tax rates applicable to the foreign companies. On further appeal, DRP upheld the order of AO.

Decision

On Appeal, the Tribunal held in favour of the assessee as under:

i) ITAT observed that the case of the AO was that the assessee had a PE in India inasmuch as the services rendered by the assessee were not of such a nature as to be covered by the definition of "fees for technical services" under Article 12. In this regard, ITAT noted that "The fundamental question, however, that we need to examine is whether an income, offered to tax under Article 12(2) as "fees for technical services" being taxed as an income attributable to a service PE under Article 5(2)(l) can place the assessee to a disadvantageous position so far as his tax liability is concerned."

ii) In this regard, ITAT accepted assessee's argument contending that, so far as the PE under article 5(2)(l) of Indo-Swiss tax treaty was concerned, i.e. service PEs, the assessee had a choice to be taxed on gross basis at the rates provided under Article 12(2) or on net basis under Article 7.

iii) In this regard, ITAT interpreted that "A combined reading of the above provision of Article 5(2)(l) read with related protocol clause clearly shows is that the service PE being triggered on account of rendition of services by a Swiss entity in India, or *vice versa*, can never make the assessee worse off so far as the tax liability in source jurisdiction is concerned." ITAT further explained that "Unless the assessee has a lower tax liability on taxability of PE on net basis under Article 7 *vis-à-vis* taxability of FTS on gross basis under Article 12(2), the PE being triggered is in fact tax neutral. Nothing, therefore, turns in favour of the income tax department on account of service PE being triggered by the rendition of services."

iv) ITAT further took cognizance that "Of course, the words "at the request of the enterprise" appear in the above protocol provision but when the assessee is all along pleading for taxability under article 12(2), it's implicit in the contention that the assessee wants to be taxed at that rate." Thus accepting assessee's plea, The Tribunal directed the AO to "tax the assessee, in respect of the receipts as fees for technical services- i.e. ₹ 1,00,14,582, @ 10% on gross basis and under article 12(2) of the Indo-Swiss tax treaty" and accordingly allowed assessee's appeal.

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