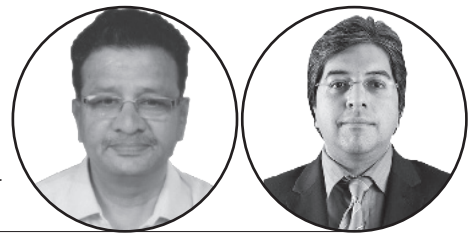

INTERNATIONAL TAXATION

Case Law Update

CA Tarunkumar Singhal & Dr. Sunil Moti Lala

A. TRIBUNAL

1 *Perfetti Van Melle (India) Pvt. Ltd. vs. ACIT*

(ITA No. 9166/Del/2019) TS-413-ITAT-2020 (DEL)

Assessment proceedings stand concluded, when a draft assessment order u/s. 144C is issued along with a notice of demand, and accordingly all the subsequent proceedings (i.e. directions of DRP and AO's final order u/s. 144C) become non est, notwithstanding the fact that the assessee participated in the subsequent proceedings

Facts

i) The assessee, a domestic company, was sought to be subjected with certain additions/adjustments, pertaining to transfer pricing and corporate tax issues, during the course of assessment proceedings for AY 2015-16. Accordingly, the AO passed an assessment order (hereinafter referred as the 'impugned order'), proposing certain transfer pricing and corporate tax additions/adjustments and the said draft assessment order was served to the assessee along with the notice of demand. The AO also initiated penalty proceedings against the assessee.

ii) The assessee participated in subsequent proceedings i.e. before the DRP and subsequently, the assessee preferred an appeal before the Tribunal against the said additions/adjustments.

iii) Before the Tribunal, the assessee sought permission for admission of an additional ground, whereby the validity of the impugned order passed by the AO was challenged by the assessee. The Tribunal admitted the additional ground raised by the assessee since the same was purely a legal issue and did not require verification of facts.

iv) The assessee contended that the impugned order was in contravention of section 144C of the IT Act as passing the impugned order along with issuing the demand notice, resulted in the conclusion of assessment proceedings and thereby the subsequent orders passed by the DRP and the AO were void ab initio.

v) The Revenue contended that the assessee had participated in the subsequent proceedings and thereby it could not be said that the assessment proceedings stood concluded on the date of passing the impugned order, as the assessee was well aware that the impugned order was a draft assessment order and not a final assessment order. Further, the Revenue also contended that the notice of demand accompanying the draft order was merely a 'proposed\draft notice of demand' and neither an entry was made in the Demand and Collection Register nor the order was uploaded on ITD, by the AO.

vi) The Revenue also placed reliance on the decision of Tribunal Kolkata Bench in case of ***Pricewaterhouse Coopers (P.) Ltd. reported in [2020] 117 taxmann.com 276 (Kolkata - Trib.)***, wherein under similar circumstances the Kolkata Tribunal had upheld the action of the AO.

Decision

i) The Tribunal observed that section 144C prescribes a series of steps to be followed in order to conclude an assessment proceedings either u/s. 144C(3) or u/s. 144C(13). The Tribunal observed that by passing the impugned order (followed by a demand notice and initiation of the penalty proceedings), the AO quantified the taxable income and determined tax payable, which resulted in the conclusion of proceedings initiated u/s 144C.

ii) The Tribunal further observed that a demand notice is an integral part of the assessment order. Reliance in this regards was placed on the decision of Hon'ble Gujarat HC in the case of ***CIT vs. Purshottam Das 209 ITR 52*** (which in turn relied on Hon'ble SC ruling in the case of ***Kalyan Kumar Ray vs. CIT 191 ITR 634),*** wherein it was held that assessment is one integrated process involving not only the assessment of the total income but also the determination of the tax and the latter being as crucial as the former.

iii) The Tribunal dismissed the Revenue's plea that the impugned order was the draft assessment order and that the demand notice was merely a 'proposed\draft notice of demand' as neither an entry was made in the Demand and Collection Register nor was the impugned order uploaded on ITD. It was observed that there was no provision under the I.T Act which required issuance of a proposed/draft notice of demand and secondly, whether the demand had been entered in Demand and Collection Register or whether the order was uploaded in the ITD was an internal matter/procedure of the Revenue and the same could not be taken into consideration to decide whether the demand notice issued along with impugned order completed the assessment proceedings.

iv) Further, the Tribunal held that the assessment could not survive since the AO had bypassed the mandatory provisions of section 144C. Reliance in this regard was placed on the decision of Supreme Court in case of Dipak Babaria reported in 3 SCC 502, wherein it was held that if the law requires that a particular thing should be done in a particular manner, it should be done in that way and none other.

v) With respect to the plea of the Revenue that the assessee had participated in the subsequent proceedings, the Tribunal held that participation in subsequent proceedings would not estop the assessee

from challenging the validity of the impugned order, by relying on the decision of Supreme Court in case of V Mr. P. Firm, MUAR reported in 56 ITR 67. The Tribunal also held the decision of Kolkata Bench in case of Pricewaterhouse Coopers (P.) Ltd. (supra) was 'per incurium' since the said decision had not considered the decision of Supreme Court in the case of V Mr. P. Firm, MUAR (supra).

vi) The Tribunal further observed that there were several decisions (the Tribunal specifically cited coordinate bench ruling in case of Nikon India Pvt Ltd (ITA No. 8752 & 8753/Del/2019), Delhi HC ruling in the case of ***Turner International Pvt Ltd 398 ITR 177*** and ***JCB India Ltd (WPC 3399/2016),*** wherein it was held that, if the AO had not followed the mandatory steps mentioned in section 144C, the assessment order had been treated as void.

vii) The Tribunal also dismissed the Revenue's plea, that the subsequent participation of the assessee would debar the assessee to raise this issue before the appellate authority u/s. 292B, by observing that this issue had been settled by jurisdictional HC ruling in JCB India Ltd (supra) wherein it was held that the final assessment order stood vitiated not on account of mere irregularity but because it was an incurable illegality, and thus section 292B would not protect such an order.

viii) In view of the above, the Tribunal allowed the additional ground and quashed the impugned order as *non est.*

2 *Edenred (P) Ltd. v. DDIT*

[2020] 118 taxmann.com 2 (Mumbai - Trib.)

Infrastructure Data Centre service which includes services such as mailbox/website hosting services, rendered by a Singapore Co. by using its hardware/security devices/ personnel and not by use of any Software, nor by developing any embedded/secret software, would not be taxable as royalty under the Act as well under the India-Singapore DTAA. Further management consultancy and referral service also, would not be taxable under the India-Singapore DTAA, since the said services did not make available technical skills, knowledge to the Indian entity

Facts

i) The assessee, a tax resident of Singapore, was engaged in the business of provision of services relating to developing, marketing and implementing incentive-based strategies and technologies through the utilization of internet, wireless technology and offline solutions to its clients.

ii) During the year under consideration, the assessee entered into various agreements with Indian entities for provision of (a) Infrastructure & Hosting Data Centre (IDC) Services, (b) Management Consultancy Services and (c) Referral Services for regional customers and claimed the receipts from the said services as not taxable under Article 12 of the India-Singapore DTAA (hereinafter referred as the DTAA).

iii) The AO concluded the assessment proceedings by holding that the receipts from provision of the above-mentioned

services were taxable as royalty in case of (a) & (c) and as fees for technical services for (b) above, under the IT Act as well under the DTAA. The action of the AO was upheld by the DRP.

iv) Before the Tribunal, w.r.t (a) IDC services, the assessee argued that it essentially provided IT infrastructure management and mailbox/website hosting services to its Indian group companies and these IDC services were performed by the appellant's personnel in Singapore. Thus, the receipts from IDC services could not be taxed as royalty under Article 12(3) of the DTAA. The Revenue rebutted the contentions of the assessee by arguing that the Indian entities would be using the IT infrastructure of the assessee via web portal and it was not material whether the right to access had been granted by the assessee-company or not, hence the revenue from the IDC services were in nature of royalty under the Act as well under the DTAA.

v) W.r.t (b) Management Consultancy Services, the assessee argued that Management Consultancy Services broadly included Consultancy services to support sales activities, Legal services, Financial advisory services and human resource assistance and these services were purely consultancy in nature to support various functions of the Indian entity and not to equip the employees of the Indian entity with core managerial functions, hence such services did not make available technical skills, knowledge to the Indian entity and thus were not taxable under DTAA. The Revenue rebutted the contentions of the assessee by arguing that the said services made available technical skills, knowledge to the Indian entity and alternatively also taxable under Article 12(4)(a) of the DTAA allegedly by being ancillary and subsidiary to the IDC services.

vi) W.r.t (c) Referral Services for regional customers, the assessee argued that the referral services/other services were provided only to support the Indian entity in carrying on it business and thereby these services did not make available any technical knowledge, skill, know-how or processes to the Indian entity. The Revenue rebutted the contentions of the assessee by arguing that the services were taxable under Article 12(4)(a) of the DTAA being ancillary and subsidiary to the IDC services and that the referral services should not be seen in isolation with the other services.

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

Decision

i) With respect to IDC services, the Tribunal observed that (a) infrastructure data centre was not an information centre, (b) the Indian entities neither accessed nor used the CPU of the assessee, (c) no CDN system was provided under the agreement and no use/access was allowed thereof, (d) the assessee did not maintain any central data (e) IDC was not capable of information analytics, data management, (f) the assessee rendered IDC service by using its hardware/security devices/personnel and what the Indian entities received was merely a standard IDC service and not any rights to use any software, (g) bandwidth and networking infrastructure was used by the assessee to render IDC services and the Indian entities only obtained the output of such bandwidth and network, (h)

consideration paid by the Indian entities was for the IDC services and not for any specific program and (i) no embedded/ secret software was developed by the assessee.

ii) The Tribunal further distinguished the rulings relied upon by the Revenue i.e. ***Cargo Community Network (P.) Ltd. 289 ITR 355 (AAR), IMT Labs (India) (P.) Ltd. 287 ITR 450 (AAR)*** and ***Thought Buzz (P.) Ltd. 346 ITR 345 (AAR),*** by observing that in the present case, the assessee rendered services by using its hardware/security devices/personnel and did not grant any rights to use any software.

iii) In view of the above, the Tribunal held that receipts from IDC could not be construed as royalty under the Act as well under the DTAA, by relying on the decision of ***Bharati Axa General Insurance Co. Ltd. 326 ITR 477 (AAR); Standard Chartered Bank vs. DDIT (International Taxation) [2011] 11 ITR 721; ExxonMobil Company India (P.) Ltd. vs. Addl. CIT [2018] 92 taxmann.com 5 (Mumbai-Trib.); DCIT vs. Reliance Jio Infocomm Ltd. (ITA No. 936/ Mum/2017).***

iv) With respect to Management Consultancy Services, the Tribunal observed that it was not disputed that the said services were taxable under the Act as fees for technical services. However considering the fact that the said services were provided only to support the Indian entity in carrying on its business efficiently and running the business in line with the business model, policies and best practices followed by the Edenred group, these services did not make available any technical knowledge, skill, know-how or processes to the Indian entity and hence were not taxable under DTAA. It relied on the decision of ***De Beers Minerals (P.) Ltd. 346 ITR 467 (Karnataka), Intertek Services 307 ITR 418 (AAR), M/s Bharati Axa General Insurance Co. Ltd. 326 ITR 477 (AAR).***

v) With respect to Referral Services for regional customers, the Tribunal held that the said services were provided to support the Indian entity in carrying on its business and these services did not make available any technical knowledge, skill, know-how or processes because there was no transmission of the technical knowledge, experience, skill etc. from the assessee to Indian entity or its clients.

3 *IMS AG v. DCIT*
[TS-342-ITAT-2020(Mum)]

Consideration for granting access to the database (on information collected & processed by the assessee particularly in the field of medicine and pharmaceuticals i.e. the IMS reports) would not be royalty under Article 12(3) of India-Switzerland DTAA

Facts

i) The assessee, a tax resident of Switzerland, was engaged in the business of providing market research reports on pharmaceutical sector to its customers across the world at a predetermined subscription price.

ii) The assessee collected, processed and utilized the data and information, particularly in the field of medicine and pharmaceuticals for the delivery of reports through online IMS knowledge link. The assessee entered into agreements with its customers for providing the review reports (referred to as IMS reports) setting out the details of modules required to be accessed

by the customers and the consideration for these services.

iii) In essence, the IMS reports, based on the module selected, were statistical database compilations, providing geo economical data, about a pharma molecule, providing insight into the connected issues relating to information and developments. The licence access so granted was a non-exclusive and non-transferable right.

iv) The tax authorities held that the subscription fees would be taxable as royalty u/s 9(1)(vi) as also under Article 12(3) of the India- Switzerland DTAA (referred as DTAA), by relying on the decision of Hon'ble Karnataka High Court's judgment in the case of ***CIT vs. Wipro Ltd [(2011) 203 Taxman 621 (Kar)].***

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

Decision

i) The Tribunal held that fees for granting access to the database (i.e. the IMS reports) would not be royalty under Article 12(3) of DTAA.

ii) The Tribunal relied on the jurisdictional HC decision in case of ***Dun and Bradstreet Information Services India Pvt Ltd. [(2012) 20 taxmann.695 (Mum)]*** (rendered in the context of India-Spain DTAA) wherein under similar facts, it was held that such consideration towards the supply of publicly available information, could not be treated as royalty or fee for technical services under the India-Spain DTAA.

iii) Further, the Tribunal also observed that India-Switzerland DTAA and India-Spain DTAA are verbatim and hence the ratio of the decision in case of ***Dun and Bradstreet Information Services India Pvt Ltd. (supra)*** would be applicable in the present case.

iv) The Tribunal also observed that once a jurisdictional HC decision had expressed a view, the Tribunal would not be swayed/ bound by the decision of other High Courts.

v) In view of the above, the Tribunal held that the consideration for granting access to the database would not be liable to tax in India under the DTAA.

4 *VVF Ltd. vs. DCIT* *[TS-394-ITAT-2020(Mum)-TP]*

No transfer pricing adjustment could be made on transaction pertaining to payment of share application money to an AE if the said transaction was a genuine transaction

Facts

i) The assessee, a domestic company, was engaged in the business of production and export of chemicals. During the course of assessment proceedings for AY 2011-12, the assessee was subjected to certain transfer pricing adjustments w.r.t (a) provision of corporate guarantee @ bank rates + 1.75%, (b) interest receivables on loan given to AE's in foreign currency @ Libor +3% and (c) interest on payment of share application money to its AE @ Libor +3%. (The assessee had not charged any fee/ interest w.r.t corporate guarantee and loan given to its AE's)

ii) Before the CIT(A), the assessee argued that it had charged corporate guarantee fee at the rate of 1.68% on the basis of its internal cup i.e. the rate at which assessee obtained such guarantee and hence the assessee argued that when the internal cup

was available, the same should be applied. W.r.t interest adjustment on loan given to its AE's in foreign currency, the assessee argued that internal cup was available i.e. Libor +2.68% and hence the same should be applied for benchmarking the said international transaction. W.r.t share application money, the assessee argued that the transaction was a genuine transaction and hence no adjustments on the same should be made.

iii) The CIT(A) upheld the adjustment on account of provision of corporate guarantee. W.r.t adjustment on account of foreign currency loan given to the AE, the CIT(A) directed that the interest should be charged at the rate of Libor +3%. W.r.t re-characterisation of share application money as loans, the CIT(A) upheld the said adjustment and directed that the interest to be charged should be @ Libor +3%.

iv) Accordingly, appeal was filed by the assessee before the Tribunal and the Tribunal held as under.

Decision

i) W.r.t provision of guarantee fees, the Tribunal held the same was an international transaction and not a shareholder function. However, the Tribunal upheld the argument of the assessee that when it had charged corporate guarantee fee at the rate of 1.68% on the basis of its internal cup (i.e. the rate at which assessee obtained such guarantee) hence the same should be applied. As regards interest on loan given to its AE's in foreign currency, the Tribunal held that the internal cup i.e. Libor +2.68% should be applied for benchmarking the said international transaction.

ii) W.r.t adjustment pertaining to interest on payment of share application money to its AE, the Tribunal remanded the said issue to the file of the AO so as to verify the submission of the assessee that the transaction was a genuine transaction not liable for any adjustments. The Tribunal further observed that if the assessee's submissions were accepted then no adjustment should be made, otherwise adjustment for interest @ Libor + 2.68% should be made.

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Just as a man would not cherish living in a body other than his own, so do nations not like to live under other nations, however noble and great the latter may be.

– Mahatma Gandhi

Only he can take great resolves who has indomitable faith in God and has fear of God.

– Mahatma Gandhi