INTERNATIONAL TAXATION

Case Law Update

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A. High Court

1 ***Concentrix Services Netherlands B.V. vs. ITO [2021] 127 taxmann.com 43 (Delhi)[22-04-2021]***

For applying the benefit of MFN clause under the India-Netherlands DTAA (which limits the rate of withholding tax imposed by India at a lower rate of 5% on dividend), the Third state (i.e. Slovenia, Lithuania and Columbia which have executed a DTAA with India) should not necessarily be a member of OECD at the time when India-Netherlands DTAA was executed but should be a member of OECD when the said MFN clause is invoked i.e. when a request is made by the payer or deductee for applying the provisions of the India-Netherlands DTAA

Facts

i) The assessee, tax residents of Netherlands, were expecting to receive dividend income from its wholly-owned subsidiaries in India. The assessee made an application with the AO u/s 197 of the IT Act to grant a lower rate withholding certificate under the IT Act, wherein the request was to permit remittance of dividend by the said Indian subsidiaries after withholding taxes at lower rate of 5% as per the MFN clause in India-Netherlands DTAA (hereinafter referred as Netherlands DTAA) read with the dividend article in India's DTAAs with Slovenia/ Lithuania/ Columbia (hereinafter referred as MFN DTAAs).

ii) The AO issued a withholding tax certificate stating that the taxes would be required to be withheld at the rate of 10% as per Netherlands DTAA when dividend income was remitted. The AO held that the benefit of MFN clause would be available only if the country with which India enters into a DTAA was an OECD member at the time of execution of the Netherlands DTAA. However, since Slovenia, Lithuania and Columbia were not OECD members on the date of execution of the Netherlands DTAA and became members only on a later date, MFN clause of Netherlands

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DTAA had no application. Further, the AO also contented that no notification was issued in order to give effect to the MFN clause of Netherlands DTAA.

iii) The Taxpayers contended that the benefit of MFN clause was automatic and could be triggered the moment India entered into a beneficial DTAA with a member of OECD and that there was no requirement to issue any specific notification to accord the beneficial rate of 5%.

iv) Aggrieved by the decision of the AO, the assessee filed writ petition before the Delhi HC.

Decision

i) The HC referring to the MNF clause of the Netherlands DTAA (relevant extract of which is reproduced below), held that the rate of withholding tax would be 5% on the dividend income under Article 10(2) of the Netherlands DTAA and ruled that the 10% withholding certificates should be quashed and a fresh certificate indicating lower rate of 5% should be issued by the tax authority.

"If after the signature of this convention under any Convention or Agreement between India and a third State which is a member of the OECD, India should limit its taxation at source on dividends, interests,.. to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention."

ii) The HC observed that the protocol of a DTAA forms an integral part of the DTAA and there is no requirement of issuing a separate notification in order to apply the provisions of the protocol. Reliance was placed on the Delhi HC decision in the case of ***Steria (India) Ltd. vs. CIT [[2016] 386 ITR 390].*** Further, the HC also observed that the MFN clause incorporates the principle of parity between Netherlands DTAA and the MFN DTAAs qua the rate of withholding tax or the scope of the DTAA in respect of items of income concerning dividends, interest, royalties, etc.

iii) As per the MFN clause, the principle of parity would be applicable if the following conditions are satisfied:

a. The third state with whom India enters into a DTAA is a member of the OECD.

b. The DTAA executed with the third state i.e. MFN DTAAs limits the rate of withholding tax imposed by India at a rate lower or a scope more restricted, than the rate or scope provided in the Netherlands DTAA.

iv) On satisfaction of the above conditions, the benefit of lower withholding tax or the restricted scope of MFN DTAAs would be applicable to Netherlands DTAA from the date when the DTAA with the third country came into force.

v) The HC rejected the contention of the Revenue that that MFN clause of Netherlands DTAA could be made applicable only in cases where the third state "is" a member of OECD on the date when the DTAA has been entered into with India, whereas the DTAAs with Slovenia/Lithuania/ Columbia were entered into with India when these countries were not OECD members and became OECD members only on a later date. The High Court held that:

a. The word "is" described a state of affairs that should exist not necessarily at the time when Netherlands DTAA was executed but when a request was made by the payer or deductee for issuance of a lower rate withholding tax certificate under the IT Act.

b. Assuming the Netherlands DTAA language was susceptible to two readings, to glean the intent of the India and Netherlands in framing MFN clause reliance could be placed on the decree issued by Netherlands (issued on 28 February 2012 [No. IFZ 2012/54M, Tax Treaties, India] published on 13 March 2012), wherein Netherlands has provided the benefit of 5% withholding tax with reference to participation dividend paid by companies resident in Netherlands to a body resident in India from the date when Slovenia became a member of OECD.

c. As per "common interpretation" rule, in order to allocate tax claims equally between the two contracting states, the courts of the contracting states were required to ensure that DTAAs are applied efficiently and fairly so that there was consistency in the interpretation of the provisions by the tax authority and courts of the concerned states. However, the common interpretation rule should be applied with care and caution having regard to the fact that the view expressed could be unique and/or personal to the tax authority or a court. Hence, an attempt should be made to choose a view that finds general acceptance with courts and authorities. Netherlands had interpreted the MFN clause in a particular way and, therefore, the principle of common interpretation would be applicable to ensure consistency and equal allocation of tax claims between the contracting states.

d. While interpreting international treaties including DTAAs the rules of interpretation that apply to domestic or municipal law need not be applied, as international treaties, conventions and DTAAs are negotiated by diplomats and not necessarily by men instructed in the law.

vi) There could be a hiatus between the dates on which the DTAA is executed between India and the third state and the date when such third state becomes a member of OECD. The MFN clause can only apply when the third state fulfils the attribute of being a member of the OECD.

2 *Pfizer Healthcare India Pvt. Ltd. vs. JCIT [TS-766-HC-2020(MAD)-TP]*

The time limit of 60 days for passing a transfer pricing order u/s 92CA(3A) read with section 153 of the IT Act, is mandatory in nature, failing which the transfer pricing order would be barred by limitation

Facts

i) The assessee, a domestic company, was subjected to assessment proceedings under the IT Act for AY 2016-17.

The AO had referred the case of the assessee to the TPO for benchmarking the international transactions of the assessee. The TPO passed the order u/s 92CA(3A) of the IT Act on 01.11.2019.

ii) The assessee filed writ petition before the Madras High Court challenging the order passed by the TPO as barred by limitation. Before the HC, the assessee contended that in terms of section 92CA(3A) of the Act, the TPO was required to pass the order at any time before 'sixty days prior to the date' on which the period of limitation referred to in section 153 of the IT Act expired. Further, the assessee also contended that the limitation u/s 153 of the IT Act expired on 31.12.2019 and consequently the period of 60 days prior thereto would run till the 01.11.2019 and therefore 'any date prior thereto' would mean the 31.10.2019 or before.

iii) The assessee also contended that the word 'may' used in Section 92CA(3A) of the IT Act was to be read as 'shall'.

iv) Whereas, the Revenue contended that limitation to pass an order of assessment runs till 12 AM of 01.01.2020 and therefore the period of 60 days would have to be computed including the 31st day of December, 2020 and ending on the 2nd of November, 2019. Consequently, the Revenue contended that the impugned order by the TPO was not barred by limitation.

v) Further the Revenue also argued that the time frame u/s 92CA(3A) of the IT Act was only directory and merely a guide to ensure that the TP audit was completed, roughly, within the period of 60 days and forwarded to the AO for integration with, and completion of assessment within the overall time limit prescribed u/s 153 of the IT Act. The Revenue also placed reliance on the General Clauses Act wherein it was provided that interpretation of the word 'to' means that the date has to be included.

vi) The Madras HC held as under:

Decision

i) The HC observed that for the purpose of interpretation, one should not proceed blindly on the basis of the words/ phrases employed in Statute (i.e. the words/phrases - 'may', 'shall', 'no order shall be passed' or 'within') and the scheme of assessment in its entirety as well as the intention of Legislature qua that scheme of assessment must be taken into account.

ii) The HC observed that an assessment involving TP issues was measured by limitation at every step, and that provisions of section 144C of the IT Act prescribed mandatory time limits both pre and post the stage of passing of a transfer pricing order u/s 92CA of the IT Act. Further, the HC also observed that assessments involving TP issues were different and distinct from regular assessments and required a separate set of officers, and a dispute resolution mechanism for resolving TP disputes in a timely manner. By placing reliance on the decision of SC in case of D.K.Basu vs. State of West Bengal (2015 8 SCC 744), the HC held that the period of 60 days stipulated for passing of an order of transfer pricing u/s 92CA(3A), was not merely directory in nature or a rough and ready guideline.

iii) With respect to the computation of period of limitation u/s 153 of the IT

Act, the HC rejected the Revenue's contention that limitation expires only on 12 AM of 01.01.2020, by observing that that the period of 21 months expires on 31.12.2019 and an order would be held to be barred by limitation as proceedings for assessment should be completed before 11.59.59 of 31.12.2019.

iv) Further, the HC also held that on excluding 31.12.2019, the period of 60 days would expire on 01.11.2019 and therefore the impugned orders thus ought to have been passed on 31.10.2019 or any date prior thereto. The HC also placed reliance on the CBDT Central Action Plan, wherein it was indicated that the date by which the Transfer Pricing orders are to be passed was 31.10.2019.

v) Thus, the impugned order passed u/s 92CA(3A) of the Act was held to be barred by limitation.

3 *Puma Sports India P. Ltd [TS-221-HC-2021(KAR)]*

Commission paid to non-resident agent for rendering services outside India, would not be taxable in India u/s 5(2)(b) read with section 9(1)(i) of the IT Act and consequently the Indian payer would not be required to be withhold taxes u/s 195 of the IT Act

Facts

i) The assessee, a domestic company and subsidiary of Austria Puma Dassler GmbH, was engaged in the trading of sports gear - mainly footwear, apparel and accessories. The purchases by the assessee consisted of import from related parties and unrelated third parties as well as domestic purchase from the local manufacturers. During the year under consideration, its AEs rendered services outside India in the form of placing the orders with manufacturers and the assessee had paid commission to the said AEs abroad for the said service.

ii) During the course of assessment proceedings, the AO made disallowance u/s 40(a)(i) of the IT Act for non-deduction of taxes at source at the time of making payment of commission to non-residents. The action of the AO was upheld by the DRP.

iii) On further appeal, the Tribunal held in favour of the assessee by relying on co-ordinate bench ruling in case of ***M/s. Exotic Fruits Pvt. Ltd. vs. ITO (ITA Nos.1008 to 1013/Bang/2012 dated 4.10.2013)***, wherein it was held that the income of the non-residents by way of commission cannot be considered as accrued or arisen or deemed to accrue or arise in India as the services of such agent were rendered/utilized outside India and the commission was paid outside India.

iv) Aggrieved by the order of the Tribunal, the Revenue filed appeal before the Karnataka High Court

Decision

i) The High Court held that the commission that becomes payable after receipt of goods, accrued, when the services were rendered by the AEs in the form of placing orders with the manufacturers. Therefore, the HC held that the Tribunal was justified in holding that the income of the AEs by way of commission could not be considered as accrued or arisen or deemed to accrue or arise in India u/s 5(2)(b) r.w.s 9(1)(i) of the IT Act, as the services of such agent were rendered/utilized outside India and the commission was paid outside India.

ii) Further, it was not the case of the Revenue that the AEs had rendered services in India in the form of placing orders with the manufacturers and therefore, the Tribunal was justified in holding that the TDS was not deductible from commission paid to the AEs.

iii) The HC further distinguished the decision of ***GVK Industries Ltd. vs. ITO (SC) 371 ITR 453***, by observing that in the present case, the services were rendered by the AEs outside India and the said services were not at all utilized in India as in the case of GVK industries (supra).

iv) The HC also relied on the decision of SC in case of ***CIT vs. Toshuku Ltd. [reported in 1980 (sup.) SCC 614]*** wherein the SC dealing with non-resident commission agent held that if no operations of business are carried out in the taxable territories, the income accruing or arising abroad through or from any business connection in India cannot be deemed to accrue or arise in India.

v) Thus, the HC concluded that since no taxing event had taken place within the territories of India, the Tribunal was justified in allowing the appeal of the assessee.

B. Tribunal

4 *Bank of India vs. DCIT [2021] 125 taxmann.com 155 (Mumbai - Trib.)*

In scenario where assessee was incurring losses on an overall basis in India and there was no actual payment of taxes in India, tax paid on its foreign income abroad would not be allowable as credit in India (and, consequently the assessee could not seek refund from the Indian exchequer). However, the said foreign tax would be allowable as a deductible expense to the assessee in view of the jurisdictional High Court ruling in case of *Reliance Infrastructure vs. CIT [TS-676-HC-2016 (Bom)]*.

Facts

i) The assessee, an Indian public sector bank, earned business income from foreign branches and dividends from foreign companies from various countries both with which India had or did not have a Double Taxation Avoidance Agreement (DTAA) [i.e. from UK, US, France, Belgium, Kenya, Japan, Singapore, China, Hong Kong, Cambodia and Jersey]. The assessee paid taxes in those countries as per domestic tax laws of the respective countries, read with the DTAA wherever applicable.

ii) However, on an overall basis, it incurred loss in India after taking into consideration the foreign incomes and, hence, it did not have any Indian tax liability on such foreign incomes. The assessee claimed credit (and, consequently, refund) of foreign taxes. Further, the assessee also took an alternate claim that in the event the said foreign taxes were not available as tax credit in India, the same should be allowed as business expense.

iii) The AO and the CIT(A) rejected both the pleas of the assessee.

iv) The assessee filed an appeal before the Tribunal:

Decision

i) The Tribunal after referring to the provisions of section 90 of the IT Act and the concerned DTAA's, rejected the assessee's claim of refund of foreign taxes, however allowed its claim for business expense deduction in respect of the same.

Subject to tax v. Liable to tax

ii) The assessee contended that the foreign incomes were "liable to tax" in India and that the mere fact that there was no final Indian tax liability due to overall losses of the assessee, was not a relevant factor to deny credit of foreign tax. The foreign incomes had the effect of reducing the losses incurred in India in as much as that the foreign income were includible in the total income of the assessee in India and thus the assessee was entitled to the credits of foreign tax in India.

iii) The Tribunal observed that what is relevant for FTC, as per Article 24 of the concerned DTAAs, was that the assessee should be "subject to tax" on such incomes both in India and the tax treaty country.

iv) The Tribunal further observed that terms "liable to tax" and "subject to tax" had different meanings and connotations. The term "liable to tax" was relevant for gaining access to tax treaty benefits and it refers to comprehensive liability to tax based on connecting factors like residence, domicile, place of effective management etc. On the other hand, the term "subject to tax" has a narrower meaning and means actual liability to tax. The Tribunal relied on the decisions in case of General Electric Pension Trust ***In Re [(2006) 280 ITR 425 (AAR), CIT vs. Petroleum India International [(2013) 29 taxmann.com 250 (Bom HC)]*** and ***Paul Wiser vs. The Commissioners [(2012) UK FTT 501 (TC)].***

v) In view of the above, the Tribunal held that the assessee did not satisfy the test of "subject to tax" since the foreign incomes were not subjected to tax in India in view of the overall loss incurred by the assessee.

Full credit v. Ordinary Credit

vi) In the present case, the foreign incomes were earned by the assessee from countries which either had a DTAA based on the "ordinary credit" method (or variant thereof like the US) or from countries with which India had no DTAA (and, hence, governed by the "ordinary credit" method as per section 91 of the IT Act).

vii) The Tribunal discussed exposition of the FTC under different methods by referring to views of international tax experts, the OECD and the United Nations model convention commentaries and Indian literature to conclude that FTC does not envisage any situation in which excess FTC can result in a scenario where the taxpayer can claim refund from the exchequer of the resident jurisdiction.

viii) At best, subject to domestic tax rules, excess FTC can be permitted to be carried forward or backward. But the Tribunal clarified that it was not required to adjudicate upon this issue in the present case.

Applicability of Karnataka High Court ruling in case o*f Wipro Ltd vs. DCIT [(2015) 62 taxmann.com 26 (Kar)]*

ix) The Tribunal observed that Karnataka HC ruling in Wipro's case (supra) was applicable only in a situation where the foreign source income was eligible for profit-linked deduction, but the assessee had sufficient taxable income against which it can claim FTC of foreign taxes paid on such income. The Tribunal further held that it was not an authority for granting refund of foreign taxes by the Indian exchequer in scenario where the assessee was incurring overall losses.

x) The Tribunal by placing reliance on ***UOI vs. Azadi Bachao Andolan [(2004) 263 ITR 702(SC)] and UOI vs. Ram Jethmalani [(2011) 12 taxmann.com 27 (SC)]*** observed that unlike statutory provisions, the DTAAs were to be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the DTAA in their context, having regard to their object and purpose rather than a purely literal or legalistic interpretation.

xi) The Tribunal also held that since the decision of Karnataka High Court was a non- jurisdictional HC ruling, it may only have a persuasive effect, unlike the binding effect of a jurisdictional HC ruling. The Tribunal placed reliance on the Bombay HC ruling in the case of ***CIT vs. Thana Electricity Co. Ltd. [(1994) 206 ITR 727 (Bom)]*** for this proposition. Further, the Tribunal also held that it was not possible to give the benefit of doubt in interpretation to the assessee since it was well-settled that such principle was not applicable in the context of deduction, exemptions and exceptions, which can be granted only if clearly authorized by the law. The Tribunal placed reliance on ***Littman vs. Barron 1952(2) AIR 393; Mangalore Chemicals & Fertilizers Ltd. vs. Dy. Commissioner of CT (1992) Suppl. (1) SCC 21; Novopan India Ltd. vs. CCE & C 1994 (73) ELT 769 (SC); State of M.P. vs. Dadabhoy's New Chirmiry Ponri Hill Colliery Co. Ltd. AIR 1972 (SC) 61*** for the said proposition.

xii) The Tribunal preferred to follow its own coordinate bench ruling in the case of ***JCIT vs. Digital Equipment India Pvt. Ltd. [(2004) 94 ITD 340 (Mum)***] wherein it was held that the India- US DTAA merely grants FTC to the extent of Indian tax liability on the income taxed in US and does not permit grant of refund of US taxes from the Indian exchequer.

xiii) The Tribunal applied similar conclusion to FTC claimed in respect of taxes paid in UK, Singapore, US, Belgium, Japan, Kenya, China and France.

xiv) The Tribunal also applied similar reasoning to deny refund in respect of FTC claimed in respect of non-DTAA countries i.e. Jersey, by referring to section 91 of the IT Act which grants credit of foreign taxes only in respect of "doubly-taxed income" and therefore when there was no tax liability in India due to loss at an overall level, the condition was not satisfied. The Tribunal placed reliance on the decision in case of *CIT vs. M. A. Morris [(1994) 210 ITR 284 (AP)]* and ***CIT vs. Dr R N Jhanji [(1990) 185 ITR 586 (Raj)]*** wherein FTC was denied u/s 91 to the extent the foreign incomes were allowed as deduction from the Indian income under the profit-linked incentive provision.

Foreign Tax Credit would be allowed as expense to the assessee

xv) The Tribunal followed the decision of the jurisdictional Bombay HC ruling in ***Reliance Infrastructure vs. CIT [TS-676-HC-2016 (Bom)***], wherein the Bombay HC held that since the assessee was not entitled to claim FTC on u/s 91 of the IT Act, it was entitled to claim business expense deduction for such expense.

xvi) Further, the Tribunal also took note of the Ahmedabad Tribunal ruling in the case of ***DCIT vs. Elitecore Technologies Pvt. Ltd. [(2017) 80 taxmann.com 6 (Ahd)]*** where the Ahmedabad Tribunal did not follow the decision of ***Reliance Infrastructure ruling (supra)***. The Tribunal, in the present case held that the Ahmedabad Tribunal, in that case, had made it clear that it was not following the decision of Reliance Infrastructure ruling because it was not a binding jurisdictional HC ruling, whereas in the present case, decision of Bombay HC ruling in Reliance Infrastructure was binding.

5 *Atos Information Technology Singapore Pte Ltd [TS-229-ITAT-2021 (Mum)]*

Provision of data centre / managed services (which interalia includes mail box services) by F Co. to an I Co. would neither be taxable as royalty nor as fees for technical services under India-Singapore DTAA

Facts

i) The assessee, a tax resident of Singapore, was engaged in the business of provision of certain services in the nature of data center/managed services to its group concern in India, viz. Atos India Pvt Ltd (Atos India) [which included remote monitoring of server, database situated outside India, disaster recovery and services, delivery management etc.]. During the year under consideration i.e. AY 2014-15 and AY 2015-16, the assessee had received income from Atos India under the following heads viz. 1.) Project Related services to Nokia Siemens, 2.) Project Related services to Standard Chartered Bank, 3.) Services for other projects and 4.) Cost recharge pertaining to salary of Mr. Thomas Boutard.

ii) In the return of income filed for the year under consideration, the assessee did not offer the income from provision of the aforesaid services by claiming that the services neither come within the ambit of 'royalty' under Article 12(3) of the India-Singapore DTAA ('the DTAA') nor it came within the ambit of 'fees for technical services' under Article 12(4) of the DTAA and therefore in absence of a PE of the assessee in India, the same would not be taxable in India in view of the beneficial provisions of the DTAA.

iii) The AO rejected the assessee's contentions and held that the payment received by the assessee would come within the ambit of royalty, both, under section 9(1)(vi) of the IT Act as well as under article 12(3) of the DTAA as the payment was for the use of or right to use of information concerning industrial, commercial, scientific experience and copyright. Further the AO also held that the services could also be treated as FTS under article 12(4) of the DTAA because the assessee had provided managerial and technical services to Atos India.

iv) On filing objections before the DRP, the DRP observed that the assessee had not made any effort to substantiate how various services rendered by it would not fall within the category of royalty/FTS with reference to the provisions of the DTAA. Therefore, the DRP based on the materials available on record, went on to analyse the services. W.r.t the managed services, the DRP concluded that the assessee provided equipment and associated software and services to manage the equipment, hence, such services would fall within the ambit of royalty u/s 9(1)(vi) read with Explanation 2(iva) as well as article 12(3)(b) of the DTAA. W.r.t the services for the Nokia Siemens and Standards Chartered Bank project, the DRP observed that the assessee practically provided all the managed services relating to the maintenance of servers of Atos India and also provided access to its specialised software's and applications, and therefore the DRP held that the same would be taxable as royalty under the DTAA. W.r.t the cost recharge of salary of Mr. Thomas Boutard, the DRP held that the said employee had provided assistance for finalization of annual accounting results of Atos India, thereby the said employee had imparted technical knowledge, experience or skill to the employees of Atos India which would enable the employees to render the task in future without his assistance and was therefore taxable as FTS under Article 12(4) of the DTAA.

v) The assessee filed an appeal before the Tribunal and the Tribunal held as under:

Decision

i) The Tribunal referred to the provisions of article 12(3) of the DTAA and observed that the said article provides 3 conditions to be satisfied to classify payment as 'royalty' viz. the payment is for: (i) the use or right to use industrial, commercial or scientific experience, (ii) use or right to use any copyright of a literary, artistic work etc., and (iii) use or right to use industrial, commercial or scientific equipment.

ii) The Tribunal observed that the assessee was simply providing mailbox hosting services and data centre services through servers maintained by it in Singapore and that the assessee was required to ensure proper functioning of the server with related software while providing such services.

iii) There was no material on record to show that assessee: (i) had allowed Atos India or any other party use of commercial or scientific experience or (ii) use or right to use of any copyright of literary, artistic or scientific work including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark etc. or (iii) the assessee was renting out either the servers or any other equipment to Atos India while providing services or that it even allowed the servers to be accessed by Atos India.

iv) Further, the Tribunal relied on co-ordinate bench decision in case of ***DCIT vs. Suvvis Communications 158 ITD 750 (Mumbai)*** for holding that though, in course of rendition of services there may be involvement of or use of scientific equipment's, but, the consideration received was not for use of equipment simpliciter, but for rendering services.

v) The Tribunal, by relying on co-ordinate bench decision in case of ***Edenred Pte. Ltd. vs. DCIT ITA 1718/Mum/2014*** observed that the payment received was not for use of information concerning industrial, commercial or scientific experience and the services were purely IT infrastructure management and mailbox hosting services and for rendering which the assessee had neither allowed use or right to use of any copyright of literary, artistic or scientific work, etc. or use of information concerning industrial, commercial. Therefore, the Tribunal held that the payment received by the assessee for rendering services relating to various projects would not qualify as royalty under Article 12(3) of the DTAA.

vi) W.r.t the services being treated as fees for technical services under the DTAA, the Tribunal observed that there was nothing on record to suggest that Atos India could use any technical knowledge, experience, skill, know-how or process, etc. independently on its own without requiring the involvement of the assessee and therefore, the Tribunal held that the payment was not fees for technical services, since no technical knowledge was made available.

vii) W.r.t the issue of cost recharge pertaining to the salary of Mr Thomas Boutard, the Tribunbal observed that similar payments were made to the concerned person in subsequent AY's which were allowed by the AO. Further, the Tribunal also observed that its taxability required examination in as much as that whether while rendering such services, the concerned person had made available any technical knowledge, skill, know-how, etc. to the employees of Atos India, which was not analysed by the AO and the DRP, the Tribunal restored this issue to AO for fresh adjudication, after the due opportunity of being heard was given to the assessee.

6 *BYK Asia Pacific Pte. Limited vs. ACIT TS-203-ITAT-2021(PUN)*

Payments made by Indian branch to foreign head office as reimbursement would not be liable to withholding tax, when there is one-to-one direct correlation between the outgo and inflow of the receipt and the payment is without any profit element

Facts

i) The assessee, a tax resident of Singapore, had several branches in several countries, including a branch office in India (Indian BO). The assessee was a part of a group of companies with the parent company in Germany (German Parent).

ii) The Indian BO was engaged in providing technical support services in the Asia Pacific region to the customers of its German Parent. It allowed the customers of its German Parent to test the effect of the formulations on the customer's products at its testing facilities and provided technical support to such customers. It also provided technical analysis and troubleshooting exercises for the queries raised and technical problems faced by the customers in the Asia Pacific region.

iii) The Indian BO did not charge any service fee from the customers to whom technical services were provided, but instead the Singapore HO reimbursed the Indian BO with all actual expenses incurred with a 10% mark-up. The Indian BO had treated itself as Permanent Establishment (PE) of the Singapore HO and offered for taxation the amount it received as mark-up on the cost of services provided.

iv) Further, during AY 2016-17, the Indian BO claimed deduction towards reimbursement of expenses i.e. Seminar expenses, IT expenses, Training expenses, Printing expenses, Staff welfare expenses. (paid to the Singapore HO) without deducting tax at source under section 195 of the IT Act. During the course of assessment proceedings, the AO disallowed the said expense / reimbursements u/s 40(a)(i) of the IT Act for non-deduction of tax at source (TDS).

v) The action of the AO was upheld by the DRP. The assessee filed appeal before the Tribunal and the Tribunal held as under:

Decision

i) The Tribunal observed that any transaction between the Indian BO and the Singapore HO was liable to be considered as a transaction between two separate independent entities, insofar as the taxability in India was concerned. Further, u/s 195 of the IT Act, the chargeability of the amount to tax in India in the hands of recipient was sine-qua-non so as to trigger TDS.

ii) The Tribunal observed that two fundamental conditions must co-exist in order to fall within the domain of reimbursement:

a. One-to-one direct correlation between the outgo of the payment and inflow of the receipt must be established. This condition would be satisfied when there was a directly identifiable amount which was spent on behalf of another and later on it was recovered as such from the latter. Therefore at the stage of incurring the expenditure itself, it was known to be for the benefit of the other and not the payer.

b. The receipt and payment must be of identical amount. This condition would be satisfied when the receipt of the amount originally spent was not mixed with any mark-up, inasmuch as exact amount incurred was recovered. Per contra, receipt of a fixed amount, which may be more or less than the actual outgo, could not be designated as 'reimbursement'.

iii) In view of the above, the Tribunal observed that each payment would have be to be considered separately to determine whether or not they constituted reimbursement of expenses.

W.r.t Seminar Expenses

iv) The Tribunal observed that a seminar was conducted in Germany, which was attended by certain customers of the German Parent who operated from India in association with the Indian BO. The Tribunal further observed that it was a back-to-back transaction wherein the third party had billed to the German Parent and eventually the Indian BO was charged by the Singapore HO with an equal amount, thereby demonstrating that at the time of incurring expense, it was very well known what was being incurred for and on behalf of the Indian BO. There was an identifiable amount incurred for the Indian BO, which was recovered as such without any mark-up from the Indian BO. Accordingly, the Tribunal held that the transaction was without any mark-up and in the nature of reimbursement of costs in the hands of the Singapore HO. Similar position was adopted for other expenses (such as business entertainment, overnight accommodation, etc.) under the head seminar expenses.

W.r.t Training Expenses

v) The Tribunal observed that invoices pertaining to training expenses were raised by a third-party on the Singapore HO. 22 persons had attended the training, out of which 3 persons were from the Indian BO and remaining 19 persons were either from Singapore or Thailand or Vietnam or Japan etc., being, the locations where the other entities of the Singapore HO were located.

vi) The Indian BO's share in such expenses representing three persons from the Indian BO, billed originally by the third-party to the Singapore HO, had been recovered as such by the Singapore HO without any mark-up and there was a one-to-one correlation between the amount spent by the Singapore HO and that recovered from the Indian BO without any mark-up. Based on the above, the Tribunal held that the said expenditure also satisfied the conditions of reimbursement and hence, did not require any TDS at the time of making payment.

W.r.t Printing and staff welfare expenses:

vii) The Tribunal observed that third-party had raised an invoice on the Singapore HO towards printing of certain visiting cards by the employee of the Indian BO. The exact amount which was billed by the other party to Singapore HO was recovered from Indian BO as such without any mark-up. Similar was the position regarding other vouchers under the head of printing expenses, which represented the printing of visiting cards by the employees of the Indian BO. Based on the above, the Tribunal held that the said expenditure also satisfied the conditions of reimbursement and hence, did not require any TDS at the time of making payment.

W.r.t IT Expenses

viii) German parent had rendered IT Services, inter alia, to the Indian BO on a regular basis and a monthly charge was raised there against. IT expenditure represented payments for receipt of intra-group services. The Indian BO allowed the customers of German entity to test the effect of the formulations on the customers' products at its testing facilities. The costs were recharged to the group companies including Singapore HO based on number of users, etc. Thereafter the Singapore HO apportioned the corresponding cost in relation to the usage of IT support services for the India activities.

ix) The Tribunal observed that the nature of work done by the Indian BO was that of providing technical analysis and testing of its parent company's additives used by Indian customers in their products, however the question as to whether or not TDS was required in the instant case on this payment could not be decided without examining the nature of IT expense and its correlation with the income earning activity.

x) In order to decide the correct nature of transaction, the matter was remanded back to the file of AO for examining the true nature of transaction and thereafter determine whether or not tax was deductible at source under Section 195 of the Act and the consequential disallowance under Section 40(a)(i), if any.