INTERNATIONAL TAXATION
Case Law Update

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A. HIGH COURT

1 *CIT. vs. Mitsubishi Corporation India (P.) Ltd. [(2024) 159 taxmann.com 539 (Delhi)]*

The Hon'ble HC held that (i) where period in issue was assessment year 2006-07, amendment brought about in section 40(a) by virtue of Finance Act, 2014 would have no relevance, therefore, equal treatment or non-discrimination clause in articles 24(3) and 26(3) of India-Japan/India-USA DTAAs would apply with regard to payment for purchases made by assessee from its group companies and, thus, Hon'ble Tribunal had rightly deleted disallowance made by AO on account of non-deduction of tax at source (TAS) under section 40(a)(i) (ii) Where assessee had made purchases from its Thailand and Singapore based AEs without deducting TAS, since the AEs did not have a PE in India, payments made to them were not chargeable to tax in India and, thus, Hon'ble Tribunal had rightly deleted disallowance made by AO on account of non-deduction of tax at source (TAS) under section 40(a)(i)

Facts

i. The assessee, an Indian Company had entered into certain purchase transactions with its seven group companies, i.e., MC (Japan), Metal One (Japan), Tubular (USA), Petro (Japan), Metini (Japan), MC Metal (Thailand) and Metal One (Singapore). It had made payments to these Associated Enterprises (AEs) on account of purchases made without deducting tax at source [TAS].

ii. The AO concluded that since MC (Japan) had a Liaison Officer (LO) in India, on account of similarity of business models, the assessee's Thailand and Singapore based group companies, amongst other companies, also had PE in India. Therefore, concluded that payments made by the assessee to its AEs were chargeable to tax in India and hence, disallowed same under section 40(a)(i) on the ground that TAS had not been deducted.

iii. The DRP upheld the addition made by the Assessing Officer.

iv. On revenue's appeal to the Tribunal, there was a difference of opinion between the two learned judges and the matter was referred to Learned third Judge.

Decision

i. The Hon'ble HC noted that the assessee insofar as the following entities were concerned, i.e., MC (Japan); Metal One Corporation (Japan); Tubular (USA);

Petro (Japan) and Miteni (Japan), had assailed the disallowance ordered by the AO, not on the ground that the payments made were not chargeable to tax in India, but on the basis that equal treatment was not accorded, as envisaged in Articles 24(3) and 26(3) of DTAAs entered into by India with Japan and USA.

ii. It further noted that before 01.04.2005, payments specified in Clause (i) of Section 40(a) made outside India or to a non-resident could not be deducted while computing the income chargeable to tax under the head "profits and gains from business and profession" unless TAS was deducted or after the deduction the amount was made over, i.e., paid. Inter alia, the payments specified in Clause (i) of Section 40(a) concern interest, royalty, fees for technical services or other sums chargeable under the Act. The rigour of the said provision, as it obtained prior to 01.04.2005, did not apply to the aforementioned specified payments made to residents. FA 2004 brought about an amendment in Section 40(a), whereby the resident was also brought within its sway, albeit with respect to payments specified in Clause (ia) viz. "any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work)".

iii. Thus, although parity had been brought about with regard to the power of the AO to deny deduction where TAS was not deducted against payments made outside India or to non-residents and residents, it was limited to certain payments. As evident upon perusal of Clause (ia) of Section 40(a), it did not bring payments made towards purchases to resident-vendors within its net. This disparity was removed by FA 2014, albeit w.e.f. from 01.04.2015, when the ambit of disallowance was enlarged by bringing any sum payable to a resident within the four corners of Clause (ia) of Section 40(a). Since the period in issue is AY 2006-07, the amendment brought about in Section 40(a) by virtue of FA 2014 would have no relevance. Therefore, the equal treatment or the non-discrimination Clause obtaining in Articles 24(3) and 26(3) of the India-Japan/India-USA DTAAs would apply with regard to the payment for purchases made by the assessee concerning the following five companies: MC (Japan); Metal One Corporation (Japan); Tubular (USA); Petro (Japan) and Miteni (Japan).

iv. The argument advanced on behalf of the revenue that since provisions of Article 9 of the respective DTAAs apply, the equal treatment/non-discrimination clause incorporated in Article 24(3)/26(3) would have no application, was untenable since Article 9 captures transactions that an assessee may enter with an AE, which may result in a transfer pricing adjustment. In the instant case, the transfer pricing adjustment impacted the payments received by the assessee against services rendered by it to its group companies. This aspect was concededly not the subject matter of the disallowance ordered under Section 40(a) of the Act. The disallowance under the said provision was confined to payments made by the assessee against purchases required to conform to the equal treatment clause or the non-discrimination Clause contained in Article 24(3)/26(3).

v. As regards the transactions entered into by the respondent/assessee with the remaining two entities, i.e., MC Metal (Thailand) and Metal One (Singapore), the assessee did not press the argument of equal treatment as the DTAAs entered into by India with Thailand and Singapore do not contain an equal treatment/non-discrimination clause. In this behalf, the assessee has rightly contended that since the two companies referred to above, i.e., MC Metal Thailand and Metal One Singapore, did not have a PE in India, the payments made to them were not chargeable to tax in India. The AO, via convoluted logic, had concluded that since MC (Japan) had a LO in India, on account of the similarity of business models these two companies, amongst other companies, also had PE in India. On the other hand, the Tribunal has returned a finding that MC Metal Thailand and Metal One Singapore did not have a PE in India. Given this position, as correctly argued on behalf of the assessee, it was not obliged to deduct TAS from payments made to MC Metal (Thailand) and Metal One (Singapore). Chargeability to tax is the paramount condition for triggering the obligation to deduct TAS as evident from the plain language of sub-section (1) of Section 195. Reliance was placed on the judgment rendered by the Supreme Court in GE India Technology.

vi. The reliance of the Revenue on the judgment rendered by the Supreme Court in Transmission Corporation of AP Ltd. v. CIT was misplaced, as that was a case involving a composite transaction where the trading receipt was embedded with a component of income. It was neither the stand of the revenue nor was any finding of fact arrived at by the AO that the transactions entered into between the assessee and its seven group companies were "composite transactions". In other words, the suggestion that an element of taxable income was embedded in the transactions executed between the assessee and its seven group companies did not emerge from the record. In this regard reliance was placed on the judgement of the Hon'ble SC in G.E. India Technology.

vii. Accordingly, all the issues were denied in favour of the assessee.

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2 ***PCIT v. Karam Chand Thapar & Bros Coal Sales Ltd. [(2024) 159 taxmann.com 644 (HC - Calcutta)]***

The Hon'ble HC held that where assessee had already charged a guarantee commission at 0.5% from associated enterprises upward adjustment made on account of corporate guarantee commission could not be sustained, since average rate of corporate guarantee commission had been accepted in several decisions of the Tribunal at 0.5%.

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3 ***PCIT vs. John Deere India (P.) Ltd. [(2024) 159 taxmann.com 681 (HC - Bombay)]***

The Hon'ble HC upheld the order of the Hon'ble Tribunal holding that (i) Where assessee was rendering ITES services to AE, a company which outsourced services to be rendered by it and thereby followed a different business model, could not be accepted as comparable (ii) A company in whose case extraordinary event of amalgamation took place during relevant year, could not be accepted as comparable (iii) Where assessee was rendering ITES services to AE, a company engaged in providing KPO services, could not be accepted as comparable.

B. TRIBUNAL

4 *Anjali Puri vs. DCIT [(2024) 159 taxmann.com 603 (Delhi Tribunal)]*

Where assessee, a tax resident of Netherlands, was residing and exercising employment in Ireland under complete control of BA PLC, Ireland for impugned assessment year and services were rendered in Ireland, the Hon'ble Tribunal held that the salary received by him in India (when he was in India for less than 183 days) and paid by BA PLC, India which was reimbursed by BA PLC, Ireland, could not be taxed in India by virtue of Article 4(1) of the India-Netherland DTAA.

Facts

i. The assessee, an individual and tax resident of Netherlands employed with British Airways PLC, a company incorporated under the laws of United Kingdom, was deputed on a long term-term assignment from April 01, 2019 to British Airways PLC, Ireland branch ("BA PLC, Ireland").

ii. During the year, the assessee rendered services outside India (i.e. in Ireland). Further, in the relevant F.Y., the total stay of the assessee in India was less than 60 days. Accordingly, by virtue of section 6(1), the assessee qualified as Non-Resident in India for the impugned Assessment Year.

iii. While on the deputation, for administrative convenience and on behalf of BA PLC, Ireland, the assessee received salary in India in respect of the services rendered outside India i.e., in Ireland to BA PLC, Ireland. Further, to ensure withholding compliance laid down under section 192 of the Act, BA PLC, India deducted tax at source on the salary paid in India and deposited with the government. The Company was reimbursed in full by the BA PLC, Ireland.

iv. The assessee filed the Income Tax Return for the impugned year, as a Non-Resident Indian and in accordance with the section 90 of the Act read with Article 15(1) of the India-Ireland Double Taxation Avoidance Agreement ("DTAA"), claimed the income to be exempt from tax in India.

v. The AO issued the draft Assessment Order under section 144C(1) holding that services were rendered in India and an addition on account of salary received was made to the income of the Assessee.

vi. The DRP affirmed the addition proposed by the AO.

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

Decision

i. The Hon'ble Tribunal noted that during the course of assessment proceedings, the assessee had provided relevant documents to substantiate the claims made *viz* Letter of Assignment, Certificate/letter by the BA PLC, India in relation to salary received by her ; Certificate/letter by the BA PLC, Ireland in relation to reimbursement of salary paid by BA PLC, India to the assessee ;Tax residency certificate; Income Tax Return filed in Ireland ;Income Tax Return filed in Ireland ; Income Tax Return filed in India along with Income Tax computation, Ireland employment permit and relevant extract of the passport.

ii. It was thus clear that despite the above submissions and evidence on record, the AO had erred in incorrectly holding that the assessee was based in India and that the salary was taxable in India, where in fact the salary was earned from BA PLC, Ireland and the services were rendered outside India.

iii. The DRP after perusing the documents submitted by the assessee had erroneously noted that there was a failure on the part of assessee to provide agreement between Irish and Indian entity without appreciating the certificate/letter of reimbursement issued by BA PLC, Ireland which substantiated the assessee's submission that during the impugned Assessment Year, the assessee was employed with BA PLC. Ireland and was paid salary in India merely for administrative convenience.

iv. Salary income of the Assessee was not exigible in India under Article 15 of the DTAA. The Assessing Officer was not correct in not granting relief under Article 15 of the DTAA and disregarding that income is accrued where employment is exercised. As per the Article 15 of the DTAA between India and Netherlands, the income earned by the person is exempt from tax if following conditions are satisfied: (1) If the person has not stayed for more than 183 days in India, and (2) If the employment is exercised outside India.

v. In the present case, both the conditions prescribed in the article 15 were satisfied. The first condition had not been disputed by the Assessing Officer, whereas the second condition had been justified by various evidences furnished by the assessee. Further, the AO himself had accepted that the services were rendered outside India.

vi. The Hon'ble Tribunal concluded that the assessee was residing and exercising employment in Ireland under the complete control of BA PLC, Ireland for the impugned Assessment Year that the salary was also borne by BA PLC, Ireland. Thus, the salary of the assessee derived from BA PLC, India on behalf of BA PLC, Ireland was exempt from tax in India.

vii. It further held that the salary income earned by the assessee for services rendered in Ireland could not be said to be deemed to accrue or arise in India under section 9 of the Act. Thus even in view of section 9(1)(ii), salary payment can be said to be earned in India only if the corresponding services are rendered in India. Thus, if the services are rendered outside India, for which salary has been paid, then the income cannot be said to accrue or arise in India.

viii. Further, it held that the contention of AO that the assessee had rendered services from India was incorrect in light of the tax residency certificate for Ireland. Thus, in light of above facts and legal position, since the employment was not exercised in India, such income could not be held to be taxable in India and hence, the addition made by the AO on this issue was directed to be deleted.

5 *TCI-GO Vacation India (P.) Ltd. vs. ACIT [(2024) 159 taxmann.com 710 (Delhi Tribunal)]*

The Hon'ble Tribunal held that since working capital adjustment took into account impact of outstanding receivables , no further adjustment was required - since margin of assessee was higher than working capital adjusted margin of comparables.

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