INTERNATIONAL TAXATION
Case Law Update

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A. SUPREME COURT

1 *DDIT vs. Vodafone Idea Ltd. - [2024] 165 taxmann.com 392 (SC)*

SLP was dismissed against order of Hon'ble Karnataka High Court holding that payments made to non-resident telecom operators by assessee, telecommunication service provider, for providing interconnect services and transfer of capacity in foreign countries were not chargeable to tax as royalty at the time when payment was made to non-resident telecom operator for A.Y 2008-09 to 2012-13 since the amendment in Explanation 4 to sec 9 (1)(vi) had prospective operation and consequently the assessee could not be treated as assessee in default for not deducting tax in respect of the said payments.

Facts

i. Assessee held an International long i. Assessee held an International long distance (ILD) License and provided telecommunication services. In order to provide ILD services, it made certain payments (for A.Y 2008-09 to 2012-13) for availing certain services offered by Non-resident Telecom Operators (NTOs) for international carriage and connectivity.

ii. Assessee claimed that as NTOs were located outside India and they provided telecom services outside India, it was not necessary to deduct TDS in India for the relevant period.

iii. AO passed order u/s 201, treating assessee as "assessee in default" for failure to deduct TDS while making payments to NTO.

iv. The Hon'ble Karnataka High Court in V***odafone Idea Ltd. vs. DDIT, (International Taxation) [2023] 152 taxmann.com 575 (Kar)*** held that when payments were made to NTO for providing inter-connect services and transfer of capacity in foreign countries for AY 2008-09 to 2012-13, the same were not chargeable to tax as royalty and the amendment in Explanation 4 to sec 9(1)(vi) had prospective operation. Thus, no tax was deductible when the said payments were made and consequently, the assessee could not be treated as "assessee in default"

v. Aggrieved, the Revenue filed SLP before the Hon'ble SC.

Decision

i. The Hon'ble SC noted that the impugned issue was covered by its judgement in ***Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT – [2022] 3 SCC 321*** which had also been followed in other cases.

ML-697

ii. In response to the Revenue's submission that since a Review Petition was pending before the Hon'ble SC for which a notice was also issued, there was no reason for entertaining any subsequent matter; the Hon'ble SC noted that by order dated 23.04.2024 passed by a three-judge bench in Review Petition (C) Diary No(s) 35475/2023 etc. titled ***CIT vs. GE India Technology Pvt. Ltd. [2024] 161 taxmann.com 707 (SC)***, it had dismissed the said Revenue Petitions both on the ground of delay as well as on merits.

iii. Consequently, the impugned SLP was also dismissed on merits following the aforesaid judgement/order.

2 *Nestle SA vs. Assessing Officer – [2024] 165 taxmann.com 334 SC*

The Hon'ble SC dismissed the review petition filed against its judgement holding that a notification under section 90(1) is a mandatory condition to give effect to a DTAA, or any protocol changing its terms or conditions, which has effect of altering existing provisions of law and thus, for a party to claim benefit of a 'same treatment' clause, based on entry of DTAA between India and another state which is member of OECD, relevant date would be entering into treaty with India and not a later date, when, after entering into DTAA with India, such country becomes an OECD member, in terms of India's practice.

B. TRIBUNAL

3 *ITO vs. Tata Teleservices Ltd. - [2024] 165 taxmann.com 603 (Delhi – Trib.)*

The Hon'ble Tribunal held that where assessee made interest payment to China Development Bank (CDB), same was not taxable in India (even in F.Y 2015-16) as CDB being a financial institution wholly owned by Government of China (despite only 36.45% of its shares being held by Government of China) was covered under the exemption provided both under the pre-amended and post-amended Article 11(3) of India-China DTAA as clarified by the notification dated 17.09.2019.

Facts

i. Assessee company made interest payment to China Development Bank (CDB) without deducting tax at source under section 195 claiming benefit of article 11(3) of the India-China DTAA, on the ground that CDB was a financial institution owned by the Government of China.

ii. AO held that since as per Financial Statement of CDB only 36.45% shares in said Bank was held by Government of China during relevant period, i.e., FY 2015-16, CDB could not claim benefit of DTAA and, hence, assessee was liable to deduct tax under section 195.

iii. CIT(A) held that China Development Bank is a financial institution wholly owned by the Government of China in view of the amended Article 11(3) of India-China DTAA vide Notification No. S.O. 2562(E) [No. 54/2019/F.No. 503/02/2008-FTD-II] dated 17.07.2019 whereby the aforesaid bank has been stated to the included in the list of financial institution wholly owned by the Govt. of China.

iv. Aggrieved, the Revenue filed appeal before the Hon'ble Tribunal on the grounds that CIT(A) failed to appreciate

a. The fact that as per the Financial Statement of China Development Bank only 36.45% shares in the said Bank was held by the Government of China (Ministry of

Finance) during the relevant period i.e. FY 2015-16.

b. Aforesaid amendment had been made w.e.f. 17.07.2019 which was not applicable during the relevant F.Y 2015-16.

Decision

i. The Hon'ble Tribunal held that the erstwhile Article 11(3) and amended Article 11(3) of the India-China DTAA provides that interest arising in India and derived/paid to any financial institution wholly owned by the Government of China is exempt from tax on the interest earned.

ii. It further noted that, in the Protocol to the India-China DTAA, paragraph 3 was simultaneously inserted by deleting the erstwhile paragraph 3 vide the same notification itself i.e. Notification No. 10. 2562(E)(No.54/2019/F.No. 503/02/2008FTD-II). Dated 17-7-2019, which defined the term 'Central bank' and 'Any financial institution wholly owned by the Government of the other Contracting State' as under:

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3. For the purpose of paragraph 3 of Article 11 (Interest):

(a) the term "Central Bank" means, in the case of China, the People's Bank of China, and in the case of India, the Reserve Bank of India

(b) the term 'any financial institution wholly owned by the Government of the other Contracting State' means:

(i) in the case of China:

(A) the China Development Bank:

(B) the Agricultural Development Bank of China:

(C) the Export-Import Bank of China:

(D) the National Council for Social Security Fund:

(E) the China Export & Credit Insurance Corporation:

(F) the China Investment Corporation:

(G) any other institution wholly owned by the Government of China as may be agreed from time to time between the competent authorities of the Contracting States."

iii. In view of the above, it held that paragraph 3 of the Protocol for the purpose of Article 11(3) of India-China DTAA inserted in 2019 has also clearly clarified that China Development Bank is a financial institution wholly owned by Government of China. Paragraph 3 of the Protocol as reproduced above uses the word "means" and not 'includes' or 'deemed to be included" which suggests that CDB is and has always been a financial institution wholly owned by the Government.

iv. It further held that, with the inclusion of the above definition and for the purpose of defining the term financial institution wholly owned by the Government, the protocol restricted the scope of the financial institutions covered under Article 11(3) of India-China DTAA to include the specified institutions or any other institution wholly owned by

ML-699

the Government of China as may be agreed from time to time between the competent authorities of the Contracting States.

v. It thus concluded that, the specific institutions listed in the protocol for both India and China, were always covered as a government owned financial institution for the purpose of Article 11(3) of India- China DTAA. The Article as if stood during the relevant FY was more expansive and after the definition of financial institution wholly owned by the Government in the protocol, wherein China Development Bank is specifically included, it is clear and beyond doubt that China Development Bank is and has always been a financial institution wholly owned by the Government and hence, eligible for the benefit for the provisions of Article 11(3) of India-China DTAA and therefore, the assessee could not be treated as "assessee in default" with respect to non-deduction of tax u/s 195 of the Act on interest payments made to China Development Bank.

vi. Accordingly, the order of the CIT(A) was upheld and the Revenue's appeal was dismissed.

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4 *Coursera Inc. vs. ACIT. - [2024] 165 taxmann.com 683 (Delhi – Trib.)*

The Hon'ble Tribunal held that , a US based company, operated a global online learning platform, offering access to online courses and degrees from leading universities and companies, the Hon'ble Tribunal held that since assessee was merely an aggregation service provider, which brought educational learning on one platform and did not provide services of technical nature to customers, receipts earned by assessee could not be brought to tax as FIS under article 12(4) of India-USA DTAA

Facts

i. The assessee, a non-resident corporate entity incorporated in United States operated a global online learning platform, which offered anyone, anywhere access to online courses and degrees from leading universities and companies.

ii. For the above purpose, it had developed a proprietary platform to host multimedia courses for consumption by end-users. Through its platform, assessee offered online education/courses in various disciplines, including but not limited to management, arts, humanities, data analysis and philosophy etc.

iii. For this purpose, the assessee had entered into agreements with Indian customers including universities from outside India to provide access to its platform in India. The assessee had provided services to individuals, educational institutions and corporates and for providing such services, the assessee had earned fees of ₹ 75,66,52,591/-, which it claimed to be not taxable in India as the same was neither in the nature of royalty nor FTS (and the assessee did not have a PE in India.)

iv. The AO observed that the assessee was not merely providing Content Services to the customers of India, but was also providing a whole range of "User Services", which were user specific, and involved a high degree of human intervention. According to him, the assessee provided customized services to its clients. Though the course content may be prepared by other educational institutions and not by the assessee, however, the fact that the content services and user

services were being provided to Indian customers by the assessee and the completion certificate bore the logo of the educational institution as well as assessee, signified that the training services were being provided by assessee itself. Thus, the AO held that the nature of services provided by the assessee was technical. He further held that while providing such services, the assessee made available specialization, technical skill and knowhow to its customers. Therefore, make available test was also satisfied in terms of Article 12(4) of the treaty. Insofar as assessee's contention that the receipts should fall within the exception provided under Article 12(5) of the tax treaty, the assessee being an educational institution providing teaching facility, the AO negated such contention by stating that the assessee was not an educational institution, rather an aggregation service provider, which brought the educational institutions and learners on one platform by using special cutting-edge technology and services.

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

Decision

i. The Hon'ble Tribunal noted that, it was established on record that the assessee provided a global online learning platform, wherein, various courses and degrees from leading universities and companies were provided and that the said courses and degrees were created by the concerned universities and companies and not by the assessee. The assessee acted as a mere facilitator and provided access to the contents of the universities/companies through the platform on receipt of fees.

ii. These facts clearly indicated that while providing access to various courses/ degrees, the assessee did not provide services of technical nature to the customers. The AO had not brought on record any material to establish the fact that the assessee provided technical services through its online platform. Merely because the assessee had a customized landing page, it did not mean that the assessee provided technical services that too, through human intervention.

iii. Even, assuming for argument's sake, the services provided by the assessee was of technical nature, that by itself would not be enough to bring such receipts within the purview of Article 12(4) of India - USA DTAA, unless the make available condition was satisfied. Burden was entirely on the Revenue to prove that.

iv. Further, relying on decisions of the co-ordinate bench viz ***Elsevier Information systems GmbH DCIT, ITA No. 1683/Mum/2015*** and ***Relx Inc. vs. ACIT, ITA No. 1876 & 1877/Del/2022***, the Hon'ble Tribunal held that the impugned receipts did not qualify as FIS under Article 12(4) of the India- USA Tax Treaty.

5 *Krishnakumar Balasankara Subramanian vs. DCIT - [2024] 165 taxmann.com 500 (Bangalore – Trib.)*

The Hon'ble Tribunal held that filing of Form No. 67 is not mandatory but a directory requirement, therefore, FTC could not be denied to assessee for non-compliance of procedural requirement of late filing of Form No. 67.

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ML-701