VERENDRA KALRA & CO
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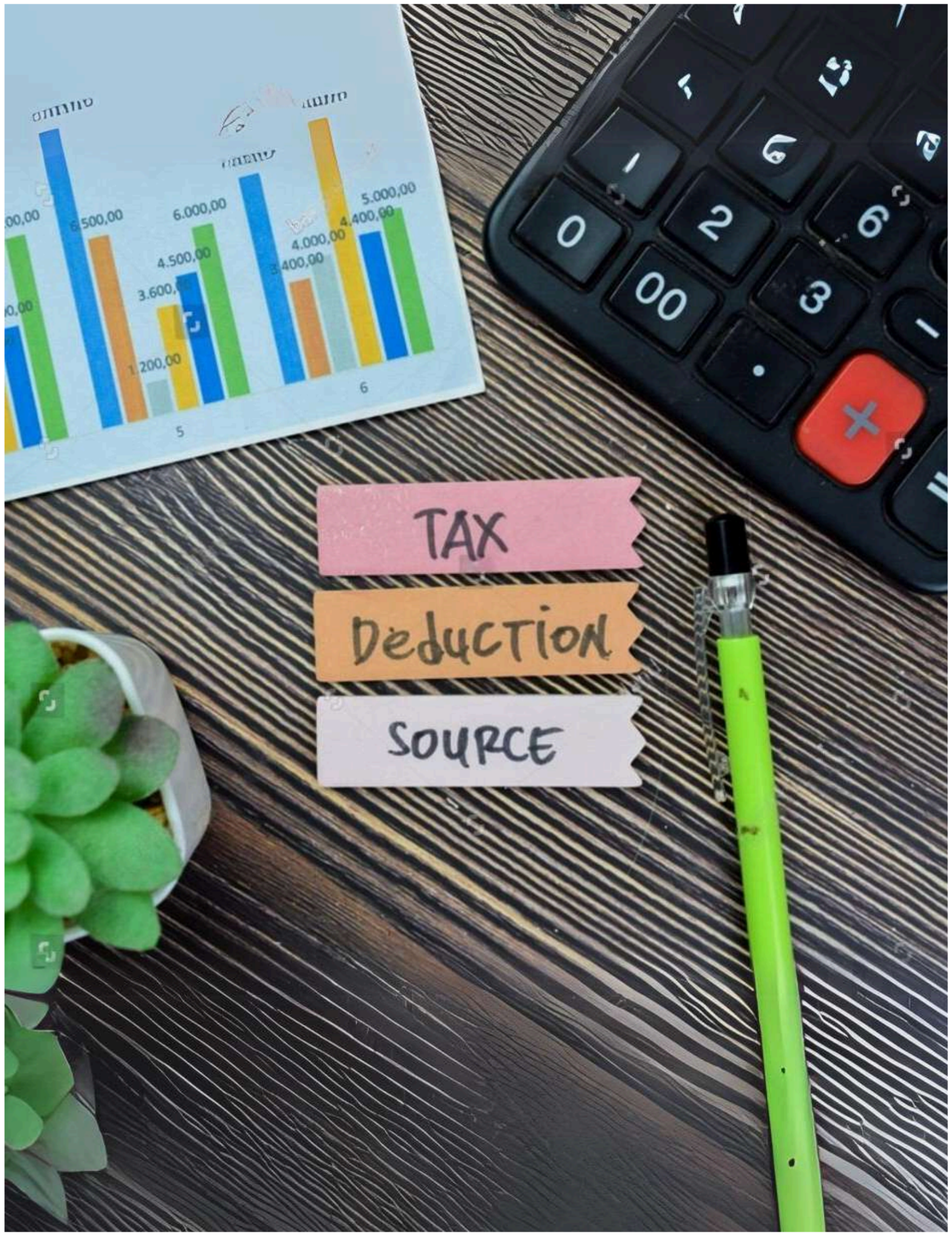
High Court Rulings

Calcutta HC Holds Idea Cellular Not Obligated to Deduct TDS Under Retrospective Amendment to Section 9 (1)(vi); Follows SC Ruling engineering Analysis

The Hon'ble Calcutta High Court noted that the Hon'ble Supreme Court in the case of Engineering Analysis had fortified that the retrospective amendment to Section 9 (1)(vi) vide Finance Act 2012 did not place upon the assessee, an obligation, to deduct tax for past periods.

In its brief judgement, The High Court observed that both the assessee and the Revenue had expressly stated that the controversy on such above issue had been well settled by the case of Engineering Analysis.In view of the same, the Hon'ble Court dismissed the appeal of the Revenue and ruled in favor of the assessee.

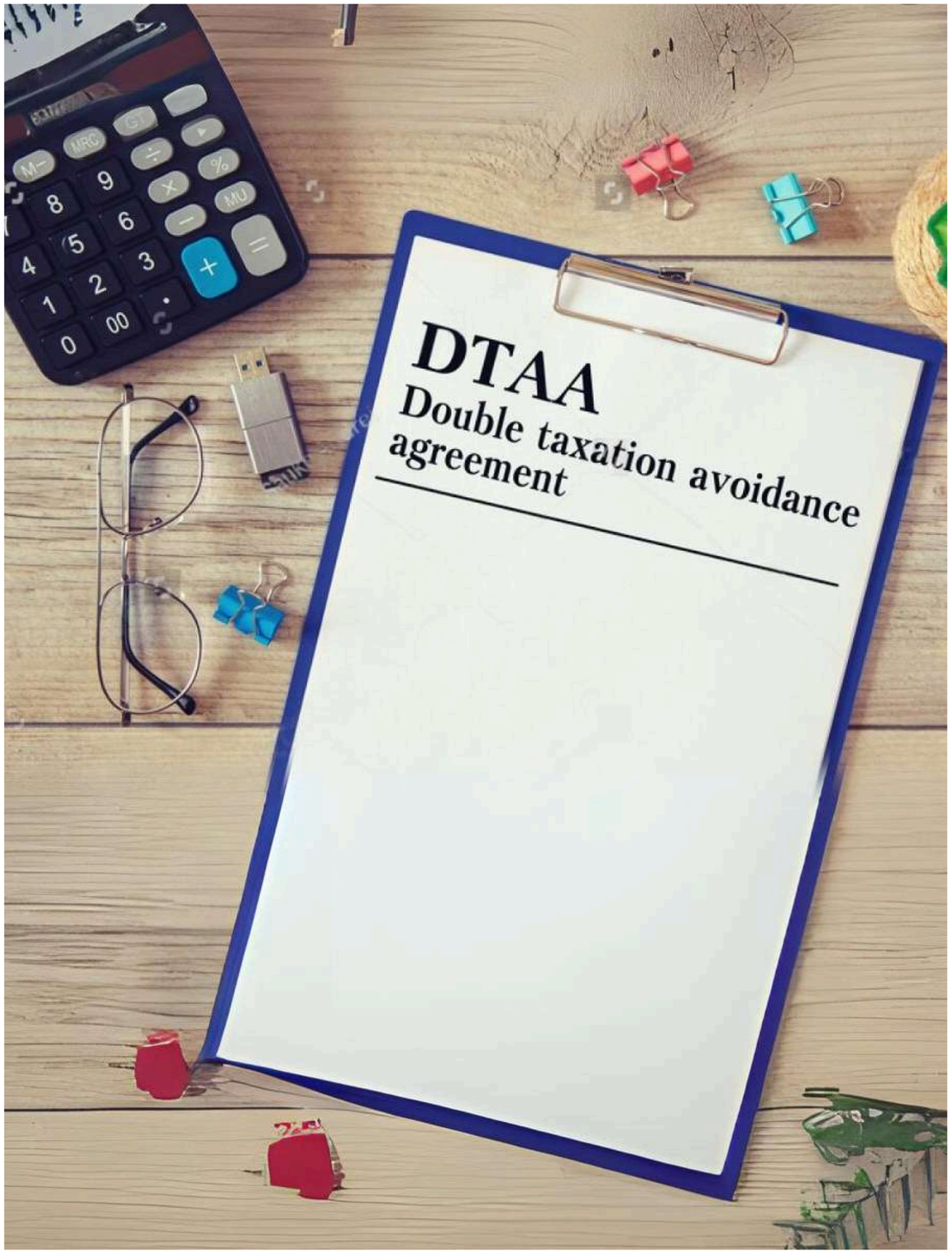
Source: High Court, Calcutta in the case of CIT (TDS) Kolkata vs. Idea Cellular Limited vide ITA/33/2020 dated July 9, 2024.



Amendments to Legislation Provisions Cannot Subsume, Eclipse or Override the DTAA Provisions; Payments made to Telstra Singapore Not Taxable as Royalty

Facts

The assessee, Telstra Singapore, was a company incorporated in Singapore and was engaged in the business of providing connectivity solutions. The assessee was engaged in the services of providing international private leased circuits, multi-protocol label switching, which facilitate high speed



data connectivity, in other words known as bandwidth services. Additionally, the assessee also held and owned infrastructure and outside India which would be utilized in connection with providing bandwidth services to customers.The assessee had entered unto a One Stop Shopping Service Agreement (OSS Agreement) with Bharti Airtel Ltd. and other related telecom operators, the terms of which dictated that the assessee was obliged to provide bandwidth services to the customers of Bharti outside India with a corresponding obligation being placed on Bharti to provide those services within India. Apart from the OSS Agreement, the assessee had also entered into a Global Business Services Agreement with various telecom operators in India.

In the AY 2012-13, the assessee had furnished Returns of Income (ROI) declaring Nil income, which were then selected for scrutiny by the Revenue. A draft assessment order was framed by the AO proposing that the amount received by the assessee from Indian customers for the provision of bandwidth services outside India to be construed as constituting equipment/process royalty taxable under Section 9(1)(vi) of the Act read along with Article 12(3) of the DTAA and brought the same to tax accordingly.Aggrieved, the assessee filed its objections before the Dispute Resolution Panel (DRP) after which a final assessment order came to be framed on 16.11.2015 with the AO determining the total taxable income of the assessee at INR 26.75 crores . The assessee preferred an appeal before the Tribunal which ruled in favor of the assessee.

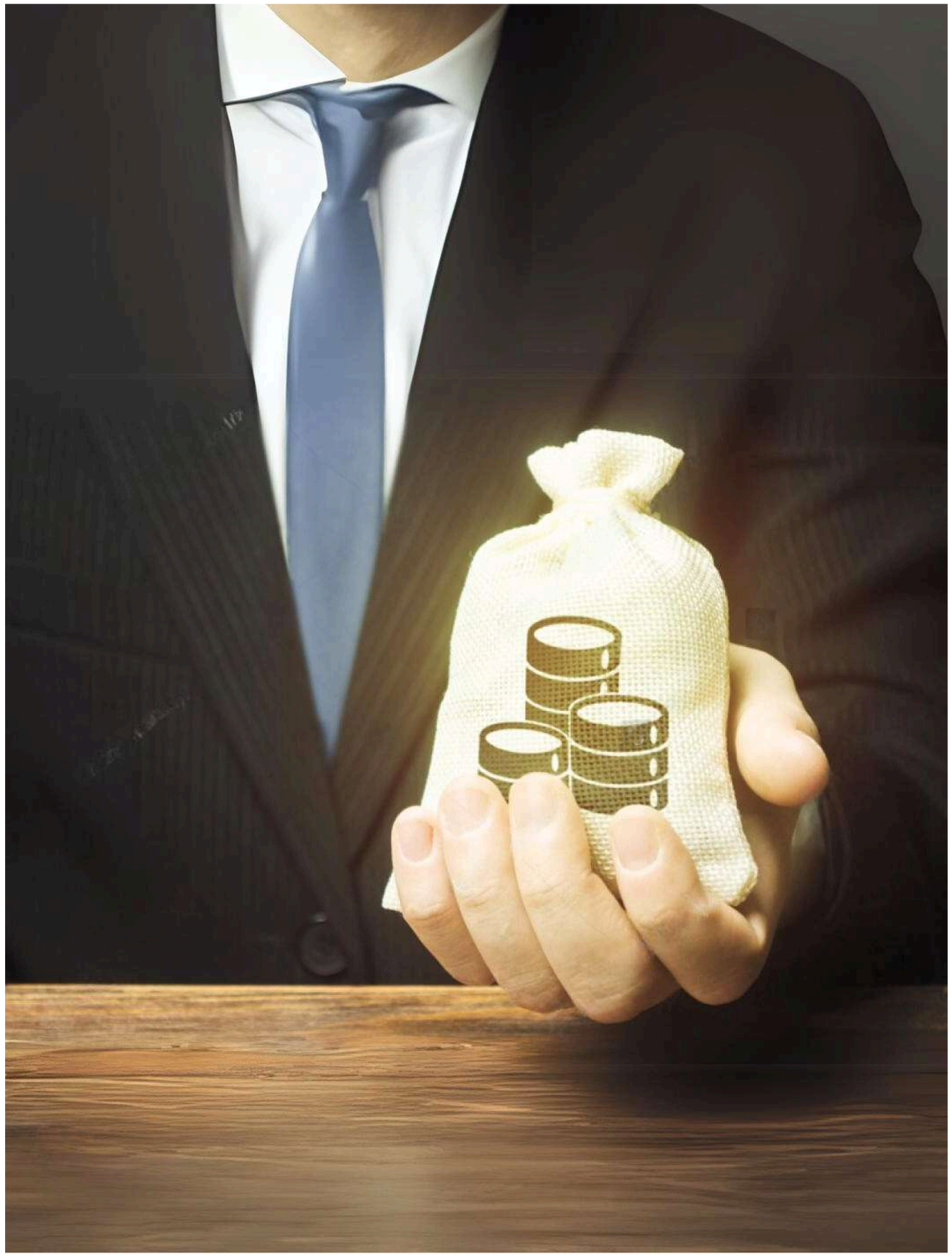
Therefore, the matter reached the Hon’ble High Court for adjudication.

Ruling

The Hon’ble High Court ruled in favor of the assessee. It delved into the intention and scope of section 90 of the Act and noted that the Hon’ble Apex Court in the case of Engineering Analysis had reiterated the legal position with respect to Section 90 by noting that such provision of the Act would only be applicable to the extent that they are more beneficial to the assessee. The Court further observed that any changes that are made to the domestic legislation cannot override the treaty provision, otherwise, **“treaty provisions could be amended or overcome based upon the will of Legislatures of independent nations to amend domestic legislation unilaterally and without being bound by the Convention.”**

Thus, the Court held that that the Section 9 amendments could not have been read as having subsumed, eclipsed, or overridden the provisions of the DTAA.

It was further noted that the primary objective of the OSS Agreement was to provide seamless and uninterrupted connectivity to the customers of Telstra and Bharti when present in the respective regions where the two entities operated. The equipment had remained under the effective control of the concerned operator. The Court observed that as it has been consistently held by our Courts and Tribunals, the mere enjoyment of a service or facility does not constitute a right to use. Hence, the consideration received for rendering of a service could not have been



construed as falling within the royalty provision of the DTAA. Conclusively it was held that Article 12 was neither attracted to the OSS Agreement/GBSA nor did the concepts of process or equipment royalty have any application to the transactions in question. The mere utilization of a process or equipment in the course of providing a service would not qualify the test of use or right to use as contemplated under Article 12 of the DTAA Furthermore, it was held that there was no transfer or conferment of a right in respect of a patent, invention or process and customers/those availing of the services provided by Telstra were not accorded a right over the technology possessed or infrastructure by it. The underlying technology and infrastructure remained under the direct and exclusive control of Telstra. Parties availing of Telstra's services were not provided a corresponding general or effective control over any intellectual property or equipment. The agreements merely enabled them to avail of the services offered by it and hence the payments could not be held as royalty.

Source: High Court, Delhi in The Commissioner of Income Tax, International Tax-3 vs. Telstra Singapore Pte. Ltd. vide ITA 334/2022 dated July 24, 2024.

Residency of Assessee Established by TRC; AO Failed to Discharge Onus of Proving Entity as a Conduit for Treaty Shopping

Facts

The assessee was a private limited company incorporated in Mauritius as well as a resident of Mauritius under the Mauritius Income Tax Act, 1995 and a tax resident of Mauritius as per Article 4 of the tax treaty. The assessee had been set up in 2014, with the principal objective of acting as an investment platform for making investments located in countries in a regional grouping that includes Cayman Islands and Asia. During the year of incorporation, the assessee made investments worth approximately INR 4030 crores, of which the direct investment in securities of Indian companies was approximately INR 142.68 crores being 3.54% of the total investment.

Over the years, the investments directly into the securities of Indian companies had increased marginally from 3.54% to 5.57% from 2014 to 2018. After, 01.04.2017, the assessee has made investments of approximately USD INR 49.27 crores in India. Furthermore, the assessee held shares in Etechaces Marketing and Consulting Pvt. Ltd. (EMC), a company incorporated under the laws of India and has brand of 'Policybazar'. During the year under consideration, out of the total shares of 'Policybazar' the assessee sold 1581 shares which were acquired on 13.10.2017 and offered same to tax at the rate of 10%. It has paid tax of approximately

INR 40.427 crores on these shares purchased after 01.04.2017. However, the long-term capital gain from sale of 9013 shares was not offered to tax and was claimed exempt under Article 13(4) of India-Mauritius DTAA. To which the AO denied the treaty benefit. The DRP had sustained same and accordingly final assessment order was passed.

Accordingly, the case reached the Tribunal for adjudication.

Ruling

The Tribunal ruled in favor of the assessee ruled in favour of the assessee. It held that the assessee had clearly been a resident of Mauritius and there was a TRC issued in favour of the assessee by the treaty partner. With respect to the TRC, and in reliance of circular number 682/1994 and circular no. 789/2000 of Board, along with the judgment of Hon'ble Supreme Court of India in the case of Azadi Bachao Andolan, it was well established that the TRC was a statutory evidence of the residential status and even if it was not considered conclusive evidence, the onus had thus shifted on the AO to establish by evidences that the assessee was a conduit, created and run for treaty shopping.

However, in the present case, it was noted that tax authorities had failed to rebut the statutory evidence of the TRC with cogent evidence, and merely on the basis of suspicion and inferences, the assessee could not have been held to be engaged in treaty shopping. The fact that the assessee had no funds of its own was due to the nature of its operation as investment platform and when any gain was made out from the dis-investment, the benefit had to be transferred to those who had initially invested trusting the fund management skill of assessee.

Source: Tribunal, Delhi in Tiger Global Eight Holdings vs. DCIT vide ITA No. 2345/Del/2023 dated July 26, 2024.

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