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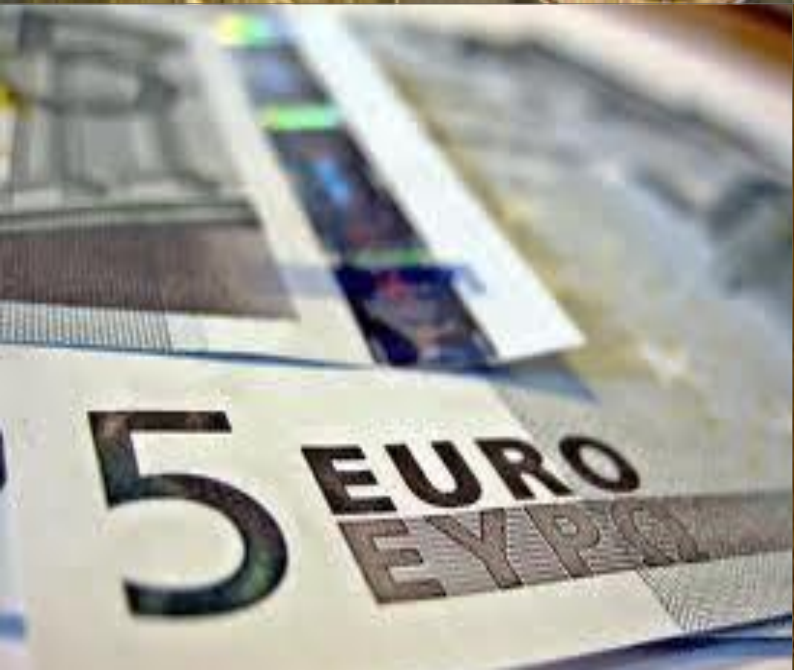
DIRECT TAX REVIEW
JAUNUARY 2022



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SUPREME COURT RULINGS

State cannot defeat section 40(a)(iib) by issuing license to more than one State Govt. Undertaking

Facts

The assessment against the appellant was completed under Section 143(3) by Ld. ACIT disallowing payments of gallonage fee, license fee, shop rental and surcharge on sales tax amounting to INR 811.90 crores u/s 40(a)(iib). The appellant filed an appeal before CIT-A who upheld the order passed by the AO. The appellant thereafter filed an appeal before the Tribunal who also dismissed the appeal and passed order in favor of the Revenue. The appellant herein thereafter has filed miscellaneous application on the ground that the Tribunal had failed to consider the issue agitated against the disallowance of the surcharge on sales tax. The miscellaneous application was allowed by recalling earlier and a fresh order was passed finding the issue against the appellant and dismissing the appeal. Aggrieved by the aforesaid three orders, the appellant herein has filed Income Tax Appeals before the HC. In the common impugned order passed by the High Court, the question of law raised, was answered partly in favor of the assessee/appellant and partly in favor of the revenue holding that Gallonage Fee, License Fee and Shop Rental will clearly fall within the purview of Section 40 (a)(iib) and the amount paid in this regard is liable to be disallowed.

Ruling

The aspect of exclusivity under Section 40(a)(iib) is not to be considered with a narrow interpretation, which will defeat the very intention of Legislature, only on the ground that there is yet another player, viz., Kerala State Co-operatives Consumers' Federation Ltd. which is also granted license under FL-1. The aspect of 'exclusivity' under Section 40(a)(iib) has to be viewed from the nature of undertaking on which levy is imposed and not on the number of undertakings on which the levy is imposed. If this aspect of exclusivity is viewed from the nature of undertaking, in this particular case, both KSBC and Kerala State Co-operatives Consumers' Federation Ltd. are undertakings of the State of Kerala, therefore, levy is an exclusive levy on the State Government Undertakings. Therefore, we are of the considered view that any other interpretation would defeat the very object behind the amendment to Income-tax Act, 1961 is fairly well settled that the interpretation is to be in the manner which will sub serve and promote the object and intention behind the legislation. If it is not interpreted in the manner as aforesaid it would defeat the very intention of the legislation. To defeat the said provision, the State Governments may issue licenses to more than one State owned undertakings and may ultimately say it is not an exclusive undertaking and therefore Section 40(a)(iib) is not attracted and such finding of the High Court runs contrary to object and intention behind the legislation.

Source: Supreme Court in Kerala State Beverages Manufacturing & Marketing Corporation Ltd. vs ACIT

CIVIL APPEAL NO. 11 OF 20 22 dated January 03, 2022

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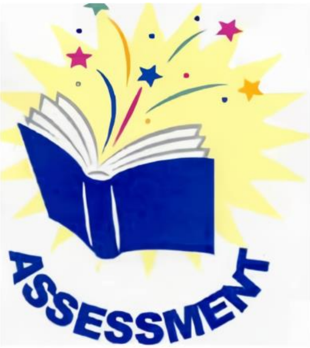
HIGH COURT RULINGS

HC declares assessment order as non-est u/s 144B(9) and quashes it for being a mere exact reproduction of the draft order.

Facts



The partnership firm is engaged in the business of real estate development. For the year under consideration, as the firm was constituted on December 16, 2017 and had no business activity by that period of time, it filed its return of income on June 02, 2018 at INR Nil. The case of the applicant was selected for scrutiny assessment on "share capital/other capital" ground. Though, all the requisite information, as called for, was furnished, yet the respondent No.1 herein without verifying such details, thought fit to issue a show-cause notice cum draft assessment order dated March 31, 2021 Annexure-D calling upon the writ applicant to show-cause as to why an amount of INR 2.71 crores be not added to the returned income of the firm on the premise that the capital contribution by the partners remains unexplained. Being dissatisfied with the aforesaid impugned order passed by the Assessing Officer, the writ applicant has been before this Court the present writ application. According to DR of the appellant, the under mentioned grounds were raised:

Firstly, if the Assessing Officer had any doubts with regard to the genuineness of the entire transaction, it could have questioned the individual partners and not the firm. It was also pointed out that the moment the firm gives a satisfactory explanation and produces the person who has deposited the amount, then the burden of the firm is discharged and, in that case, that credit entry cannot be treated to be the income of the firm for the purposes of income tax. It is open to the Assessing Officer to take appropriate action under Section 69 against the person who has not been able to explain the investment.

Secondly, impugned assessment order is an exact reproduction of the draft assessment order.

Ruling

High Court in the given case held that in view of the aforesaid, we are left with no other option but to quash and set aside the impugned assessment order and remit the entire matter to the Assessing Officer for de novo consideration. On remand, we expect the Assessing Officer to meaningfully look into all the relevant aspects as highlighted by the assessee including the observations made by this Court in this order and even if the Assessing Officer still deems fit to reject the stance of the assessee, he shall to do so by assigning cogent reasons. The impugned assessment order is quashed and set aside.

Source: High Court, Gujarat in Darshan Enterprise vs DCIT
CIVIL APPLICATION NO. 13556 of 2021 dated January 03, 2022

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Personal Hearing is assessee's vested right; right to PH cannot depend upon the facts of each case

Facts

Present writ petition has been filed by the petitioner challenging the action of respondent in passing the impugned final assessment order under Section 143(3). The orders have been passed arbitrarily, without following the principles of natural justice and in gross violation of the scheme of faceless assessment under Section 144B, inasmuch as even

after the 'Nil' or 'Null' variation proposed in the show cause notice, additions had been made to the assessed income in the draft assessment order as well as in the impugned final assessment order. The draft assessment order as well as in the impugned final assessment order had proceeded to make additions to the assessed income on the false premise that the petitioner had not furnished relevant details/ information in response ignoring the fact that the respondent was unable to upload the file due to technical glitches on the respondent's own portal.

Ruling

HC stated as under:

Court is unable to comprehend as to how despite 'Nil' or 'Null' variation proposed in the SCN, additions had been made to the assessed income in the draft Assessment Order and the final Assessment Order. In fact, while the show cause notice assessed a total loss of INR 176. 94 crores, the impugned final assessment order and notice makes a demand of INR 169.77 crores as if the petitioner made a super profit! Further, no SCN, as mandatorily required by Section 144B(1)(xvi), had been served upon the petitioner with respect to the variations made. The draft Assessment Order had also been issued without considering the reply no opportunity of personal hearing was given despite a specific request made by the petitioner. HC thereafter held that This Court is of the opinion that a faceless assessment scheme does not mean no personal hearing. It is not understood as to how grant of personal hearing would either frustrate the concept or defeat the very purpose of Faceless Assessment Scheme. It also held that if the argument of the respondent/Revenue is accepted, then this Court while hearing an appeal under Section 260A (which only involves a substantial question of law) would not be obliged in law to grant a personal hearing to the counsel for the Revenue! Consequently, High Court held that an assessee has a vested right to personal hearing and the same has to be given, if an assessee asks for it. The right to personal hearing cannot depend upon the facts of each case.

Source: High Court, Delhi in Bharat Aluminium Company Ltd. Enterprise vs Union of India & Ors.

W.P.(C) 14528/2021 & CM APPL. 45702/2021 dated January 14, 2022

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HC quashes reassessment notices for past years issued on or after 1-4-2021 for not complying with new provisions applicable w.e.f. 1-4-2021

Ruling

Other things apart, undeniably, on 01.04.2021, by virtue of

FY 2021-22 CHANGES IN COMPLIANCE

plain/unexpected effect of Section 1(2)(a) of the Finance Act, 2021, the provisions of Sections 147, 148, 149, 151 (as those provisions existed up to 31.03.2021), stood substituted, along with a new provision enacted by way of Section 148A of that Act. In absence of any saving clause, to save the pre-existing (and now substituted) provisions, the revenue authorities could only initiate reassessment proceeding on or after 01.04.2021, in accordance with the substituted law and not the pre-existing laws. High Court therefore held that According to us, it would be incorrect to look at the delegation legislation i.e. Notification dated March 31, 2020 issued under the Enabling Act, to interpret the principal legislation made by Parliament, being the Finance Act, 2021. A delegated legislation can never overreach any Act of the principal legislature. Second, it would be over simplistic to ignore the provisions of, either the Enabling Act or the Finance Act, 2021 and to read and interpret the provisions of Finance Act, 2021 as inoperative in view of the fact circumstances arising from the spread of the pandemic COVID-19. Practicality of life de hors statutory provisions, may never be a good guiding principle to interpret any taxation law. In absence of any specific clause in Finance Act, 2021, either to save the provisions of the Enabling Act or the Notifications issued thereunder, by no interpretative process can those Notifications be given an extended run of life, beyond March 31, 2020. They may also not infuse any life into a provision that stood obliterated from the statute with effect from March 31, 2020. Inasmuch as the Finance Act, 2021 does not enable the Central Government to issue any notification to reactivate the pre-existing law (which that principal legislature had substituted), the exercise made by the delegate/Central Government would be de hors any statutory basis. In absence of any express saving of the pre-existing laws, the presumption drawn in favor of that saving, is plainly impermissible. Also, no presumption exists that by Notification issued under the Enabling Act, the operation of the pre-existing provision had been extended and thereby provisions of Section 148A (introduced by Finance Act 2021) and other provisions had been deferred. Such Notifications did not insulate or save, the pre-existing provisions pertaining to reassessment under the Act. 80. In view of the above, all the writ petitions must succeed and are allowed. It is declared that the Ordinance, the Enabling Act and Sections 2 to 88 of the Finance Act 2021, as enforced w.e.f. April 01, 2021, are not conflicted. Insofar as the Explanation appended to Clause A(a), A(b), and the impugned Notifications dated March 31, 2020 and 27.04.2021 (respectively) are concerned, we declare that the said explanations must be read, as applicable to reassessment proceedings as may have been in existence on March 31, 2020 i.e. before the substitution of Sections 147, 148, 148A, 149, 151 & 151A. Consequently, the reassessment notices in all the writ petitions are quashed.

Source: High Court, Calcutta in Manoj Jain vs Union of India
WPA No.11950 of 2021 dated January 17, 2022

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Land brought in by partner & credited by firm to his capital A/c at its cost to him, is not taxable u/s 45(3) even if firm revalues it subsequently

Facts

The assessee along with three other companies was a partner in a partnership firm under the name M/S. Salapuria Soft Zone. The income declared by the assessee was on account of the share of exempt profit from the partnership firm and the return was processed under section 143(1). Subsequently, proceedings

under section 147 were initiated on the account that the partnership firm had revalued its assets and transferred the revalued reserve to its partners' account and the assessee being a partner had received certain sum of money on account of such revaluation reserve. A large tract of land was the subject matter owned by one M/s. Gate Global Solutions Ltd. The said land was advertised for sale. The assessee company along with the two other companies offered to purchase for a sum of INR 16.94 crores. Subsequently the price stood fixed at INR 21.88 crores. The guideline value for the purpose of stamp duty as fixed by the Government at the relevant time was INR 260 per sq. ft. and the purchase price paid by the three companies was INR 701 per sq. ft. The land was purchased with a proposal to develop an industrial park and the three companies accounted for the said land so purchased as "work in progress" and reflected it under "Current Assets" in their balance sheet. These three companies along with a fourth who was to arrange the finance required for development of the land formed a partnership firm who was entitled to avail a loan/credit facility from commercial banks/financial institutions by mortgaging the movable and immovable properties. The Assessing Officer in the reassessment proceedings held that bringing of land into the firm by way of inventory without crediting partners' capital account and without bringing it as fixed asset cannot be considered as capital contribution by the partners and that Section 45(3) was applicable in respect of such transfer made. Further, the Assessing Officer pointed out that the land was grossly undervalued till it was part of inventory in the books of accounts of the firm to avoid the market value of the land being taken into consideration and consequently to avoid higher taxes on capital gains in the hands of the assessee company. Thus, the Assessing Officer concluded that the revaluation amount was real profit and not notional and the firm was taxable in respect of its profits but the revaluation profit was not disclosed by it as its income. The CIT(A) held that even if the case made out in the reasons recorded by the Assessing Officer is accepted, no belief could have been entertained by the Assessing Officer that any income in respect of which the partner was chargeable to tax had escaped assessment, and therefore held that the Assessing Officer acted without jurisdiction by issuing notice under section 148. With regard to the revaluation, tribunal re-appreciated the facts which were considered by the CITA.

Ruling

HC held that after having given our anxious consideration to the entire matter we find that a thorough examination of the factual position has been done by the CIT(A) and the tribunal as well. We find no questions of law; much fewer substantial questions of law arise for consideration in this appeal. In the result, the appeals are dismissed.

Source: High Court, Calcutta in PCIT vs M/S. Orchid Griha Nirman Pvt. Ltd.

ITAT/250 OF 2017 dated January 18, 2022

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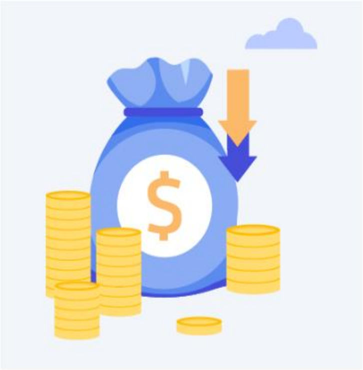
No additions u/s 68 if assessee-company routes its own accounted money back to itself as share capital

Facts

The Assessing Officer passed an assessment order under Section 143(3) making an addition of INR 18.50 crores on account of unexplained share capital and share premium". Being aggrieved, the assessee preferred an appeal before CIT(A) who deleted the aforesaid addition. Pertinently, the revenue did not carry the matter further. Consequently, the assessment proceedings vis-a-vis AY 2012-2013, stood concluded. Likewise, for AYs 2013-2014 and 2014-2015, the A.O.  passed assessment orders under Section 143(3), whereby the income declared/returned by the assessee was accepted. For AY 2015-16, 2016-17 and 2017- 18, while the returns filed by the assessee were pending assessment, a search and seizure operation was carried out qua the assessee. The assessment was concluded with the addition on account of share premium. The CIT upheld the addition which were deleted by the Tribunal. Against which the revenue has preferred current appeal.

Ruling

HC held that there was no such question before the High Court. Unless and until a finding of fact reached by the Tribunal is canvassed before the High Court in the manner set out above, the High Court is obliged to proceed upon the findings of fact reached by the Tribunal and to give an answer in law to the question of law that is before it. 8. The only jurisdiction of the High Court in a reference application is to answer the questions of law that are placed before it. It is only when a finding of the Tribunal on fact is challenged as being perverse, in the sense set out above, that a question of law can be said to arise. the appeals were accordingly dismissed.

Source: High Court, Delhi in PCIT vs Agson Global Pvt. Ltd.
ITA 68/2021 & CM No. 9319/2021 dated January 19, 2022

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ITAT RULINGS

Heading Mitsui India Pvt. Ltd. held not DAPE of Mitsui & Co. Japan, no income to be attributed under Article 7 of DTAA, consequent profit attribution rejected

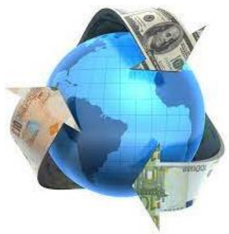
Facts

Assessee is a company stated to be incorporated in Japan and is involved in trading of various items and also undertakes several projects in connection with big industrial installations power projects. Assessment was framed u/s 144C(3) r.w.s 143(3). It was noticed by the AO that during the year under consideration assessee had received consideration for executing two projects, namely Teesta & Purulia projects. He noted that assessee had entered into contracts for carrying out Electrical and mechanical works of Teesta Housing projects and Purulia Pumped Storage Project. The AO held that 10% of the payments that was received from offshore supplies in respect to Teesta & Purulia projects should be considered as taxable income u/s 44BBB of the Act.

Mitsui India Pvt. Ltd. was treated as DAPE in India and taking into consideration a 1.530% (GP ratio from the non-consolidated balance sheet of Mitsui & Co. Japan) of the supplies made by Mitsui Japan to Indian customers, AO added 50% of the Gross Profits as attributable to Indian operation. The CIT(A) upheld the action of AO to the extent of holding Mitsui India Pvt. Ltd. as DAPE but restricted the profit attributable to Indian operation at 20% as held by his predecessor.

Ruling

The Tribunal observed that identical issue arose in Revenue's appeal in



A.Y. 2006-07 in ITA No. 2801/Del/2011. The Co-ordinate Bench for the detailed reasons stated in the order in para 46 of the order concluded that CIT(A) was correct in holding that income from offshore supplies was not liable to tax in India both u/s 44BBB as well as under the provisions of Article – 7 r.w. para 6 of DTAA between India & Japan. Revenue's ground was dismissed. The issue in the second ground is with respect to the computation of profits attributable to PE. AO attributed the profit to PE @ 50% whereas CIT(A) attributed it to 20%. The Tribunal following its own order of previous years, held that MIPL is not a DAPE of assessee company. Once MIPL is not held to be DAPE of assessee-company, then ostensibly no income can be attributed to the assessee company under Article 7 of DTAA, and therefore, there cannot be any question of computing income of PE or any disallowance of commission which is otherwise at Arms' Length Price as accepted by the TPO.

Source: ITAT Delhi in DCIT vs. Mitsui & Co
ITA Nos 5106 & 5108 dated January 4, 2022

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Receipts by NR Company from Indian subsidiary against services rendered outside India are not taxable as per India Singapore DTAA

Facts

Assessee is a non-resident company incorporated in Singapore and is a tax resident of that country. Assessee is organized as a support and business development centre for all Orkla moved companies in

Southeast Asia region, they render advice, support and assistance in the area of marketing and sales in Southeast Asia region to Orkla group companies through experienced personnel. The AO held the receipts by assessee from Indian subsidiary measures MTR Foods Pvt. Ltd., to be taxable under the act as well as the DTAA as FTS.

Ruling

On perusal of the above Service Agreement, the Tribunal observes that MTR Foods Pvt. Ltd., entered into an agreement with assessees as a company and not with the employee of assesses, who was to render the marketing research and sales support services. It is also observed that at the time of entering into the service agreement in 2010 the personnel who was rendering services was sequentially changed from April 2014. Assessee has also provided the certificate of residents therein categorically states that assessee is a resident in Singapore for income tax purposes for assessment year 2015.

The Tribunal held that this could not be considered similar to the case of secondment of employee as the employee of assessee on behalf of assessee is rendering the relevant services to MTR Foods Private Limited who is located outside India. It is also pertinent to note that the services are rendered by assessee outside India. There is no doubt that the services rendered by assessee to MTR Foods were 'managerial' in the nature. In the present facts of the case such services rendered by assessee were utilized in a business carried on by MTR Foods outside India. Therefore, the services rendered by assessee cannot be deemed to have been accrued or arisen in the hands of the assessee in India.

Analyzing Article 12 of India Singapore DTAA, the Tribunal observed that the crux of the matter is after rendering of such technical services by the service provider, whether the recipient is enabled to use the technology which the service provider had used. Therefore, unless the service provider makes available his technical knowledge, experience, skill, know-how, etc. to the recipient of the technical service, the liability to tax is not attracted. Accordingly, if the technology is not made available along with the technical services and what is rendered is only technical services and the technical knowledge is withheld, then, such a technical service would not fall within the definition of technical service in Tax Treaty and not liable to tax.

The Tribunal concluded that nothing is made available by non-resident Assessee to MTR Foods in India. Accordingly, the services rendered by the non-resident assessee to MTR Foods are not taxable as per India Singapore DTAA. Since the non-resident assessee do not have a permanent establishment in India, the income so arising cannot be taxed under Article 7 as 'business profits' either.

Source: ITAT Bangalore in Orkla Asia Pacific Pte Ltd vs. DCIT
ITA No. 193/Bang/2019 dated January 5, 2022

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GIA India not PE of GIA USA

Facts

Assessee/appellant is a group company of Gemmological Institute of America Inc., USA (in short "GIA-US"). The AO held that the assessee is an Indian PE of GIA-US. The appellant/assessee is incorporated in Thailand and is providing gem grading services. The assessee/appellant is a group concern of GIA-US. During the period relevant to the assessment year under appeal the assessee has rendered diamond grading services to its Associated Enterprise (AE) in India i.e., GIA India Laboratories Pvt. Ltd. During the course of assessment proceedings, the AO formed an opinion that the assessee's AE i.e., GIA India Lab. Pvt. Ltd. has all essential components of having PE of the assessee. The DRP after considering the provisions of Article 5 of India – Thailand DTAA upheld the findings of AO in draft assessment order.

Ruling

The Tribunal observed that in holding Indian AE as PE of the assessee, the AO has placed extensive reliance on the assessment order for AY 2011-12 in the case of GIA-US. The AO in draft assessment order has verbatim quoted afore said assessment order. In fact, the AO has not given independent findings and has merely adopted the findings given in the assessment order for AY 2011-12 in the case of GIA- US stating similarity of facts. The Co-ordinate Bench of Tribunal in the case of Gemmological Institute of America Inc. vs. Additional CIT(supra), after threadbare examining business model of the assessee and the provision of Article – 5 of India –US DTAA held that GIA India Lab. Pvt. Ltd. is not PE of GIA-US in India.

The income-tax authorities have invoked section 9 of the Act and/or Article 5 of the India-US Treaty in order to say that the assessee company has a PE in India. On the contrary, as per the assessee, the impugned receipts are in the nature of business profits, and in the absence of any PE in India, the same are not taxable in India. Factually speaking, it is evident that the on perusal of the agreements, the transaction of grading services between assessee company and GIA India Lab cannot be considered to be in the nature of a joint venture, since GIA India Lab has its own independent expertise but only due to its technology/capacity constraints, it forwards the stones to the assessee company for grading purposes; it is not an arrangement between two parties where each party contributes its share in order to undertake an economic activity which is subjected to joint control; in fact, the arrangement is akin to an assignment or subcontracting of grading services to the assessee company, wherever GIA India Lab does not have the requisite expertise or technology or capacity for carrying out the grading services; further, the aforesaid arrangement has also been accepted as a mere rendering of grading services by the Transfer Pricing Officer both in the case of GIA India Lab and the assessee company.

A similar situation has been considered by the Hon'ble High Court of Delhi in the case of e-Funds IT Solutions (supra), which has been upheld by the Hon'ble Supreme Court. In that case, it has been held that a subsidiary cannot be regarded as a 'fixed place PE' of the parent company on the ground of a close association between the Indian subsidiary and the foreign taxpayer. In that case, it was noted that because various services were being provided by E-Fund India (Indian subsidiary) to the taxpayer or that the foreign tax payer was dependent upon Indian subsidiary (e-Fund India) for its earnings or assignment or sub-contract of contracts to e-Fund India or e-Fund India being reimbursed on a certain cost plus basis or saving / reduction in cost by transferring business or back office operations to the Indian subsidiary or the manner and mode of the payment of royalty transactions or e-Fund India providing support for carrying on core activities being performed by the taxpayer or associated transactions, cannot be the basis to construe the Indian subsidiary as PE of the foreign tax payer. Further, before the Hon'ble Delhi High Court, the Department had contended that the foreign company had a joint venture or partnership with Indian subsidiary as the businesses of the assessee company and the Indian subsidiary were inter-linked and closely connected (which is also contended in the case of the assessee before us) and therefore the Indian subsidiary was regarded as PE of foreign company in India. The aforesaid argument of the Revenue was repelled since the conditions under Article 5 of the DTAA were not met and it has been held that PE cannot be established merely because of transactions between associated enterprises or the principal sub- contracting or assigning the contract to the subsidiary.

Factually, in the case of the assessee company, there is no joint venture arrangement between the assessee company and GIA India Lab vis-à-vis gem grading services rendered by the assessee company to GIA India Lab since it is GIA India Lab who enters into agreement with the client and bears all the risks including credit risks, client facing risks, etc. Also, in terms of the agreement, GIA India Lab bears the risk of loss or damage to articles while in transit to and from the assessee company and also during the time when the articles are at or in the assessee company's facilities. Therefore, the economic risks of the gem grading services rendered by the assessee company vis-à-vis stones/diamonds of customers of GIA India Lab shipped to it are borne by GIA India Lab and hence, there is no joint venture arrangement whatsoever between the assessee company and GIA India Lab. In terms of Article 5(6) of the India USA DTAA, it is provided that the mere fact that a company has controlling interest in the other company does not by itself construe the other company to be its PE. Accordingly, the assessee company is not having a 'fixed place' PE in India.

In terms of Article 5 (1) of the India - USA DTAA, a service PE arises on the furnishing of services in India by the assessee company through employees or other personnel, but only if: activities of that nature continue in India for a period or periods aggregating to more than 90 days within any twelve-month period; or the services are performed within India for a related enterprise. Hence, a service PE is triggered if the services (other than included services as defined in Article 12 'Royalties and Fees for Included Services') are rendered by the assessee company through employees or other personnel and activities of that nature continue in India for a period or periods aggregating to more than 90 days within any twelve-month period; or the services are performed within India for a related enterprise. The assessee company renders 'grading services' and 'management services to GIA India Lab'. In fact, 2 graders who were earlier employed with the assessee company are now employed with GIA India Lab and are on the payrolls of GIA India Lab and are working under control and supervisions of GIA India Lab and therefore, no service PE is created in India in terms of India- US DTAA.

Source: ITAT Mumbai in Gemological Research (Thailand) Co Ltd vs. ACIT

ITA Nos 978/Mum/2021 dated January 17, 2022.

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Transponder charges not 'Royalty' u/s 9(1)(vi)

Facts

Assessee is a company incorporated in India and during relevant period was engaged in broadcasting television channels from India which included marketing of advertising airtime on different channels and distribution of chose channels. At the time of payment, the assessee approached in terms of section 195(2) of the Act before AO for determining the portion of sum towards service fee as not taxable in India, hence not liable for deduction of tax at source. The AO, in all the relevant orders held the payment made to those parties in India as "royalty" as per the DTAA and accordingly, held the assessee as liable for withholding the tax at source, contending that the definition of the "royalty" as per India USA DTAA includes, the payment made for any process and as the term "process" is not defined in the DTAA, he imported the term from the Act.

Ruling

The Tribunal observed that in appeal for assessment year 2015-16, the Ld.CIT(A) has considered the facts of one of the parties in whose case, the assessee sought determination of sum chargeable under the Act and consequential deduction of tax at source u/s 195(2) of the Act. The Ld.CIT(A) referred to master agreement between the assessee and Intersat Corporation, USA to highlight the services of transponding facility provided by the party. The Ld.CIT(A) has noted that while passing the orders of previous years, the Tribunal was not having any benefit of decision of the Hon'ble Bombay High Court in the case of New Sports Broadcast Pvt Ltd (ITA 1487 of 2018) and, therefore, transponder payments were held to be royalty, taxable under the Act/Treaty.

However, subsequently, in ITA Nos. 599 to 614/Mum/2016 it was held that since no income was chargeable in the hands of the recipient, there was no liability on the part of the assessee to deduct tax at source on the similar payments for transponder facility. Further, the Ld.CIT(A) has followed binding precedents of jurisdictional High Court in the case of New Sports Broadcast Pvt Ltd (supra), wherein it is held that transponder charges are not in the nature of 'Royalty' income in the hands of recipients despite amendment to section 9(1)(vi) of the Act. Appeals filed by the revenue were dismissed.

Source: ITAT Mumbai in ACIT vs. Viacom18 Media (P.) Ltd.
134 taxmann.com 243 dated January 20, 2022

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VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

CONTACT DETAILS:

Head Office
3rd Floor MJ Tower,55 Rajpur Road, Dehradun
T +91.135.2743283, 2747084, 2742026
E info@vkalra.com
W www.vkalra.com

Branch Office
80/28 Malviya Nagar, New Delhi
E info@vkalra.com
W www.vkalra.com

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

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