VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

Communiqué

International Tax

October 2023

Inside this edition

High Court Rulings

IT and Administrative Services Provided by Assessee to Indian Subsidiary not FTS; Non-Satisfaction of "Make-Available Clause"

ITAT Rulings

Assessee Entitled to Carry Forward Long Term Capital Loss Alongside Short Term Capital Gains Benefit under DTAA; ITAT Relies on Past Judicial Precedents

Assessee Entitled to Exemption under DTAA, GAAR Inapplicable Due to Non-Invocation; Dismisses Allegations against Assessee Owing to Lack of Cogent Evidence

& more...

IT and Administrative Services Provided by Assessee to Indian Subsidiary not FTS; Non-Satisfaction of "Make-Available Clause

Facts

The assessee provided information technology and other administrative services to its affiliate in India. During assessment proceedings pertaining to Assessment Year (AY) 2019-20, the Assessing Officer (AO) vide the draft assessment order dated 28.09.21 concluded that the services provided by the assessee to its Indian subsidiary were in the nature of "management support services". Therefore, he proceeded to consider the same taxable at the rate of 10% under the Indo-Singapore DTAA. The aggrieved assessee filed objections before the Dispute Resolution Panel (DRP) which upheld the findings of the AO. Consequently, a final assessment order dated 30.03.20 was passed by the AO under section 143(3) read with section 144C (13) of the Income Tax Act 1961. {hereinafter referred to as 'the Act'}.

Subsequently, the matter reached the Tribunal which ruled in favor of the assessee. Aggrieved the Revenue appealed before the Hon'ble High Court.

Ruling

The Hon'ble High Court ruled in favor of the assessee by unanimously and completely upholding the judgement of the Tribunal. The tribunal had opined that the services offered by the assessee to its Indian affiliates did not fall within the purview of Fees for Technical Services (FTS) in accordance with Article 12(4)(b) of the Indo-Singapore DTAA, as they did not fulfil the criteria of the "make available" principle.

The Tribunal opined that in order to invoke make available clauses, technical knowledge and skill must remain with the person receiving the services even after the particular contract comes to an end. This is so that the receiver can deploy similar technology or techniques in the future without depending upon the provider.

However, since the contract between the parties had been entered into on 01.01.2010 and was still effective then the above clause was evidently unsatisfied.

Source: High Court, Delhi in The Commissioner of Income tax (International Taxation) vs. M/s. Bio Rad Laboratories (Singapore) PTE Ltd. Vide CM. Appeal 50704/2023 dated October 3, 2023

Assessee Entitled to Carry Forward Long Term Capital Loss Alongside Short Term Capital Gains Benefit under DTAA; ITAT Relies on Past Judicial Precedents

Facts

The Assessee company was incorporated in Mauritius on 19.12.2008, as a public company limited by shares and is also a tax resident of Mauritius under the India-Mauritius DTAA. It invests in Indian securities directly under the Foreign Direct Investment (FDI) route or indirectly through its subsidiaries.

The assessee filed its Return of Income for A.Y. 2017-18 declaring its total loss of INR 14,35,11,469. The Return was selected for scrutiny under CASS and the case was referred to the Transfer Pricing Officer (TPO) u/s 92CA of the Act for determination of Arm's Length Price (ALP) in relation to the international transaction. During the proceedings, the AO found that the assessee had carried forward a long-term capital loss on redemption of Shares amounting to INR 14,35,11,469 but had also claimed the Short Term Capital Gains on redemption of Shares amounting to INR 2,19,26,65,193 as exempt under Article 13 of the India-Mauritius Tax Treaty. As such, the AO felt that the assessee was claiming double benefit under the Act as well as the DTAA.

The AO noted that capital gains derived by a tax resident of Mauritius in India were not taxable in India, and the same was not tax-deductible in Mauritius. Further, the AO opined that since the capital gains derived by the tax resident of Mauritius in India were exempt, the question of carrying forward of capital losses from such transactions did not exist in either India or Mauritius.Accordingly, rejecting all of the assessee's the AO finalized the draft assessment order.

Subsequently, the assessee filed objections before the DRP which favored the AO's finding. Aggrieved, the assessee preferred an appeal before the Tribunal.

Ruling

The Tribunal decided in favor of the assessee. Before reaching its conclusion, the Tribunal referred to the judicial matrix pertaining to the issue of whether a taxpayer can choose the provisions of the Act or those of the Treaty for different sources of income. The Tribunal placed reliance on the following rulings:

i.IBM World Trade Corporation vs. DDIT (IT) [2012] 20 taxmann.com 728 (Bangalore), upheld by the Hon'ble High Court of Karnataka in [2021] 436 ITR 641.

ii.Dimension Data Asia Pacific Pte. Ltd. Vs. DCIT (IT) [2018] 99 taxmann.com 270 (Mumbai).

iii. JCIT vs. Montgomery Emerging Markets Fund [2006] 100 ITD 217 (Mumbai) Special Bench case.

After examining the ratio of the above judgements, the Tribunal opined that it is clear that source of income must have a direct nexus with the stream out of which the income is derived to the assessee.

The Tribunal further observed that each transaction constituting the short-term and long-term assets were different sources of income. Accordingly, any gains or losses arising from different transactions would be treated as distinct transactions and a separate source of income. Therefore, the Short-Term Capital Gain (STCG) and the Long-Term Capital Loss (LTCL) were distinct and separate streams of income arising to an assessee.

Accordingly, the Tribunal concluded by allowing the assessee to claim the beneficial provisions of the India- Mauritius in respect of STCG and allowed to carry forward the LTCL as per section 74 of the Act.

Source: Tribunal, Mumbai in Indium IV (Mauritius) Holdings Limited vs. DCIT (International transaction) vide ITA No. 2423/MUM/2022 dated October 6,2023.

Assessee Entitled to Exemption under DTAA, GAAR Inapplicable Due to Non-Invocation; Dismisses Allegations against Assessee Owing to Lack of Cogent Evidence

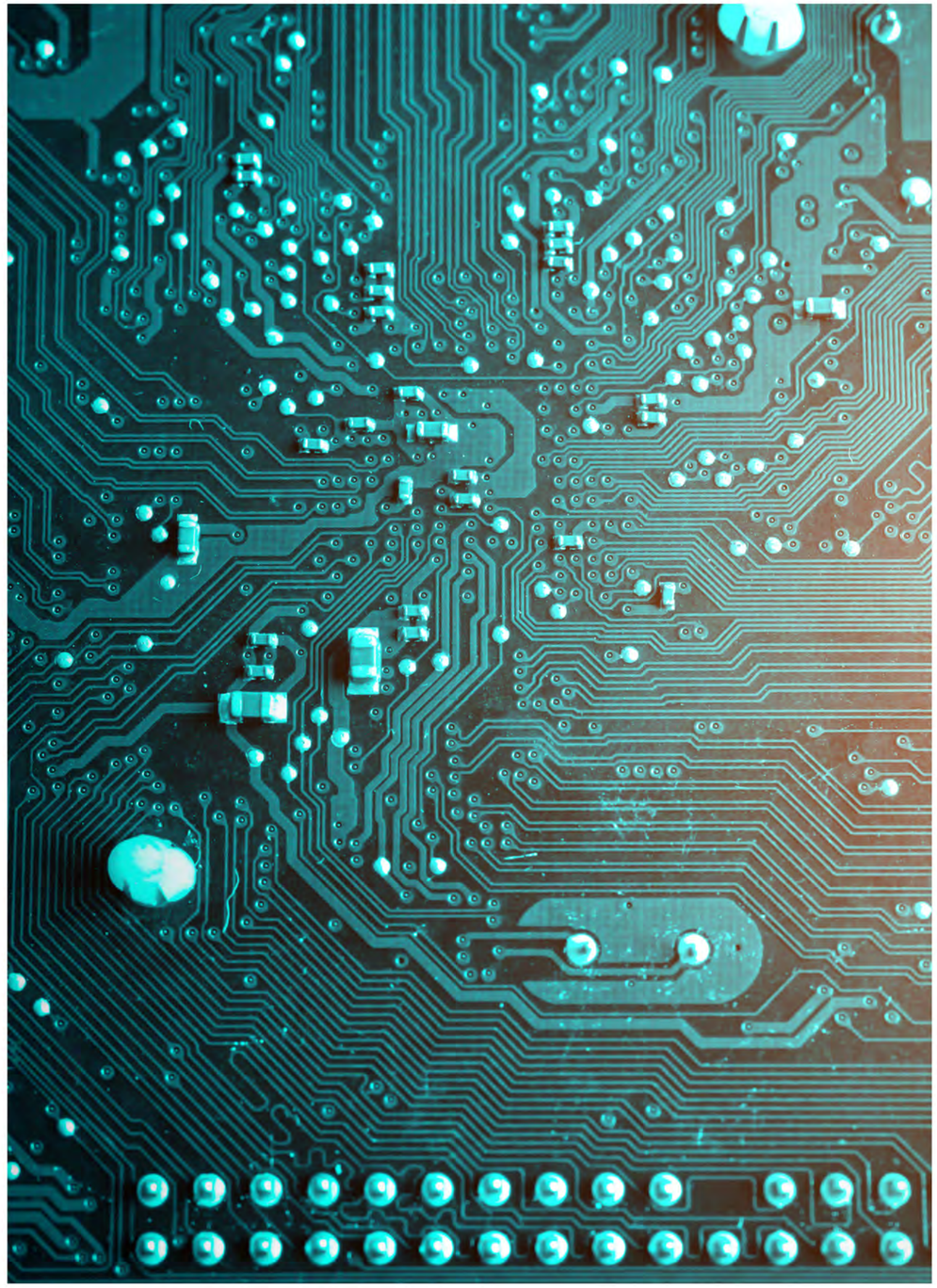
Facts

The assessee is a non-resident corporate entity incorporated under the laws of Mauritius as well as a tax resident of Mauritius and holds a Category 1 Global Business License issued by the Financial Services Commissioner under the Mauritius Financial Services Act, 2007. The principal activity of the assessee is to act as an investment holding company. As an investment holding company, the assessee has invested in acquiring equity shares in certain Indian companies.

The assessee derived long-term capital gain on sale of shares of Northern Arc Capital Ltd. and Aye Finance Pvt. Ltd., two Indian companies, and derived total long term capital gain of INR 91,14,47,001 and INR 124,90,36,610 respectively. The assessee also derived short term capital gains amounting to INR 4,23,62,054 assessee offered the short-term capital gain to tax. Whereas the long-term capital gain was not offered to tax by the assessee contending that being a tax resident of Mauritius holding a valid Tax Residency Certificate (TRC), it is entitled to avail benefits under India – Mauritius Double Taxation Avoidance Agreement (DTAA).

However, the AO did not accept the claim of the assessee. Noting that the control and management decisions of the company were vested with a non-resident of Mauritius, rather than director resident in Mauritius, the AO observed that the assessee is merely a paper company set up for availing treaty benefits. The AO further stated that since the assessee has been set up through a scheme of arrangement to avoid taxes adopting colourable device, the scheme had to be regarded as impermissible tax avoidance arrangement. Accordingly, he proceeded to tax the entirety of the capital gains.

The DRP upheld the findings of the AO, consequently, the matter reached the Tribunal for adjudication.



Ruling

The Tribunal decided in favor of the assessee. It opined that,

"it is fairly well settled that the TRC issued by the competent of a particular country determines the tax residency of a particular person/entity. The aforesaid position has not only been accepted by the Revenue in Circular No. 78, dated 13.04.2000, but while upholding the validity of the aforesaid Circular, the Hon'ble Supreme Court in case of Azadi Bachao Andolan (supra) has also held that the person/entity holding a valid TRC would be entitled to the treaty benefits. Subsequently, the aforesaid legal position has been followed in many decisions."

Furthermore, the Tribunal dismissed the observations of the AO classifying the assessee as a conduit company set up under a scheme of impermissible tax avoidance arrangement holding such allegations devoid of cogent evidence.

The Tribunal concluded its findings by holding that since the AO has accepted that the shares in the Indian company were acquired prior to 01.04.2007 and has chosen not to invoke General Anti Avoidance Rules (GAAR), the capital gains derived on the sale of these would be well exempt as per Article 13(4) of the India-Mauritius Double Taxation Avoidance Agreement (DTAA).

Source: Tribunal, Delhi in ACCION Africa Asia Investment Company vs. ACIT (International Taxation) vide ITA No.1815/Del/2023 dated October 26, 2023.

Let's Connect

+91.135.2743283, +91.135.2747084

3rd Floor, MJ Tower, 55, Rajpur Road, Dehradun - 248001

E: info@vkalra.com | W: vkalra.com

Follow us on

For any further assistance contact our team at kmt@vkalra.com

© 2023 Verendra Kalra & Co. All rights reserved.
This publication contains information in summary form and is therefore intended for general guidance only. It is not a substitute for detailed research or the exercise of professional judgment. Neither VKC nor any member can accept any responsibility for loss occasioned to any person acting or refraining from actions as a result of any material in this publication. On any specific matter, reference should be made to the appropriate advisor.