VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

Communiqué

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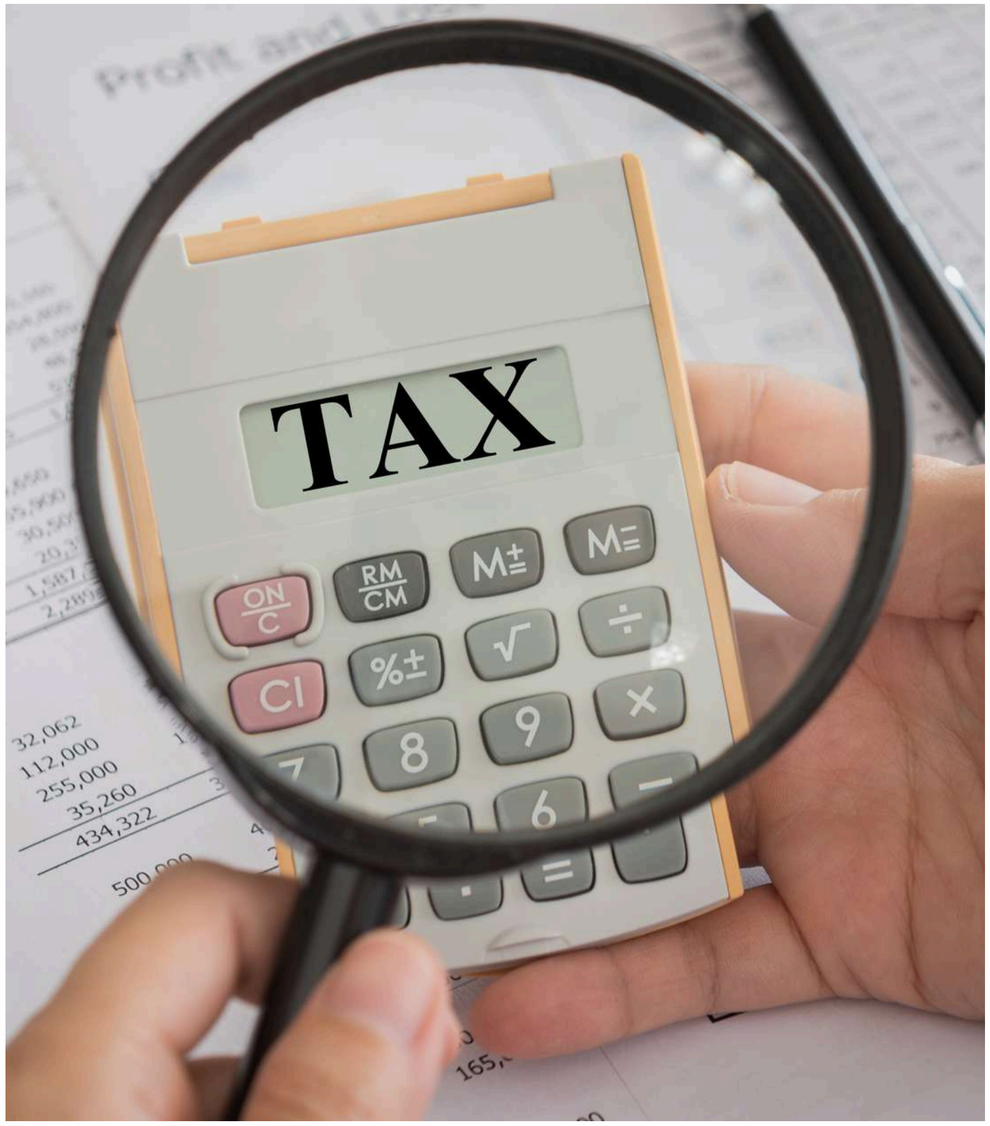

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HC Opines Taxability of Income Concerned Solely with Income Accrual; Holds Guarantee Charges Taxable in India as per DTAA

Facts

The Assessee was a tax resident of UK, engaged in the manufacture of specialty chemicals with various subsidiaries across the globe including in India.

During the relevant Assessment Year (AY) 2011-12, the assessee had extended guarantees to several overseas branches of foreign banks on a global basis with respect to credit facilities extended by them to their Indian subsidiaries, such as Johnson Matthey India Private Limited (JMPL) and Johnson Matthey Chemicals India Private Limited (JMCI).

In March 2010, the assessee and its Indian subsidiaries executed the Intra Group Parental Guarantee and Indemnity Services Agreement. Through these agreements, the assessee received guarantee charges amounting to INR 1.49 crores from the subsidiaries which received guarantees from the banks through the assessee.

During the relevant AY, the assessee filed its ROI declaring the guarantee fee as interest fee covered under the scope of Article 12 of the India-UK DTAA. However, the AO passed a draft assessment order considering the guarantee charges as ‘other income’ under Article 23(3) of the DTAA and accordingly brought it to tax.

The DRP dismissed the objections of the assessee and upheld the findings of the AO. Aggrieved, the assessee preferred an appeal before the Tribunal, which favoured the revenue.

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

Ruling

The Hon’ble High Court ruled in favour of the revenue. It opined that the guarantee charges received by the assessee from the Indian subsidiaries accrued in India and as per Article 23(3) of the India- UK DTAA would be taxable in India itself. Furthermore, on examination of facts, the Hon’ble court found that the guarantee charges did not fall under the purview of Article 12(5) of the DTAA, as they were not income derived from any debt of claim and hence could not be classified as “interest”.

Additionally, the Hon’ble Court relied on the judgment of the Hon’ble Apex Court in Tuticorin *Alkai Chemicals & Fertilizers Ltd. vs. CIT (1997) 6 SCC 117 held that the “that taxability of income is concerned solely with income accruing or arising. It is clearly not concerned with the ultimate destination of that income or the use to which it may be put.”*

Source: High Court, Delhi in Johnson Matthey Public Limited Company vs. CIT (International Tax-2) vide ITA 727/2018 dated May 28, 2024.

HC Decrees Indian PE Not a Separate Entity; Allows Interest Income Received from Overseas Branches and Head Office as Not Taxable in India

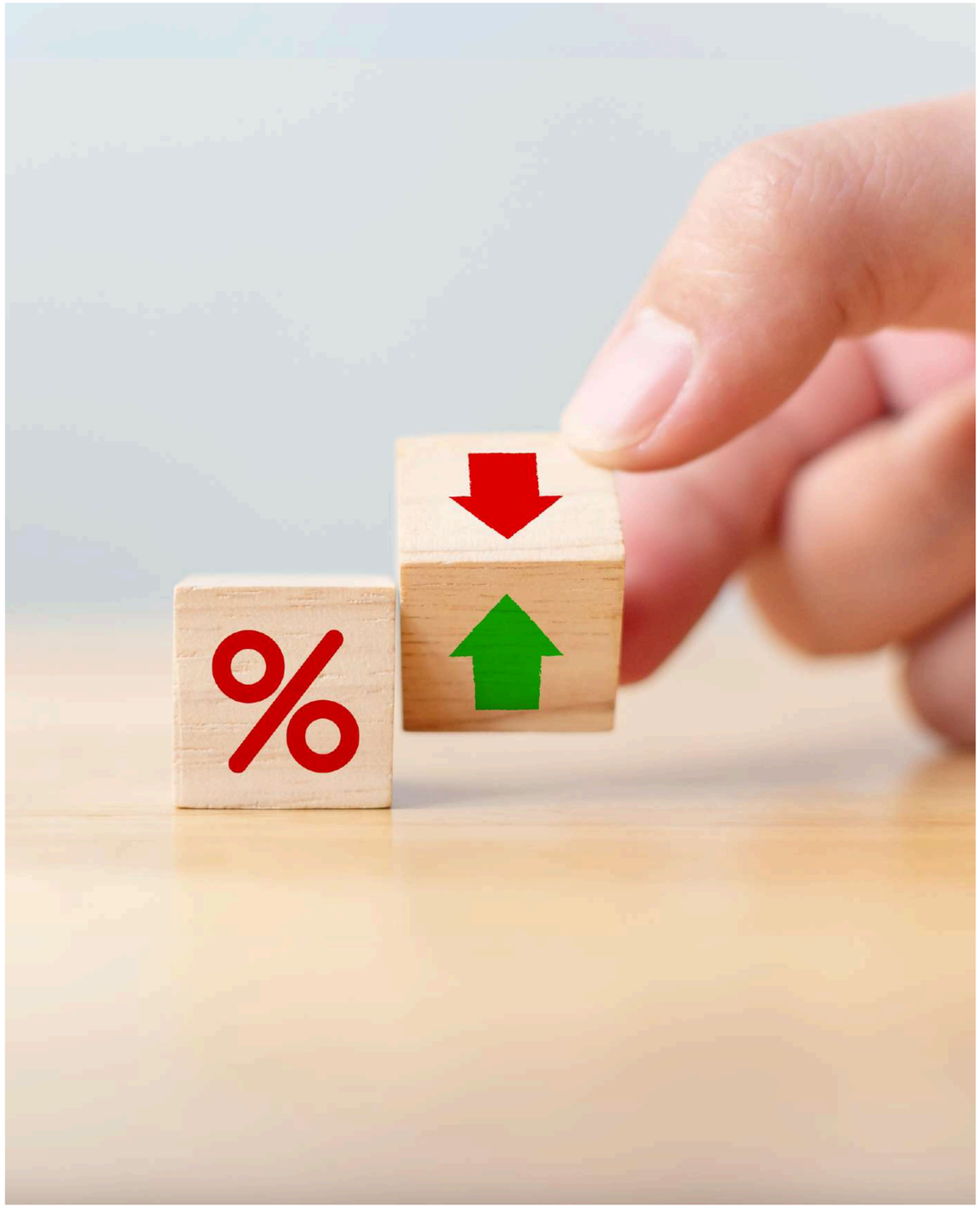
Facts

The assessee was the Bank of Tokyo Mitsubishi UFJ Ltd., now known as MUFG Bank, comprised of branches in India from its overseas branches and Head Office. During the relevant AY 2003-04, the interest received by the assessee's Permanent Establishment (PE) amounted to INR 70.02 lakhs, from its overseas branches and head office on the balances maintained with the aforementioned offices.

The AO considered the interest received as taxable. On appeal, the CIT(A) upheld the AO's orders by dismissing the assessee's contention that the interest income was payment to self as payer and payee were both the same persons. The CIT(A) relied on the Hon'ble Supreme Court judgment in Goetz India.

Aggrieved, the assessee had preferred an appeal before the Tribunal which was allowed on the ground that the case was already covered by the assessee's own case for AY 2011-12.

Consequently, the matter reached the Hon'ble High Court for adjudication.



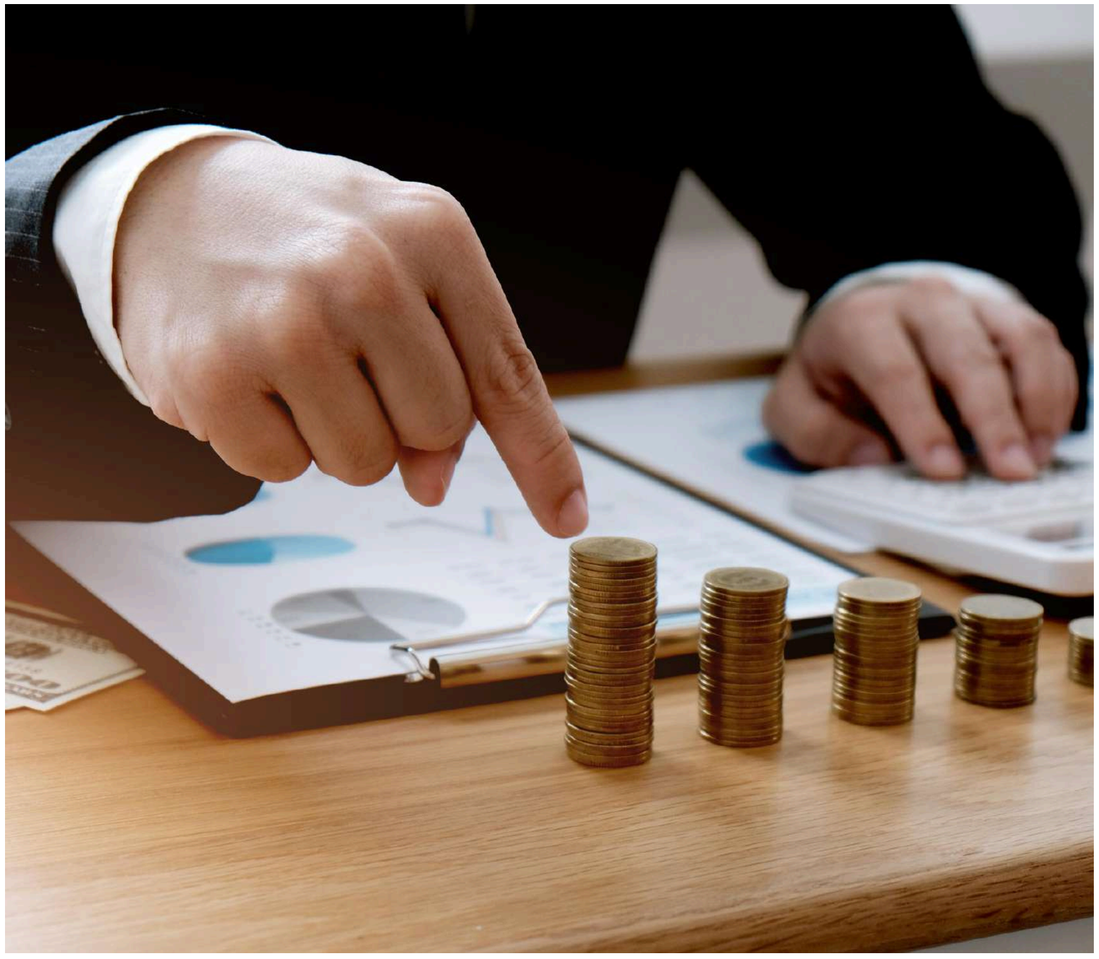
Ruling

The Hon'ble High Court ruled in favour of the assessee. It analysed Article 7(3) of the India-USA DTAA dealing with banking enterprise which noted that no account would be taken while determining the profits of a PE for amounts charged by it by way of royalties, fees or other similar payments or for that matter commission or other charges for specific services performed or by way of interest on monies lent to the head office of the enterprise or any of its other offices, except in the case of a banking enterprise.

The Court further referred to the CBDT Circular No. 19/2015 and Explanation to Section 9(1)(v) as well as the case of *Kikabhai Premchand KT vs. Commissioner of Income Tax (Central) Bombay (1953 SCC OnLine SC 127)*, wherein it was held that it "*is wholly unreal and artificial to separate the business from its owner and treat them as if they were separate entities trading with each other and then by means of a fictional sale introduce a fictional profit which in truth and in fact is non-existent.*

Cut away the fictions and you reach the position that the man is supposed to be selling to himself and thereby making a profit out of himself which on the face of it is not only absurd but against all canons of mercantile and income tax law".

Accordingly, the Hon'ble High Court dismissed the Revenue's appeals, concluding that "*the branch office would not partake the character or attribute of a separate legal personality, the view as taken by the Tribunal is clearly rendered unexceptional. In any event, it would be the exception carved out in the DTAA with respect to banking enterprises which would govern.*"



Source: High Court, Delhi in CIT (International tax-3) vs. The Bank of Tokyo-Mitsubishi UFJ LTD. ITA 773/2018 dated May 28, 2024.

ITAT Denies MFN Benefit; Holds Manage Fee and Reimbursement Expenses Taxable as FTS

Facts

The assessee was a holding company of the JCDecaux Group, incorporated under the laws of France as well as a tax resident of France. The assessee was engaged in the field of outdoor advertising and was the owner of all intellectual property rights including all copyrights in drawings and models, trademarks, patents, domain names and know-how developed and used by the JCD group across the globe.

During the year under consideration, the assessee had filed its Return of Income (ROI) on 29.11.2018 declaring a total income of INR 2.32 crores. The AO however, proposed the following additions:

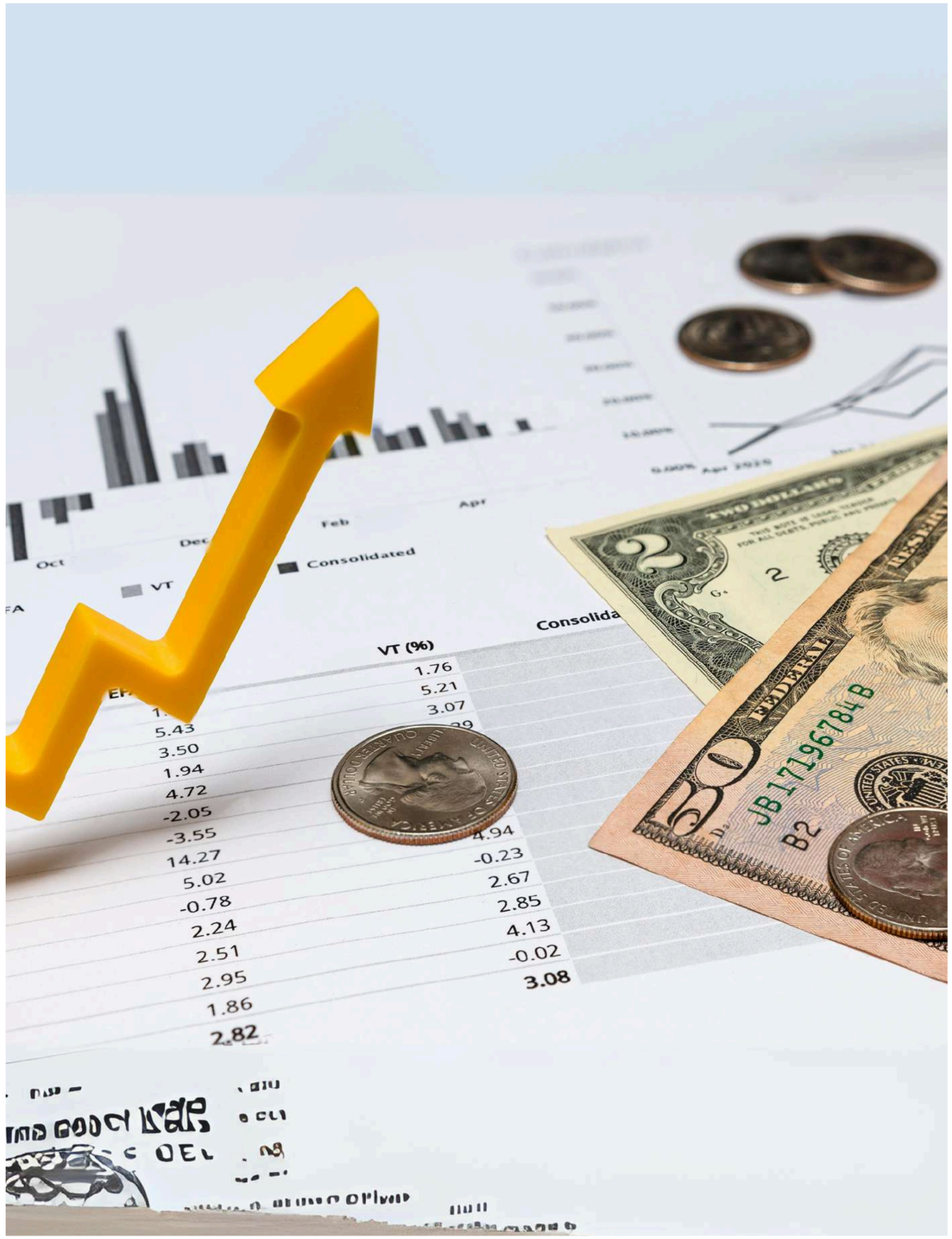
1.Addition of INR 2.39 crores management fee

2.Addition of INR 54.14 lakh corporate guarantee fee

3.Addition of INR 44.61 lakhs reimbursement of expenses

The AO denied the assessee the benefit of MFN clause, as envisaged under the India-France DTAA and held the services rendered by the Appellant as technical services. The ld. AR argued that similar services were rendered by the assessee to JCD India in A.Y. 2011-12 & A.Y. 2012-13 under the old agreement i.e ., Functional and Technical Support Agreement (effective from January 01, 2011), in lieu of which management fees were paid to the assessee. The AO proceeded to treat such receipts as FTS in those years. The Co-ordinate bench of the Tribunal accepted the applicability of the MFN clause of the India-France DTAA, however in the absence of sufficient documentary evidence, the matter was remanded to the AO for limited purpose of verification of documents and subsequent decision after consideration of the same.

In order to reduce litigation and difficulty in retrieving documents for these years, the appeals for AY 2011-12 and AY 2012-13 were settled under Vivad se Vishwas Scheme (VSV). Consequently, the matter reached the Tribunal for adjudication.



Ruling

The Tribunal ruled in favour of both the revenue and the assessee. With respect to the addition of management fee, the Tribunal favoured the stance of the Revenue, who relied upon the case of *Assessing Officer Circle (International Taxation-2(2)(2), New Delhi Vs. M/s Nestle SA in Civil Appeal Nos. 1420 to 1432/2023 vide judgment dated 19.10 .2023,* wherein it was held as follows:

"A notification under Section 90(1) is necessary and a mandatory condition for a court, authority, or tribunal to give effect to a DTAA, or any protocol changing its terms or conditions, which has the effect of altering the existing provisions of law."

With respect to the addition of corporate guarantee fees as FTS, the Tribunal decided in favour of the assessee. It held that as the case of the assessee in AY 2011-12 and AY 2012-13 the corporate guarantee fees were not treated as FTS, then the same would be the case in the present AY as well. Accordingly, the assessee's ground was allowed.

With respect to the reimbursement of expenses, the Tribunal favoured the revenue. It dismissed the assessee's ground by relying on the judgment of the Jurisdictional High Court in the case of Centrica India Offshore Pvt. Ltd. Vs. CIT W.P.(C) No. 6807/2012.

Source: Tribunal, Delhi in JCDECAUX S.A. vs. ACIT vide ITA No. 2473/Del/2022 dated May 03, 2024.

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