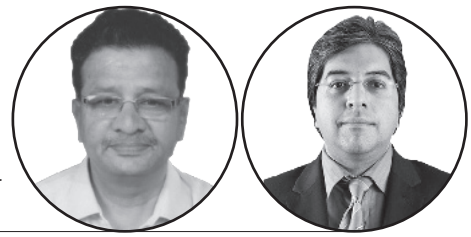

INTERNATIONAL TAXATION

Case Law Update

CA Tarunkumar Singhal & Dr. Sunil Moti Lala

A. TRIBUNAL DECISIONS

1 *Volkswagen Finance Pvt. Ltd. v. Income Tax Officer (IT)*

[TS-172-ITAT-2020(Mum)] - ITA No. 2195/Mum/2017 for AY 2015-16

Appearance fees paid to a celebrity for appearing in an event held in Dubai, which is focused for furtherance of business interests of the assessee in India and targeted towards the Indian customers of the assessee, the said relationship would result in a creation of a business connection in India and accordingly the appearance fees would be taxable u/s 9(1)(i)

Facts

i) The Appellant (i.e. assessee) along with its group entity namely Audi India, conducted an event in Dubai for the purpose of launch of a new model of an Audi car i.e. Audi A-8L. For the purpose of making the said event, a lavish event with special focus on HNI individuals and other existing customers of Audi cars, the assessee and Audi India entered into an agreement with a US entity for facilitating the appearance of Nicholas Cage (an Oscar-winning celebrity, hereinafter referred as 'celebrity) at the event. An appearance fees of USD 440,000 was paid to the celebrity outside India.

ii) As per the agreement, the celebrity was required to engage with the directors of Audi India for a Q&A session followed by socializing with the guests and interaction with Indian media. Further, the assessee and Audi India had full rights to use all the event footage/material/films/stills/interviews etc., capturing the celebrity's presence, across all platforms for publicity on the internet, in press releases, news reports and social media. The assessee had explained that the event was specifically focused on the Indian customers in as much as that pursuant to the said event, Audi India would receive enquiries from potential customers based in India for purchase of the said Audi Car and the assessee would enable the customer to get the same financed from it.

iii) The AO concluded proceedings u/s 201 by holding that fees paid to the celebrity were in nature of "royalty" and, accordingly, the assessee was required to withhold taxes u/s 195. On appeal before the CIT(A),

the CIT(A) upheld the order of the AO and also observed that the said fees paid to the celebrity could also qualify as business income accruing or arising in India u/s 9(1)(i).

iv) Accordingly, the present appeal was filed by the assessee before the Tribunal.

Decision

i) The Tribunal, by relying on the Hon'ble Supreme Court decision in case of ***R D Aggarwal & Co (1965) 56 ITR 20 (SC)***, observed that a business connection is not only a tangible thing like people or businesses but also includes a relationship, real or intimate, through which an income directly or indirectly, accrues or arises to the non-resident. Having interpreted the term business connection as above, the Tribunal then proceeded to analyse whether the income accruing to the celebrity on account of appearance in the event held in Dubai, had accrued or arisen, directly or indirectly on account of a business connection in India.

ii) The Tribunal held that the event conducted in Dubai and the resulting benefit of the said event in assessee's business in India resulted in creation of a business connection through which the income accrued in the hands of the celebrity. The following factors were considered by the Tribunal for arriving at the above conclusion: -

a. The event was focused specifically for the Indian customers and the benefit of the said event were to be utilized for assessee's business in India.

b. Assessee and Audi India had full rights to use all the event footage/ material/films/stills/interviews etc., capturing the celebrity's presence, across all platforms for publicity and hence would be used by the assessee as a marketing tool in India.

c. The entire event expenses were claimed as business deduction u/s 37(1) by the assessee and Audi India as being incurred wholly and exclusively for their business purposes in India.

iii) The Tribunal further observed that in the present case the business connection in India is intangible inasmuch as it is a relationship rather than an object, but it is a significant business connection which has resulted in income accruing and arising to the non-resident and hence none of the judicial precedents would be applicable to such types of modern/evolving business models.

iv) The income was not covered under the India-USA DTAA provisions dealing with entertainers i.e. Article 18 since the activity was not exercised in India. Accordingly, the Tribunal held that the said fees were also taxable in India as per the provisions of "Other Income" article i.e. Article 23(3) of India-USA DTAA.

2 *Sreenivasa Reddy Cheemalamarris v. Income Tax Officer (IT) - [TS-158-ITAT-2020(HYD)] - ITA No. 1463/Hyd/2018 for AY 2014-15*

DTAA benefit cannot be denied solely on the ground that the assessee had not provided TRC if the assessee with circumstantial evidences demonstrates that he is a resident of the other state, and accordingly provisions of section 90(4) could be relaxed to that extent

Facts

i) The Appellant (i.e. assessee) a non-resident for AY 2014-15 had earned income from

salaries from IBM India Pvt. Ltd. on which requisite taxes u/s 192 were deducted. The assessee filed its return of income and claimed exemption of the said income u/s 90 read with Article 15(1) of India-Austria DTAA.

ii) During the course of the assessment proceedings, the assessee was required to provide documentary evidences of the said income for which exemption was claimed, which inter alia included the tax residency certificate (hereinafter referred as 'TRC') from the Austrian authorities. However, the assessee was unable to obtain the TRC from the Austrian tax authorities despite best possible efforts. The AO denied the claim of the assessee for double taxation relief u/s 90 since the TRC was not provided during the assessment proceedings. On appeal by the assessee before the CIT(A), the CIT(A) upheld the order of the AO.

iii) Accordingly, the present appeal was filed by the assessee before the Tribunal.

Decision

i) The Tribunal observed that obtaining a TRC from foreign tax authorities is generally a herculean task and hence the assessee cannot be obligated to perform an impossible task (i.e. obtaining the TRC from Austrian tax authorities in the present case). In view of the same, the Tribunal held that if the assessee with circumstantial evidences demonstrates that he is a resident of the other state, the provisions of section 90(4) ought to be relaxed and accordingly the claim of the assessee should not be rejected merely on the grounds of non-production of TRC.

ii) Further, the Tribunal, by relying on the decision of Tribunal (Ahmedabad Bench) in case of ***Skaps Industries Pvt. Ltd. (TS-330-ITAT-2018(AHD)***, held that the provisions of section 90(4) cannot override the provisions of the relevant DTAA and accordingly if the conditions prescribed under the relevant DTAA are fulfilled, then the assessee cannot be denied the benefit of the DTAA.

3 *Shri Paul Xavier Antony Samy v. Income Tax Officer (IT) -*

[TS-138-ITAT-2020(CHNY)] - I.T.A.No. 2233/Chny/2018 for AY 2015-16

Section 5 is subjected to other provisions of the Act and accordingly salary received in India for the services rendered outside India would not be taxed in India in view of section 15(a) and section 9(1)(iii).

Facts

i) The Appellant (i.e. assessee) a non-resident for AY 2015-16 had earned income from salaries from General Electric International Inc. in India (hereinafter referred to as 'GE India'). The assessee was seconded by GE India for an overseas assignment in Australia from 30th August 2014. During the course of secondment, the assessee was employed by General Electric International Inc. in Australia (hereinafter referred to as 'GE Australia'). The salaries for the employment with GE Australia were paid directly to the bank account of the assessee in India, by GE India on which requisite taxes were deducted by GE India u/s 192.

ii) The assessee filed the return of income declaring the income upto 30th August 2014 as taxable in India and the balance income received for the services rendered post 30th August 2014 were claimed as not taxable in India, since the services were rendered outside India.

iii) The AO concluded the assessment proceedings by holding that the income received for the services rendered outside India would be taxable u/s 5(2)(a) since the said income was received in India. On appeal by the assessee before the CIT(A), the CIT(A) upheld the order of the AO.

iv) Accordingly, the present appeal was filed by the assessee the Tribunal.

Decision

i) The Tribunal observed that provisions of section 5 stipulates that the said section is subjected to other provisions of the Act, which in the present case would be section 15.

ii) The Tribunal, on perusal of section 15, held that the salary is always taxable on accrual basis and also as per section 9(1)(ii), salary income could be deemed to accrue or arise in India, only if it is earned in India in respect of services rendered in India. Accordingly, the Tribunal held that the salary income for the services rendered outside India, though received in India, would not be taxable in India. The Tribunal also held that as per Article 15 India-Australia DTAA income from salaries should be taxed only in Australia and hence the said receipt was not taxable in India.

4 *Sofina S.A. v. ACIT (IT)*

[TS-129-ITAT-2020(MUM)] - ITA No.7241/Mum/2018 for AY 2015-16

Provisions of explanation 5 to section 9(1)(i) of the IT Act i.e. indirect transfer of shares of an Indian company, cannot be read into the India-Belgium DTAA in absence of similar provisions in the DTAA itself.

Facts

i) The appellant (i.e. assessee) was a tax resident of Belgium. The assessee had subscribed to the preference shares of Accelyst Pte Ltd., (a company which was a tax resident of Singapore and hereinafter referred as 'Accelyst Singapore') totalling to 11.34% of its total shareholding. Accelyst Singapore in turn held 99.99% of the total shareholding of Accelyst Solutions Pvt. Ltd., (a company which was a tax resident of India and hereinafter referred to as 'Accelyst India').

ii) During the year under consideration, the assessee sold its entire stake in Accelyst Singapore (i.e. 11.34%) to Jasper Infotech Pvt. Ltd. (a company which was a tax resident of India). Jasper Infotech Pvt. Ltd. while discharging the consideration for the above mentioned transaction, withheld taxes u/s 195. The assessee filed its return of income declaring NIL income as per the provisions of Article 13(6) of India-Belgium DTAA (hereinafter referred as the 'relevant DTAA'). By virtue of the said provision, gains from alienation of the said shares would be taxable in the state of the alienator i.e. Belgium.

iii) The AO concluded the assessment proceedings by holding that the shares of Accelyst Singapore derived their value substantially from the shares of Accelyst India and accordingly the transfer of shares of Accelyst Singapore would be taxable in India in terms of explanation 5 to section 9(1)(i). Further with respect to India-Belgium DTAA, the AO held that by virtue of the deeming fiction created by explanation 5 to section 9(1)(i), the shares of Accelyst Singapore were deemed to be situated in India and consequently Accelyst Singapore was deemed to be a tax resident of India. In light of the same, the AO

applied Article 13(5) of the relevant DTAA to conclude that the transfer would be taxed in India. The assessee filed objections before the DRP, however, the DRP upheld the order of the AO.

iv) Accordingly, the present appeal was filed by the assessee before the Tribunal.

Decision

i) The Tribunal, by relying on the decision of Andhra Pradesh HC in case of Sanofi Pasteur Holding SA v. Department of Revenue (2013) (30 taxmann.com 222), observed that by virtue of Article 13(5) of the relevant DTAA which inter alia provides that gains from alienation of shares in a company can be taxed in the State in which the said company is resident only if the following two conditions are satisfied viz.

a. the transfer of shares should represent participation of at least 10% in the capital stock of company; and

b. the company whose shares are transferred should be a resident of a contracting state i.e. either India or Belgium as per article 3(1)(c) of the relevant DTAA.

In view of the above, the Tribunal held that since the shares transferred by the assessee in the present case were of Accelyst Singapore, the pre-condition that the shares transferred should form part of the capital stock of a company which is a resident of a Contracting State i.e. India was not fulfilled and hence Article 13(5) would not be applicable in the present case.

ii) Further, the Tribunal observed that explanation 5 of section 9(1)(i) incorporates a 'see-through' approach i.e. if a person holds shares outside India, which derives its value substantially from the assets located in India, the legislation deems such shares located outside India to be located in India for taxation purposes. However a similar 'see through' approach is not envisaged in Article 13(5) of the relevant DTAA (since words such as 'directly or indirectly' are not used in the said Article) and hence it cannot be deemed that the above mentioned transaction results in the transfer of shares of Accelyst India.

iii) In view of the above findings, the Tribunal held that the captioned transaction would be taxed in accordance with Article 13(6) of the relevant DTAA and hence not taxable in India.

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