INTERNATIONAL TAXATION
Case Law Update

Dr. CA Sunil Moti Lala
Advocate

A. SUPREME COURT

1 ***CIT vs. GE India Technology Centre (P.) Ltd. [(2024) 161 taxmann.com 707 (SC)]***

Revenue's review petition was dismissed against order of Hon'ble Supreme Court holding that amount paid by resident Indian end-user/distributors to non-resident computer software manufacturers/suppliers, as consideration for resale/use of computer software through EULAs/distribution agreement, was not payment of royalty for use of copyright in computer software, and thus, same did not give rise to any income taxable in India.

2 ***CIT vs. Gracemac Corporation [(2024) 161 taxmann.com 510 (SC)]***

The Hon'ble SC dismissed Revenue's SLP against order of the Hon'ble HC holding that where payments were made by an Indian company to a non-resident company which was computer software manufacturer/supplier for resale/use of computer software through distribution agreements, the said payment did not amount to royalty for use of copyright and computer software, and then same did not give rise to any income taxable in India.

3 ***PCIT vs. Microsoft India (R and D) (P) Ltd. [(2024) 161 taxmann.com 770 (SCi)]***

The Hon'ble SC dismissed Revenue's SLP against order of Hon'ble HC holding that companies earning revenue from software development services as well as sale of software products about which segmental information was not available could not be accepted as comparables to assessee company rendering only software development services to its AE.

B. TRIBUNAL

4 ***J.M. Voith SE & Co. KG vs. DCIT [(2024) 161 taxmann.com 734 (Delhi Tribunal)]***

The Hon'ble Tribunal held that where assessee had entered into a single contract providing for purchase, installation, commissioning, performance – run of a single unit, and the assessee was required to ensure proper functioning of paper mill after commissioning through start-up and test-run, since contract was a composite indivisible contract of setting up paper mill in India, receipts from offshore supplies of plant and equipments etc. were taxable in India

Facts

i) The Assessee, a non-resident company incorporated in Germany, was engaged in business of design and manufacture of paper machines.

ii) It entered into four contracts with Indian entities for design, manufacture, supply, installation, commissioning etc. of paper machines - Under aforesaid contracts, assessee received certain amount for which it claimed that same was not chargeable to tax in India as all activities relating to offshore supplies, such as, manufacturing, fabrication, designing etc. had taken place outside India.

iii) The AO held that though entire contract comprised of end to-end single integrated activity of setting up paper making plant in India, assessee had dissected various activities only for purpose of tax avoidance. Since the assessee was involved in entire activities starting from design to manufacture, supply, erection, commissioning, test run of entire plant and machinery, it could not be denied that assessee had a PE in form of supervisory PE.He thus concluded that though equipments needed for paper mill were manufactured by assessee in Germany but were utilized in India, hence, a part of profit earned by assessee from offshore sale/supply was directly attributable to PE in India. Further, he estimated profit at rate of 10 per cent on income received from offshore supply of plant and equipment and attributed 25 per cent thereof as profit of PE.

iv) The CIT(A), more or less agreed with the decision of the AO. However, he reduced the profit on off shore supply estimated by AO at 10% to 5%.

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

Decision

i) The Hon'ble Tribunal held that, a reading of the agreement, as a whole, revealed that the assessee was given one integrated end to end activity of setting up a 6000 MTs capacity per annum state of art CWBN paper making machine compatible with slitter, sheet cutter, inspection packaging line and mould cover plant on turnkey basis, which is otherwise known as the mill. The end to end activity covered design, supply, erection, commissioning, performance run of the entire paper mill. Thus, the assessee had to complete a single integrated project in terms of the contract.

ii) The agreement further revealed that assessee's obligation under the contract did not end with the supply of goods and equipments, but would only end with the satisfactory commissioning and performance run of the paper mill. Only after the satisfactory performance run, the assessee could receive full payment qua the supply of goods and equipments. Thus, supply of goods and equipment from outside India could not be treated as a standalone activity. On the contrary, as per the scope of work under the agreement, the assessee had to deliver the project of the Security Paper Mill and hand over to the contractee at deliverable stage as a complete package.

iii) The contract between the assessee and the contractee was not for purchase of plant and equipments simpliciter, but a complete paper mill to be installed and commissioned at deliverable stage. Thus, assessee's contention that the income received from supply of plants and equipments was not chargeable to tax in India, as the supplies were made from outside India, was not acceptable.

iv) Further, the Hon'ble Tribunal observed that receipts from offshore supplies were

in relation to four projects in India and prima facie, it appeared that the terms of the contracts in different projects were not identical. Therefore, if offshore supplies of plant and material did not have any relation to onshore services, they could not be brought to tax in India. These facts had not been verified by going into the terms of the contract by the departmental authorities. Even, to what extent the PE of the assessee, if at all there was one in India, was involved in manufacture and supply of plant and equipments, had not been properly gone into by the departmental authorities. Thus, without properly analysing the role of PE in offshore activities, 25% of the receipts arising out of offshore supplies could not be attributed to PE, as it was purely on *adhoc* basis.

v) Furthermore, the AO had attributed profit rate of 10% to the receipts/income of the PE, which had been reduced to 5% by learned Commissioner (Appeals). The estimation of profit was purely on adhoc basis without any rationale. When the assessee had furnished evidence to show that the global profit rate in the paper division was 3%, there was no justification for adopting the rate at 10% or 5%.

vi) Also, assessee's contention regarding existence or otherwise of PE in terms of paragraph 7, 1(a) and (b) of Protocol to India-Germany DTAA had not at all been considered by learned first appellate authority.

vii) Since, various claims and contentions of the assessee had not been considered by the departmental authorities while attributing part of the receipts from offshore supplies as income of the PE, the Hon'ble Tribunal restored the issue to the Assessing Officer for de novo adjudication after providing reasonable opportunity of being heard to the assessee.

5 *Genpact Services LLC vs. ACIT [(2024) 161 taxmann.com 765 (Delhi Tribunal)]*

The Hon'ble Tribunal held that where assessee, an Indian branch of US based company, availed support services from its AEs and TPO accepted cost allocation key of 'headcount' used by assessee for allocation cost of support services, which was accepted by TPO to be at ALP, the same could not be subjected to retest by AO under garb of examining same in context of allowability of deduction under section 37

Facts

i) Assessee was an Indian branch of Genpact, a US based company. It was a service provider rendering off-shore support services akin to BPO services, including collections/analytics, call center services and other back-office support services to its AEs.

ii) Assessee rendered designated BPO collection services from its facility/ infrastructure in India for which it required various support services like technology etc.

iii) Assessee availed such services from its AE for which it paid support services fee. In relation to said support services, expenses incurred by AEs were subsequently allocated to group companies based on appropriate allocation keys.

iv) The TPO accepted cost allocation key of 'headcount' used by assessee for allocation cost of support services.

v) There was a survey in the case of the assessee and the entire set of documents in support of the workings of the cost allocations were duly furnished before the survey team itself and no defects were pointed out in the said workings

either by the survey team or by the AO. However, subsequently the AO while passing assessment order changed cost allocation methodology to 'salary expense ratio' and disallowed support services cost.

Decision

i) The Hon'ble Tribunal held that fact of services being rendered was not disputed by the revenue right from the time of survey. The cost allocation Key on 'headcount basis' had been duly examined and accepted by the ld TPO to be at ALP in the transfer pricing proceedings. The same could not be subjected to retest by the ld AO in the peculiar facts and circumstances of the instant case, under the garb of examining the same in the context of allowability of deduction u/s. 37 of the Act.

ii) No doubt, the scope of ld TPO is only to ensure whether the pricing of services is at arm's-length or not. But for that purpose, the cost sharing agreement, cost allocation keys used thereon and reasons for such usage of allocation keys were very much material for the ld TPO to examine and conclude whether the pricing thereon is at ALP or not. In the instant case, all these documents were duly placed on record before the ld TPO and the same was accepted to be at ALP by the ld TPO.

iii) The reference u/s. 92CA(1) of the Act to the ld TPO was made by the ld AO after the survey proceedings. Hence, even the findings of the survey team were very much available before the ld TPO.

iv) It noted that the cost allocation on the basis of "headcount" had been affirmed to be an appropriate allocation key by the Hon'ble jurisdictional High Court in the case of ***CIT vs. EHPT India Private Limited reported in [2011] 16 taxmann.com 305/[2012] 246 CTR 217/[2013] 350 ITR 41/[2012] 204 Taxman 639 (Delhi)*** and by the coordinate benches of the Hon'ble Tribunal in the case of ***Orange Business Services India Solution Pvt Ltd vs. DCIT in ITA No. 6928/Del/2017 for AY 2013-14 dated 15.07.2021*** and in the case of ***Cable and Wireless India Ltd vs. DCIT in ITA No. 6075/Mum/2017 for AY 2012-13***.

v) In light of the above, the Hon'ble Tribunal allowed the assessee's appeal and deleted the disallowance.

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6 *DCIT vs. DLF Urban (P) Ltd. [(2024) 161 taxmann.com 585 (Delhi Tribunal)]*

The Hon'ble Tribunal held that (a) clause (i) of Section 92-BA which has been omitted from 1-4-2017 has to be considered to have never been part of the statute and, accordingly no transfer pricing adjustment could be made on a domestic transaction. (b) When a transaction involving land was to be bench marked, the AO was not justified in making adjustment considering circle rates invoking principles of Section 50(c) and rejecting the market value based on the detailed valuation report of Cushman & Wakefield (wherein 'other method' was chosen being average of sales comparable method and discounted cash flow method for bench marking the transaction).

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7 *Axis Bank Ltd. vs. ACIT [(2024) 161 taxmann.com 530 (Ahmedabad Tribunal)]*

The Hon'ble Tribunal held that where assessee had provided tier II loan to its UK based AE, interest rates prescribed under Safe Harbour Rules as per rule 10 TD (2A)(5)(v) i.e six months LIBOR plus 400 bps was acceptable.

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