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CHARTERED ACCOUNTANTS

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Inside this edition

High Court Rulings

Proceedings stayed where there is non-application of mind by the AO, application allowed for seeking interim relief

ITAT Rulings

Professional services receipt by EY not FIS sans fulfilment of ‘make available’ criteria

DDT by domestic entity on dividend to foreign company not entitled to DTAA benefit

Proceedings stayed where there is non-application of mind by the AO, application allowed for seeking interim relief

Facts

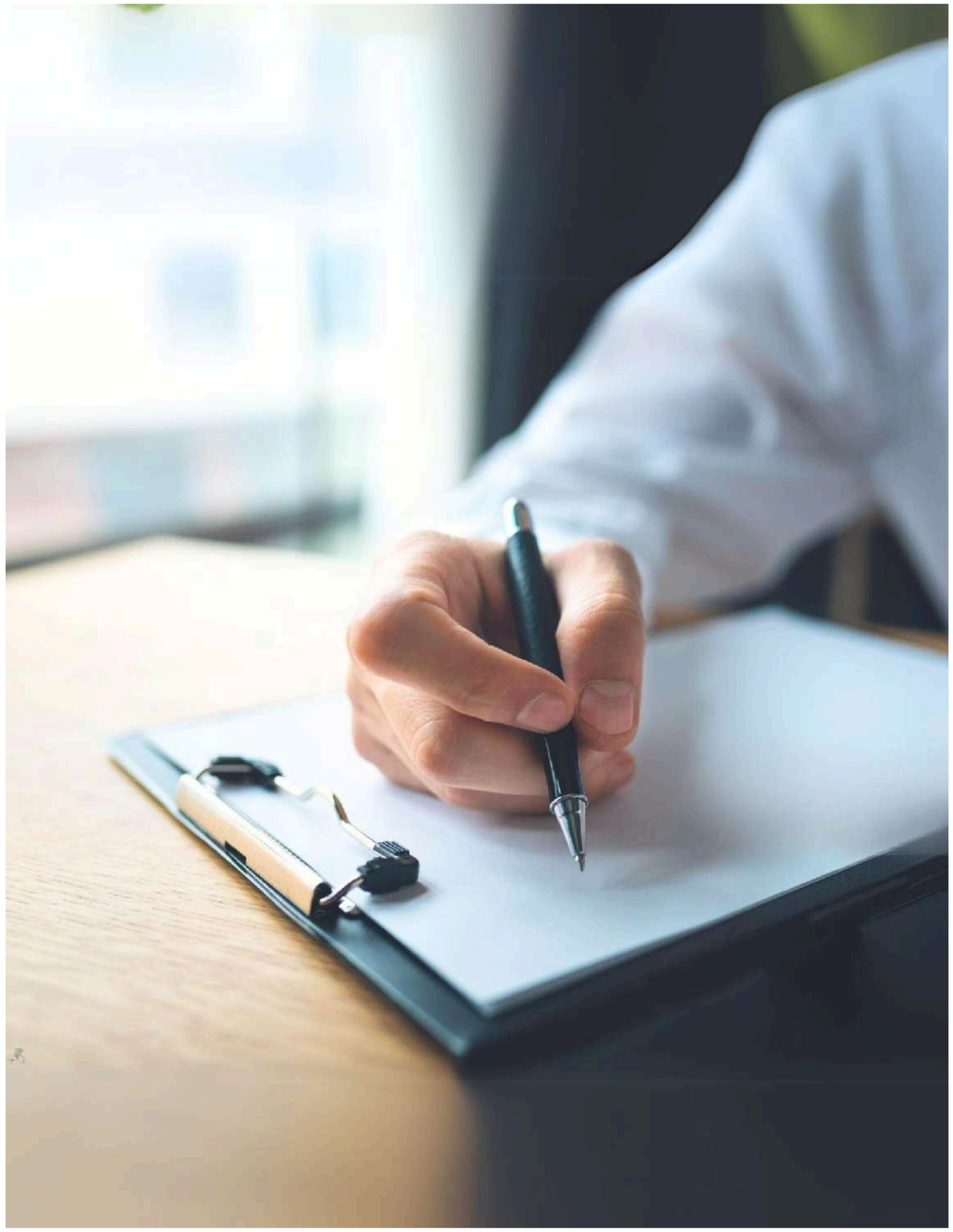
The petitioner was issued a notice dated 24-03-23 u/s 148A(b). The allegation levelled against the petitioner concerned the following two aspects:

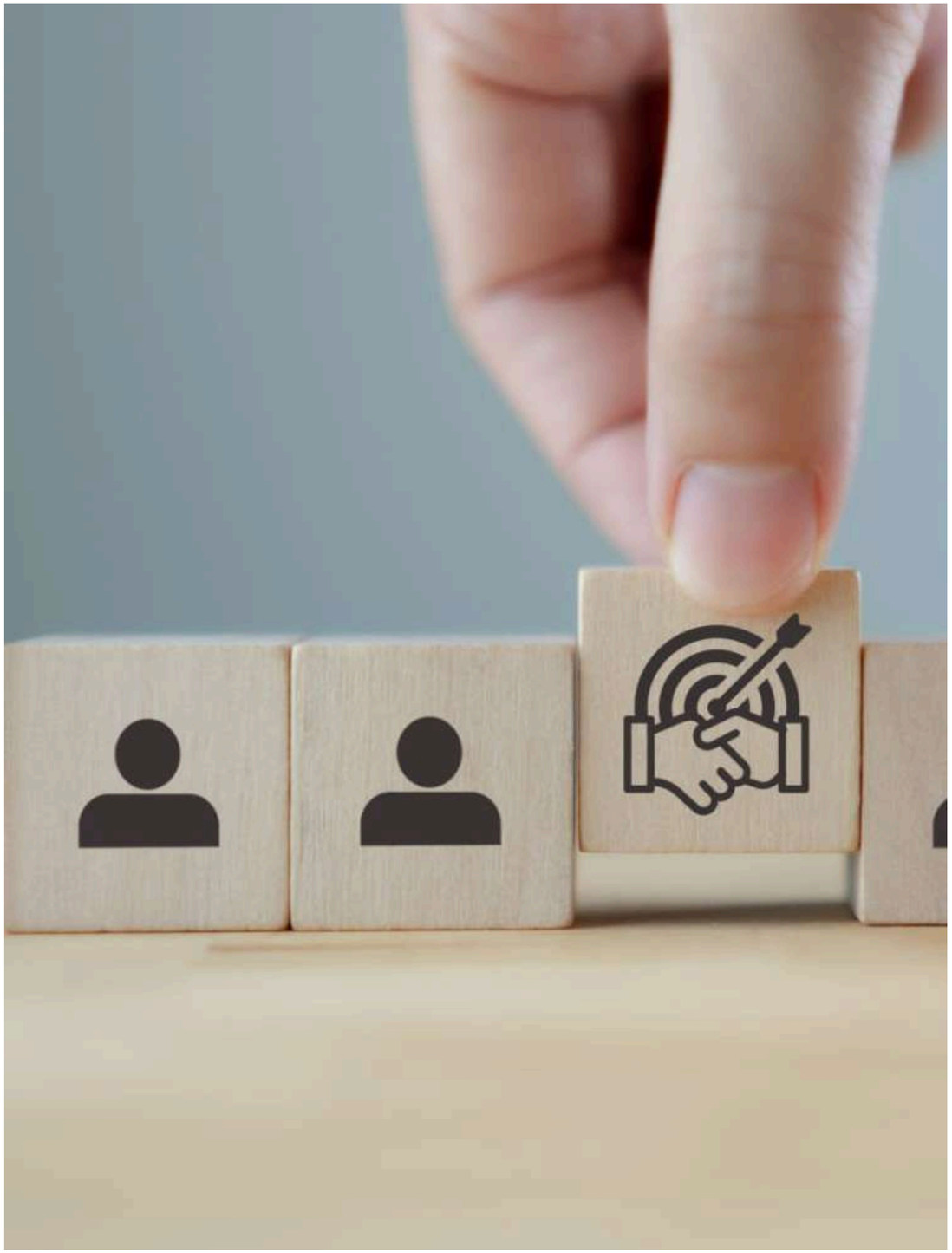
(i) First, it had remitted monies to non-resident/foreign company.

(ii) Second, it had paid Rs.1 lakh or more, for acquiring shares.

The allegations concerning the monies paid by the petitioner for acquiring shares was concerned, it was pegged at INR 10.19 crores. It was pointed out that the petitioner had, in fact, received monies upon the sale of shares, and not, as alleged, remitted monies through a non- resident/foreign company. In this regard, the petitioner indicated that it had sold shares of two entities i.e., Landmark Hi Tech Development Private Limited and Safari Retreats Private Limited. And had received INR 36.70 crores and INR 8.99 crores respectively on sale of both the shares.

As regards the other allegation, The petitioner claims that an amalgamation took place between TDPL and another company, namely, Suncity Dhoot Colonizers Private Limited. It is stated that the scheme of amalgamation concerning these companies was sanctioned via an order dated 22-06-15 passed by the Delhi High Court in Company Petition No. 417/2015.





The petitioner claims that, consequent to the amalgamation, it was allotted 1,01,85,948 shares of Suncity Dhoot Colonizers Private Limited, bearing a face value of INR 10 per share. Thus, the explanation given was that the amount which was flagged by the AO, was nothing but the face value of the aforementioned shares amounting to INR 10.19 crores. The petitioner also brought to the notice of the AO that the allotment of shares in a scheme of amalgamation was not construed as transfer under the Act. In this regard, the provisions of Section 47(vii) of the Act was mentioned by the petitioner.

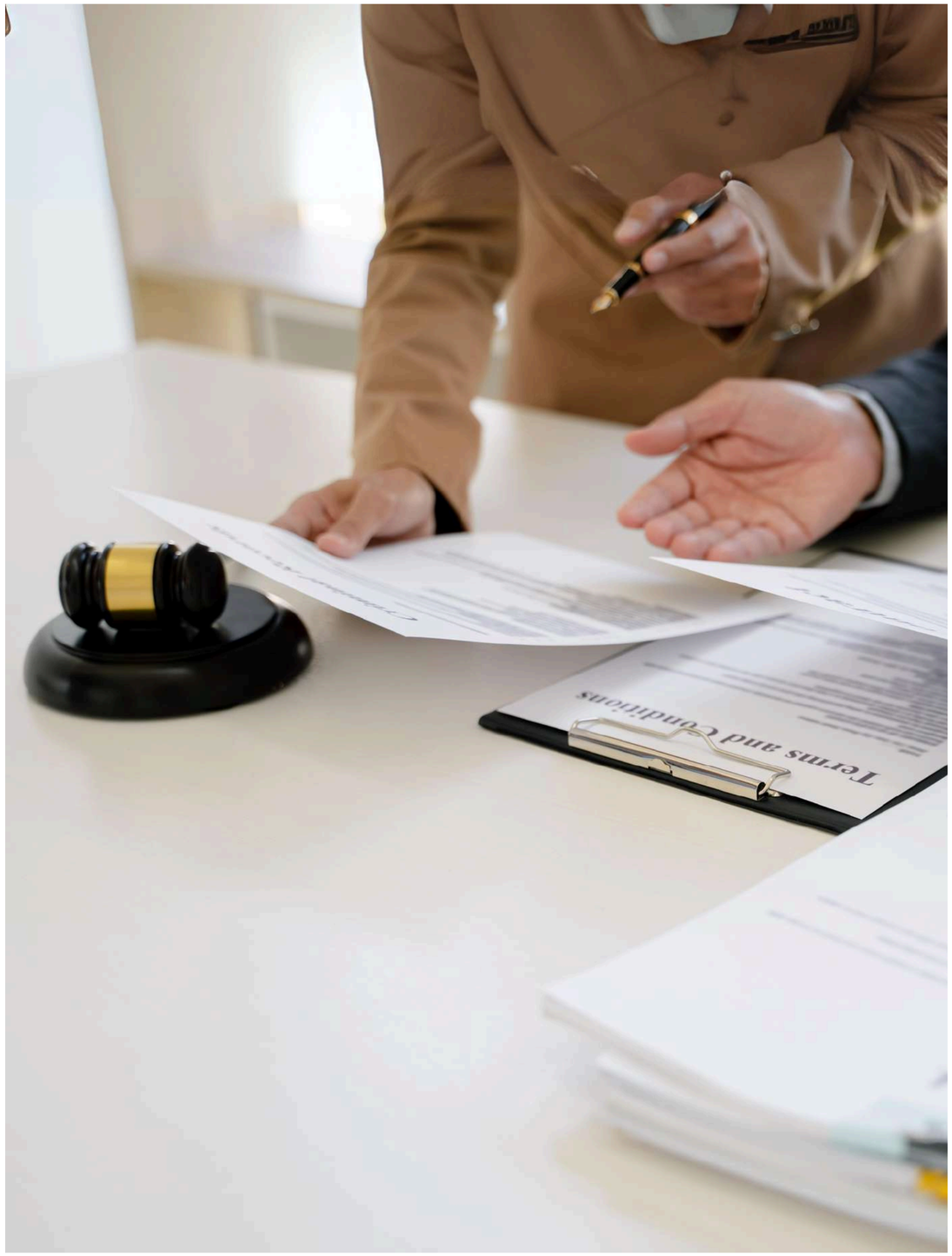
Ruling

The AO, while noticing the reply filed by the petitioner, seems to have continued on the course embarked upon by him i.e., continuing with the reassessment proceedings, without any course correction. It is quite obvious that the AO has muddled up the facts and thus made allegations which, prima facie, don't appear to be correct. Furthermore, as pointed out by the Mr Indruj Singh Rai, for the first time, in the Section 148A(d) order, the AO seems to have flagged the issue that the petitioner was attempting to take benefit of the Double Tax Avoidance Agreement (DTAA) executed between India and Mauritius, and, in this context, stated that it had failed to provide the audited balance sheets of Indian entities, whose shares were sold in the AY in issue. Furthermore, on this aspect, the AO also made observations that the details concerning the Directors, shareholding patterns of the Indian entities, the Minutes of Board Meeting and the valuation report as per Section 50 of the Act, read with rule 11UA, had not

been submitted.

A bare perusal of the notice issued would show that these aspects were not adverted to by the AO. However, on being queried, Mr Indruj Singh Rai, did concede that the benefit of the DTAA has been denied to the assesee for AY 2014-15. It is, however, stated by the Mr Indruj Singh Rai that this aspect is pending adjudication before this Court in W.P(C) No. 4652/2022. Mr Puneet Rai, learned senior standing counsel, who appears on behalf of respondent/revenue says that he would have to file a counter- affidavit in the matter and accordingly, issue notice. Simultaneously, operation of the impugned order passed u/s 148A(d) and the consequent notice of even date i.e., 27-04-23 issued u/s 148 shall remain stayed.

Source : High Court, Delhi in the case of Banyan Real Estate Fund Mauritius vs ACIT vide 10485/2023 on August 05, 2024



Professional services receipt by EY not FIS sans fulfilment of 'make available' criteria

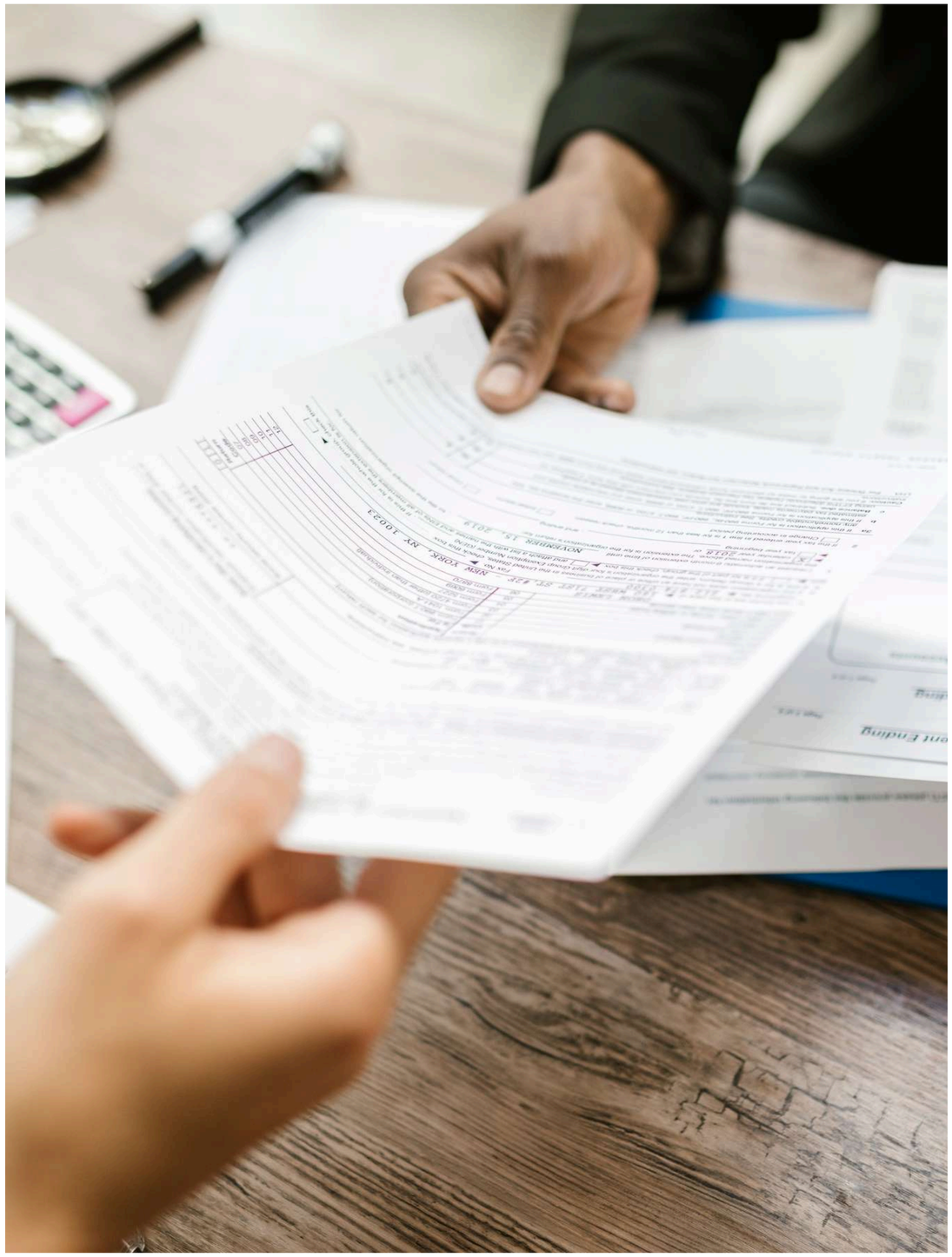
Facts

The assessee is tax resident of USA and in the business of providing professional services in the field of assurance, tax, transaction and business advisory services etc. to its clients across the globe including India. The assessee received an amount of INR 18.29 crores on account of reimbursement of costs with respect to employees seconded to Indian Member firm and an amount of INR 65.20 crores on account of receipts from Indian based clients for services performed in and from USA for such clients.

The AO treated the amounts received by the assessee on account of professional services as Fees for Inclusive Services as per the Article 12 on the premise that such services do not qualify the definition of professional services as per Article 15 of DTAA. Aggrieved the assessee filed objections before the ld. DRP. The AO made addition of INR 30.74 crores as FIS. Aggrieved, the assessee filed appeal before the Tribunal.

The ld. AR submitted that even the Section 194-J refers to professional or technical services and hence the technical services provider shall be considered as professional. The ld. AR argued that Article 15(2) gives an inclusive definition and therefore services of other functions also qualify to

be a professional service. The ld. AR has also referred to CBDT notification dt. 12-01-77, dt. 04-05-01 and dt. 21-08-08 which has expanded the scope of professional services with regard to Section 194-J and argued that the scope of term of “professional services” is much wider than the Article 15 in Section 194-J and hence the services rendered by the assessee shall be considered to be the nature of professional services but not in the nature of inclusive services or technical services. The crux of the argument of ld. AR was that the professional services would stand on a wider platform than consultancy and technical service and the work executed by the assessee company was by qualified professionals and hence should treated as professional services as per Article 15.



Ruling

ITAT held that they have also examined the qualifications of the engagement partners and principal responsible for engagement, wherein these consultants are having qualifications in business management, business administration, masters of science and doctorate in economics or math, commerce & finance. ITAT have also examined the various orders of the Tribunal namely, **MSEV Vs. DCIT (83 TTJ 325), EC Group India Pvt. Ltd. (84 taxmann 108) and the Hon'ble Apex Court in Union of India Vs. India Fisheries Pvt. Ltd. (57 ITR 331)**. The Hon'ble Apex Court held that if there is an apparent conflict between two independent provisions of law, the special provision must prevail. Respectfully, we hold that there are no two calms about the principle laid down by the Hon'ble Apex Court, there has to be two independent provisions which are in conflict between each other. In the instant case, there are two Article of DTAA which are totally different with different explanation neither overlapping nor in conflict in each other.

These two Articles of DTAA operate in fundamentally different arenas and the area of operations and definitions are clear and easily discernable. With regard to the provisions of interpretation of the clause includes, it is prima facie extensive as held by the **Hon'ble Apex Court in Hamdard (W) Laboratories Vs. Deputy Labour Commissioner (5 SSC 281)** and it always includes the words, professions which are easily relatable and includable in the absence of specific mention of such profession or service. It can be inclusive of same kind of meaning like investments have to be construed with shares or securities. The principles of ejusdem generis have to be applied to treat the subjects which are of the same kind or alike. ITAT stated that the assessee has given the party wise breakup of services rendered to India based clients from USA which was to the tune of INR 65.20 crores which includes E&Y LLP, SR Batliboi & Company LLP, Honeywell International Inc. The details of the services extended have already been discussed at length above. On going through the services, we find that they cannot be said to be meeting the requirement of "make available" technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design" clause under Article 12(4)(b) of DTAA.

Further, we have gone through the Article 12(5)(e) which states that the FIS does not include the amounts paid to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services). To conclude, the case of the assessee has been covered by the benefits of provisions of Article 12(4) (b) of DTAA as the "make available" criteria is not satisfied. The appeal of the assessee on this ground is allowed.

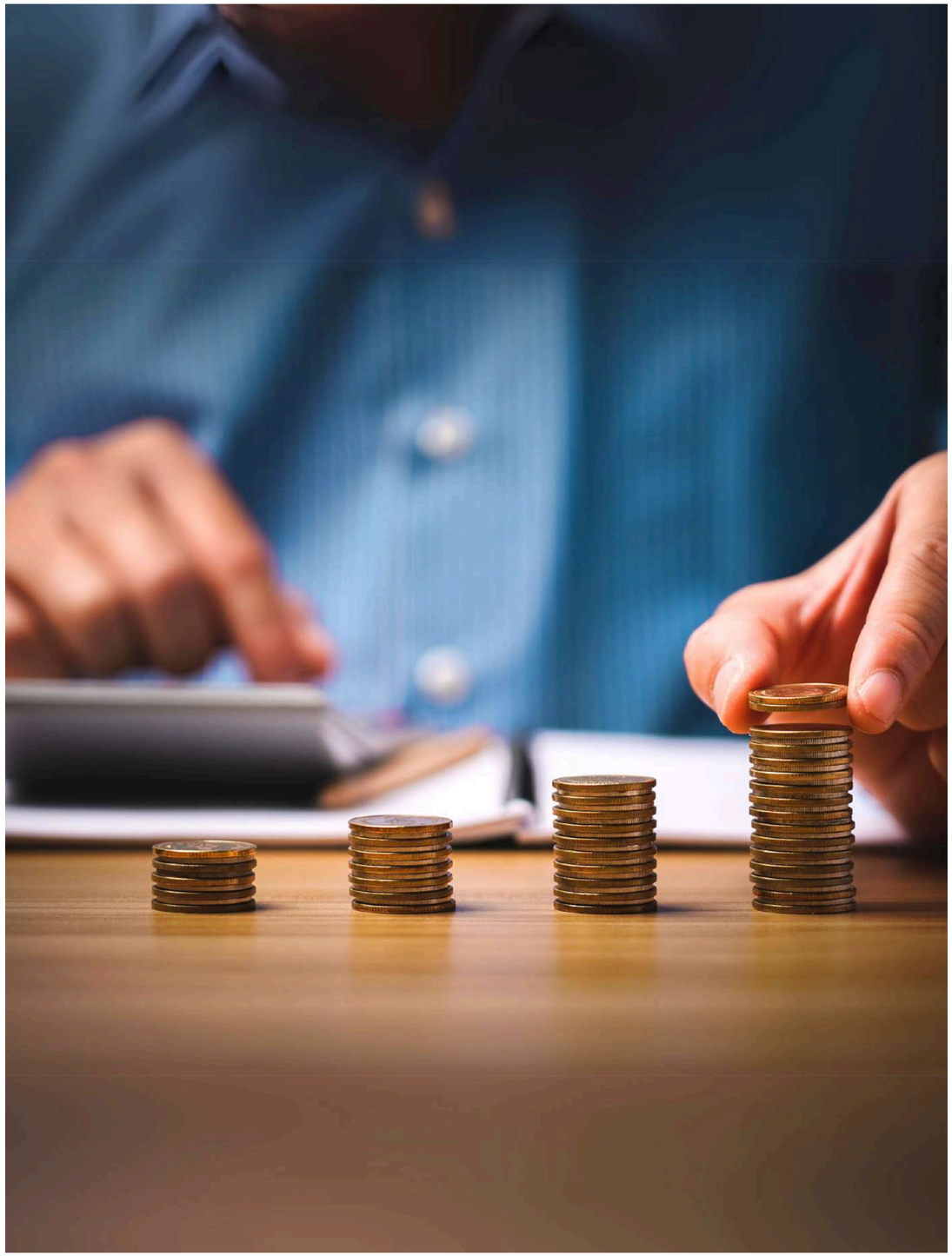
Source : ITAT Delhi in the case of Ernst and Young U.S. LLP vs ACIT vide ITA No. 3253/Del/2023 on August 07, 2024

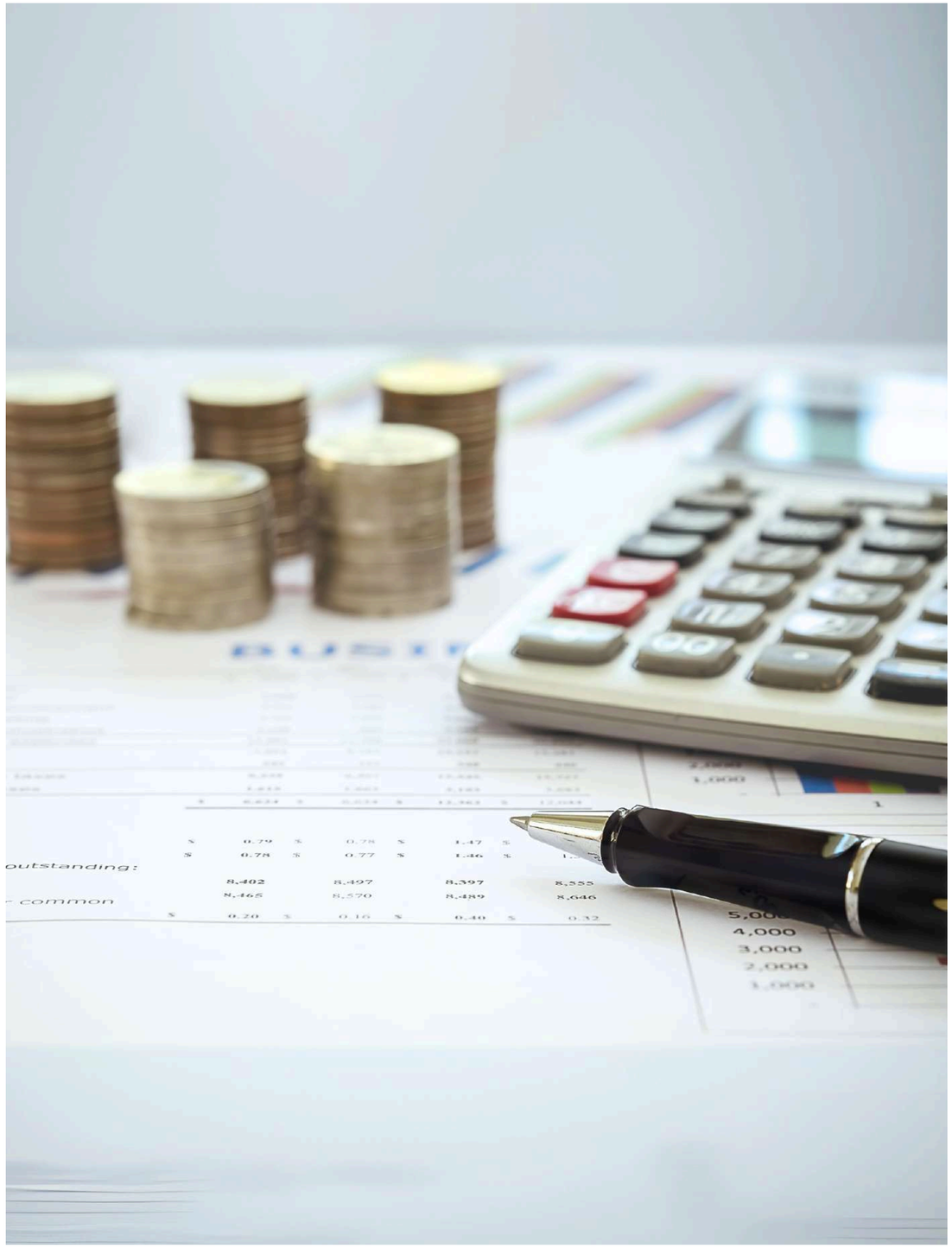
DDT by domestic entity on dividend to foreign company not entitled to DTAA benefit

Facts

The assessee is a domestic company and is engaged in manufacture and sale of three and four-wheeler motor vehicles for the transportation of goods and passengers. It is also engaged in the manufacture of two-wheeler vehicles by the brand name 'Vespa' as well as sale of spare and manufacture of petrol and diesel engines. The assessee filed its return of income for AY 2016-17 declaring total income of INR 244.63 crores which was subsequently revised by filing the revised return on 08.03.2018 declaring total income of INR 244.75 crores. The case was selected for scrutiny and a reference was made to the TPO u/s 92CA(1) to determine the Arm's Length Price of the international transactions entered into by the assessee with its Associate Enterprises during the relevant AY. Pursuant thereto an upward adjustment of INR 7.37 crores was proposed by the Ld. TPO. The ld. AO after incorporating the above transfer pricing adjustment completed the assessment u/s 143(3) r.w.s.144C(3) assessing the total income of the assessee at INR 2.52 crores.

The assessee carried the matter in appeal before the Ld. CIT(A) challenging the transfer pricing adjustment which were allowed by the Ld. CIT(A) relying on his decision in preceding AY 2015-16 in assessee's own case involving the identical issues in respect of export of parts and component-service spares and export of parts and components – global sourcing and payment





of corporate guarantee fees. Before the Ld. CIT(A) the assessee raised an additional claim pertaining to refund of excess taxes paid on dividend distributed. The assessee claimed that as the DDT represents tax on dividend income, the assessee should be granted the benefit of Article 11 of the India-Italy Double Tax Avoidance Agreement and that the dividend declared and paid by the assessee to Piaggio & C.S.P.A., Italy, being tax on dividend income should be liable to tax at rate prescribed in the India-Italy DTAA. Consequently, excess tax (DDT) paid by the assessee should be refunded. The Ld. CIT(A) called for a remand report from the Ld. AO. The assessee prayed before the Ld. CIT(A) that the DDT discharged by it during the AY 2016-17 in excess of 15% as prescribed under Article 11(2) of the India-Italy DTAA should be allowed as refund to it. Aggrieved, the assessee is in appeal before the Tribunal.

Ruling

ITAT held that if domestic company has to enter the domain of DTAA, the countries should have agreed specifically in the DTAA to that effect. In the Treaty between India and Hungary, the Contracting States have extended the Treaty protection to the dividend distribution tax. It has been specifically provided in the protocol to the Indo Hungarian Tax Treaty that, when the company paying the dividends is a resident of India the tax on distributed profits shall be deemed to be taxed in the hands of the shareholders and it shall not exceed 10 per cent of the gross amount of dividend. Further, ITAT also stated that Taxation is a sovereign power of the State- collection and

imposition of taxes are sovereign functions. DTAA is in the nature of self-imposed limitations of a State's inherent right to tax, and these DTAAs divide tax sources, taxable objects amongst themselves. Inherent in the self-imposed restrictions imposed by the DTAA is the fact that outside of the limitations imposed by the DTAA, the State is free to levy taxes as per its own policy choices. The dividend distribution tax, not being a tax paid by or on behalf of a resident of treaty partner jurisdiction, cannot thus be curtailed by a tax treaty provision."

For the reasons give above, ITAT hold that where dividend is declared, distributed or paid by a domestic company to a non-resident shareholder(s), which attracts Additional Income-tax (Tax on Distributed Profits) referred to in Section 115-0 such as additional income tax payable by the domestic company shall be at the rate mentioned in section 115-0 and not at the rate of tax applicable to the non-resident shareholder(s) as specified in the relevant DTAA with reference to such dividend income. Nevertheless, we are conscious of the sovereign's prerogative to extend the treaty protection to domestic companies paying dividend distribution tax through the mechanism of DTAAs. Thus, wherever the Contracting States to a tax treaty intend to extend the treaty protection to the domestic company paying dividend distribution tax, only then, the domestic company can claim benefit of the DTAA, if any. Thus, the question before the Special Bench is answered, accordingly". ITAT endorse the findings of the Ld. CIT(A) as there is no infirmity in the order of Ld. CIT(A) in rejecting the claim of the assessee.

Source: ITAT, Pune in the case of Piaggio Vehicles Private Limited vs ACIT on August 05, 2024

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