Communiqué

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CHARTERED ACCOUNTANTS

Communiqué

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Case remitted to AO by High Court: Reassessment of Proceedings Pertaining to DTAA Benefit of Vodafone Mauritius Private Limited

Facts

The assessee is a foreign company incorporated under the laws of Mauritius, had sold shares worth Rs.1295 crores, of an Indian company going by the name Bharti Infotel Pvt. Ltd, against which TDS was not deducted. The assessee, had in its possession, a tax residency certificate issued under the laws of Mauritius, and therefore, is entitled to take benefit of the provisions of Article 13 of the Double Taxation Avoidance Agreement [in short, "DTAA"] forged between India and Mauritius.

The assessee had incurred a loss of Rs. 28, 73,49,89,247 on a transaction. It was noted that the assessee had not filed a return in the relevant assessment year. The AO had initiated proceedings against the assessee. It was contended that by the assessee that due to such non filing the concerned assessing officer (AO) had no jurisdiction to trigger the impugned proceedings. The Revenue, on the other hand contended, that since the return was not filed, the concerned AO was within his jurisdiction to commence proceedings under Section 147/148 of the Act and that this was a case of deemed escapement of income chargeable to tax, as no return was filed by the petitioner.

Ruling

The Tribunal remit the relevant case to the AO with extensive directions that stated the following:

- The matter is remitted to the concerned AO.
- The concerned AO, before moving ahead in the matter, will determine as to whether this is a fit case for exercising jurisdiction, having regard to the objections articulated in the writ petition. In particular, the concerned AO will deal with the aspects referred to hereinabove.
- The concerned AO will accord personal hearing to the authorized representative of the petitioner and grant liberty to file written submissions in support of the pleas made before her/him.
- The AO will pass a speaking order, both, with regard to the objections raised by the petitioner and on merits.
- In case the decision taken by the AO is adverse to the interests of the petitioner, the petitioner will have liberty to take recourse to an appropriate remedy, albeit, as per law. However, if such an eventuality arises, the said decision will not be given effect to for four weeks from the date when the order is served on the petitioner

Source: High Court, New Delhi in Vodafone Mauritius Limited vs. Asst. Commissioner of Income Tax, Circle International Tax-3(1)(1) vide W.P. (C) 12600/2022 dated 8th December 2022

Google Ireland Not the Beneficial Owner of Royalties Paid by Google India: ITAT Dismisses Revenue's Appeal as Infructuous.

Facts

The assessee company, Google India Pvt. Ltd. (GIPL) was incorporated on 16.12.2003 as wholly owned subsidiary of Google international LLC, US. GIPL or Google India. It was engaged in the business of providing information technology and information technology enabled services to its group companies. Additionally, Google India also acts as a distributor for Adwords program in India. The activities of the company could be classified as the following:

IT services: GIPL has entered into a service agreement with Google Inc to render software development services. For these services, GIRL, is remunerated at cost plus 17.5%

IT enabled services: GIPL has entered into a service agreement with Google Ireland Limited (Google, Ireland) to render IT enabled services. For these services, GIRL is remunerated at cost plus 15.5%.

Marketing and distribution services for the Ad Words program: Under the Google AdWords Program Distribution Agreement dated 12.12.2005 (Agreement) entered into between GIPL and Google Ireland, Google India is appointed as a non-exclusive authorized distributor of AdWords program to the advertisers in India.

The AO observed that M/s. Google Ireland was not beneficial owner of the amount received from the assessee in relation to royalty amount. Furthermore, the Ld. CIT(A) observed that in relation to characterization of amounts payable to M/s. Google Ireland as royalty by placing reliance on earlier order of the ld. CIT(A) in assessment years 2007-08 to 2012-13 in relation to contention of AO that M/s. Google Ireland is not beneficial owner of receivable from M/s. Google India Ltd., the CIT(A) has rejected the same and upheld that M/s. Google Ireland is beneficial owner of the sum received from M/s. Google India Ltd. under the reseller agreement. Aggrieved by the order of the ld. CIT(A), assessee is in appeal before this Tribunal on the issue of characterization of the amount payable to M/s. Google Ireland as royalty and the revenue is in appeal before us in relation to issue as to whether M/s. Google Ireland is the beneficial owner of the amount received from M/s. Google India Ltd.

Ruling

The Tribunal ruled in favor of the assessee by dismissing the appeal of revenue as infructuous. The Tribunal noted that it had been decided on payment made by GIPL to M/s. Google Ireland Ltd. for purchase of online advertisement phase for onward resale to India advertisers, in terms of distribution agreement dated 12.12.2005, were not in nature of royalty as defined u/s 9(1)(vi) of the Act read with Article 12(3)(a) of TTA between India and Ireland. Furthermore, it was opined that GIPL was not an assessee in default u/s 201 of the Act, for not deducting the tax at source, on the payment in question, under the section 195 of the Act. In the matter of beneficial ownership, the Tribunal held as, "consequential in nature and as such this issue became academic and the appeal of the revenue is not surviving…."

Source: Tribunal, Bangalore in M/s. Google India Pvt. Ltd. vs. JDIT (International Taxation) vide IT(IT)No. 1190/Bang/2014 dated 15th December 2022

No Reason For Weighted Average To be Included in the Arithmetic Mean Method Under Section 92C (2) of the Act.

Facts

The assessee is a financial services company with a leading market position in Indian stock broking business with several large investors as its major clients. It is also engaged in providing institutional equity sales and trading services to both domestic and overseas institutional clients. As the assessee has entered into an international transaction as submitted in form no.3CEB, reference made to the learned Transfer Pricing Officer–I (2), Mumbai, (the learned TPO) to examine the Arm's Length Price of the international transaction. The assessee has earned the broking derivatives clearing services in cash segment in equity of ₹6074,19,839 and in futures and option segment of ₹56,11,35,866/-. It also received support services income relating to the equity business amounting to ₹2,04,39,148/- and also investment banking services income of ₹64,53,37,040/-.

The provision of broking and derivatives income and support services were benchmarked using Transactional Net Margin Method as the most appropriate method and investment banking services was benchmarked using profit split method and also Transactional Net Margin Method. The TPO noted that there is an adjustment history in the earlier assessment years wherein Transactional Net Margin Method adopted by the assessee is rejected and Comparable Uncontrolled Price is adopted.

For A.Y. 2009-10, the learned Dispute Resolution Panel directed to apply the weighted average rate in respect of clearing house trades and delivery versus payment trades. No further adjustment was allowed.

The TPO was informed that Transactional Net Margin Method is the most appropriate method, however, it was stated that for A.Y. 2009-10, DRP had directed to take weighted average of all the trades for the purpose of benchmarking.

The TPO rejected the contention of the assessee and applied CUP method. Thus, he computed the Arm's Length Price for CH trade considering arithmetic mean of CUP brokerage and total TP adjustment was proposed by the order under Section 92CA (3) of the Act of ₹2,05,97,294/-. The AO assessed the returned income of the assessee of ₹328,69,20,549/- determined at ₹330,01,03,399 and passed a draft assessment order on 30th March, 2015.

After an appeal to DRP, the TPO vide letter dated 19th January, 2016, furnished revised transfer pricing adjustment amounting to ₹17,34,651/-. Based on this, assessment order under Section 144C read with section 143(3) of the Act was passed wherein transfer pricing adjustment of ₹17,34,561/- and disallowance under Section 14A of the Act of ₹1,70,70,056/- was made and total income was assessed at ₹330,57,25,166/-.

Aggrieved with the above order, both parties preferred respective appeal and cross objection before the Tribunal.

Ruling

The Tribunal ruled in favor of both parties partially. It referenced judgements such as State of Haryana v. Suresh reported in 2007 (3) KLT 213, Visitor Amu v. K.S. Misra reported in (2007) 8 SCC 594, Phool Patti v. Ram Singh reported in (2009) 13 SCC 22, State of Haryana v. Suresh reported in 2007 (3) KLT 213 to fortify its conclusions. It was further observed that surviving…."

"that in none of the decisions cited by the LD AR, [including the decisions in case of the assessee itself] the provision of proviso of section 92 C (2) were noted at all. Therefore all these decision losses or weaken the binding force of those decisions"

It was also noted that *"'Arithmetic mean' means add up all the values and divide the sum by the number of values. It does not have any scope for any weight to any value. To interpret it in any other manner is violence to plain meaning of the section. It has no reason to include weighted average. The plain meaning rule dictates those statutes are to be interpreted using the ordinary meaning of the language of the statute."*

The Tribunal further held that,

"To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. Justice Bronson in Pierces v. Delameter (AMY at p.18) said that a judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead: and courageous enough to acknowledge his errors [Distributors (Baroda) (P.) Ltd. v. Union of India [1985] 155 ITR 120 (SC)] 040. Accordingly, we hold that only arithmetic mean of the prices of brokerage should be taken and not weighted average of such prices to determine Arm's length price of the International Transaction. Directions of the LD DRP are unsustainable in law."

Source: Tribunal, Mumbai in Morgan Stanley India Company Private Limited vs. Asst. Commissioner of Income Tax vide ITA No. 1715/Mum/2016 dated 15th December 2022

Cost of Seconded Employees Not Taxable as Fees for Technical Services Under Article 12 of India-Japan DTAA.

Facts

The assessee is a company head quartered in Japan and had filed its return of income on 29.11.2019 declaring a total income of Rs. 22,19,87,040. The case was selected for scrutiny and statutory notices were issued to the assessee who in response filed submissions regrading the same. The AO observed that the company has entered into an agreement for secondment of its personnel with Indian entities M/s. Toyoda Gosei South India Pvt. Ltd. And M/s. Toyoda GoseiMinda India Pvt. Ltd. It was further noted that during the impugned financial year, 18 employees were employed with the assessee company and the AO has also observed that the seconded employees were functioning as administrative heads at various levels from the rank of President downwards.

Accordingly, the AO noticed that their services are squarely fall under managerial services and the employees were also providing consultancy services in the nature of technical services. Therefore, the same employees fall within the ambit of the definition of fee for technical services both under the income tax Act and DTAA prima facie.

After considering the various judgements and analysis of the judgements, he held that the amount paid is a fees for technical services. Accordingly, it was brought to tax in accordance with Indian Income Tax law as well as DTAA. He also referred to section 191 of the Act as well as section 115A of the Act. As such, a sum of Rs.2,52,91,243/- was brought to tax as fees for technical services. Accordingly, order u/s 144C of the Act was passed. The assessee filed objection before the DRP which passed the order on 28.6.2022. Accordingly, the final assessment order was passed on 27.7.2022 by making addition on Rs.2,52,91,243/- and completed the assessment.

Ruling

The Tribunal adjudicated in favor of the assessee. It noted that, during the impugned assessment year, the 18 employees were engaged by the assessee company, out of which, the payment made for social security in the nature of reimbursement has not been accepted by the AO in respect of 11 employees to the extent of Rs.2,52,91,243/-. Additionally, relying on the paper books, the Tribunal found that,

"we notice that the seconded employees have been paid salaries and duly TDS has been deducted. The AO has accepted the salary payments directly to the employees and while computing total income of the employees, the social security amount has been considered as income in the hands of the employee. The reimbursement made by the assessee is on cost-to-cost basis and no any profit elements are involved. The terms and conditions of the services of the employees have been examined by the AO and agreements have also been examined."

The Tribunal concluded that the amount paid by the assessee was only the reimbursement, which was part of the salary of expatriate employees as covered under Article 12 of the DTAA provisions between Japan and India.

Source: Tribunal, Bangalore in TOYODA Gosei Company vs. Deputy Commissioner of Income tax (international Tax) vide IT(IT)A No. 800/Bang/2022 dated 16thDecember 2022.

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