The Chamber of Tax Consultants

Recent Case Laws in International Taxation

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8th June, 2022

1. Larsen & Toubro Ltd. vs. DIT (2022) (442 ITR 217) (Bom)

- *Relevant Facts-*

- L&T secured a turnkey contract from ONGC for design, engineering and commissioning of a project on Bombay High.
- It took on hire, barges and tugs from non-resident companies for transporting some equipment from its yard to the offshore site.
- Question on taxability in India of hire charges.

Larsen & Toubro Ltd. vs. DIT (continued)

- *Relevant provisions-*

- Clause (iva) of Explanation 2 to section 9(1)(vi)-

"the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB"

- Section 44BB-

"Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee, being a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils, a sum equal to ten per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession."

Larsen & Toubro Ltd. vs. DIT (continued)

- *Assessee's contention-*

- Its receipts are taxable under section 44BB, being a special provision dealing with taxability of activities connected with production of mineral oils.

- *Department's contentions-*

- Income taxable under the regular provisions of section 9(1)(vi) read with section 115A.
- Simplicitor supply of equipment is not covered by section 44BB.
- Income of a sub-contractor is not covered by section 44BB.

Larsen & Toubro Ltd. vs. DIT (continued)

➢ *Findings of the High Court-*

- Deciding in the assessee's favour, the High Court held that the income will be taxable under section 44BB.
- Section 44BB covers incomes of both, contractor and sub-contractor.
- The proximity of the facilities and services with exploration, extraction and production of mineral oils is to be seen.

Larsen & Toubro Ltd. vs. DIT (continued)

- If the services and facilities are inextricably connected with and are indispensable for exploration, extraction or production of mineral oils, then the same will be covered by section 44BB.
- Clause (iva) of Explanation 2 to section 9(1)(vi) specifically carves out an exception for section 44BB.

2. GRI Renewable Industries SL vs. ACIT (2022) (ITA 202/Pun/2021)

- *Relevant facts-*

- Assessee, a resident of Spain, received certain royalty and FTS from an Indian company. Part of the receipt was towards reimbursement of expenses.
- Two issues before the Tribunal- 1) Whether lesser rate of tax from India-Portugal DTAA could be imported into India-Spain DTAA by invoking MFN clause? and 2) whether receipt towards reimbursement of expenses could be excluded in gross-basis of taxation?

GRI Renewable Industries SL vs. ACIT (continued)

- *Relevant provisions-*

- Protocol to India-Spain DTAA-

the undersigned have agreed upon the following provisions which shall be an integral part of the Convention.

However, if under any Convention or Agreement between India and a third State which is a Member of the OECD, which enters into force after 1-1-1990, India limits its taxation at source on royalties or fees for technical services to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of incomes, the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention with effect from the date on which the present Convention comes into force or the relevant Indian Convention or Agreement, whichever enters into force later.

GRI Renewable Industries SL vs. ACIT (continued)

- Article 13 of India-Spain DTAA-

in the case of fees for technical services and other royalties, 20 per cent of the gross amount of fees for technical services or royalties.

- Section 115A (3)-

(3) No deduction in respect of any expenditure or allowance shall be allowed to the assessee under sections 28 to 44C and section 57 in computing his or its income referred to in sub-section (1).

- Section 90-

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

GRI Renewable Industries SL vs. ACIT (continued)

- *Assessee's contentions (Issue I)-*

- No separate notification is needed to implement MFN clause.
- Circular no. 3 of 2022 dated 3rd February, 2022 does not state the correct position in law.

- *Department's contentions (Issue I)-*

- Under section 90(1), a separate notification is needed to implement MFN clause.
- Circular no. 3 of 2022 is binding.

GRI Renewable Industries SL vs. ACIT (continued)

- *Findings of the Tribunal (Issue I)-*

- Deciding in the assessee's favour, the Tribunal held that a Protocol is an integral part of the treaty. It need not be separately notified by the Central Government.
- In any event, the circular cannot be retrospective since it imposes additional obligations.
- Reduced rate of taxation under India-Portugese DTAA available under India-Spain DTAA.
- Tribunal's findings in line with Steria India Ltd. vs. CIT (2016) (386 ITR 390) (Del).
- Different considerations will apply if the Protocol is worded differently- Torrent Pharmaceuticals Ltd. vs. ITO (2016) (76 taxmann.com 341) (Ahd) dealing with India-Switzerland DTAA.

GRI Renewable Industries SL vs. ACIT (continued)

- *Assessee's contentions (Issue II)-*

- Cost to cost reimbursements cannot be taxed under section 115A read with Article 13 of the DTAA.

- *Department's contentions (Issue II)-*

- Under gross-basis of taxation, entire receipt is taxable, no deductions are permissible.

- *Findings of the Tribunal (Issue II)-*

- Deciding the issue in the Department's favour, the Tribunal held that under gross basis of taxation in terms of section 115A read with Article 13, there is no scope for reducing any expenses, including cost reimbursements.

3. Blackstone FP Capital Partners Mauritius V Ltd. vs. DCIT (2022) (ITA 981/Mum/21)

- *Relevant facts-*

- The assessee, a Mauritian company, which is a wholly-owned subsidiary of a company in Cayman Islands, sold shares of an Indian company to a company in Singapore and claimed exemption in India in terms of Article 13(4) of India-Mauritius DTAA.
- Question on the entitlement of a Mauritian company to the benefits of the DTAA when there is an allegation that it is not the beneficial owner of the shares which were sold.

Blackstone FP Capital Partners Mauritius V Ltd. vs. DCIT (continued)

- *Relevant provisions-*

- Article 13(4)- *Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs (1), (2) and (3) of this article shall be taxable only in that State.*

- Article 10(2)- *However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed…*

- Article 11(4)- *Interest arising in a Contracting State shall be exempt from tax in that Contracting State to the extent approved by the Government of that State if it is derived and beneficially owned…*

Blackstone FP Capital Partners Mauritius V Ltd. vs. DCIT (continued)

- *Assessee's contentions-*

- TRC is conclusive proof of eligibility to the benefits of the treaty.
- The concept of beneficial ownership is irrelevant in determining the taxability of capital gains.

- *Department's contentions-*

- As the parent company in Cayman Islands funded the transaction, was in administrative control of the assessee and was actively involved in the transaction, it is the beneficial owner of shares and benefits of India-Mauritius DTAA cannot be given.

Blackstone FP Capital Partners Mauritius V Ltd. vs. DCIT (continued)

- *Findings of the Tribunal-*

- Concept of beneficial ownership cannot be read into Article 13 of India-Mauritius DTAA.
- Judgement of Bombay High Court in the case of Aditya Birla Nuovo Ltd. vs. DDIT (2012) (342 ITR 308) which recognised the concept of beneficial ownership was based on a concession.
- Matter remanded to the AO to examine the issue afresh.

- *Other points-*

- Whether a binding precedent?
- Treaty amended in 2016 to give India the taxing rights.

4. Goldman Sachs Services Pvt. Ltd. vs. DCIT (2022) (IT (IT)A no. 362/Bang/20)

- *Relevant facts-*

- A group company in USA seconded its employees to assessee, an Indian resident. 25% of the salary of the seconded employees was paid by the assessee in India and 75% of the salary was paid by the group company in USA which was then reimbursed by the assessee to the group company.
- Assessee deducted TDS under section 192 on the entire salary (including 75% paid in USA by the group company).
- 201 proceedings initiated against the assessee for not deducting tax at source while making reimbursements to the group company as being remittance in the nature of Fees for Included Services.

Goldman Sachs Services Pvt. Ltd. vs. DCIT (continued)

- *Assessee's contentions-*

- Assessee was the economic employer and tax was deducted under section 192.
- Independent agreement was entered into between the assessee and the employees.
- Salary is outside the scope of FTS under Explanation 2 to section 9(1)(vii).
- No service provided by the group company.

Goldman Sachs Services Pvt. Ltd. vs. DCIT (continued)

➢ *Department's contentions-*

- Income is taxable in the hands of the group company as FTS under the Act and FIS under the treaty, as provision of personnel is also covered within the definition.
- The foreign company continues to be the employer.
- The fact that cost has been reimbursed and that there is no element of profit is irrelevant.

Goldman Sachs Services Pvt. Ltd. vs. DCIT (continued)

- *Relevant provisions-*

- *Explanation 2.*—For the purposes of this clause, "fees for technical services" means any consideration (including any lump sum consi-deration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

Goldman Sachs Services Pvt. Ltd. vs. DCIT (continued)

- Article 12-
- *"fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :*
- *(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or*
- *(b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.*
- *…"fees for included services" does not include amounts paid to an employee of the person making the payments or to any individual or firm of individuals…*

Goldman Sachs Services Pvt. Ltd. vs. DCIT (continued)

➢ *Findings of the Tribunal-*

- As assessee was the de facto or economic employer, income is taxable as salary on which tax has already been deducted under section 192.
- The definition of FTS and FIS specifically excludes payment of salaries.
- In any event, make available clause is not satisfied.

➢ *Points to consider-*

- The form of arrangement (and not just substance) is relevant.
- Service PE exposure.

5. AB Sciex Pte. Ltd. vs. ACIT (2022) (ITA 514/Del/21)

- *Relevant facts-*

- The assessee, a resident of Singapore, sold products directly in India and also through an Indian distributor. For all Indian sales, the distributor provided the Indian customers, after-sales/warranty services.
- The AMC charges received by the assessee were not offered to tax in India.

AB Sciex Pte. Ltd. vs. ACIT (continued)

➢ *Assessee's contentions-*

- AMC charges are not taxable in India as the assessee does not have a PE in India.

➢ *Department's contentions-*

- Basis information obtained from the assessee's customers in India, the distributor was acting as its representative and also maintained inventory at its premises.
- The Indian distributor constitutes a dependent agent PE and its premises constitute a fixed place PE of the assessee in India.

AB Sciex Pte. Ltd. vs. ACIT (continued)

- *Relevant provisions-*

- Article 5- *1.For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on*.

- *8. ….where a person - other than an agent of an independent status to whom paragraph 9 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if —*

(a) he has and habitually exercises in that State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise ;

(b) he has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise ; or

(c) he habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise.

AB Sciex Pte. Ltd. vs. ACIT (continued)

- *Findings of the Tribunal-*

- Onus on the Department to prove the existence of a PE.
- Statements of the employees of the customers cannot be relied upon as they were neither confronted to the assessee nor was it given an opportunity to cross-examine.
- Indian distributor's premise does not constitute a fixed place PE as it was not at assessee's disposal and assessee's goods were not stored there.
- Indian distributor does not constitute a Dependent Agent PE as there was no material to suggest that it was a dependent agent, or it exercised an authority to conclude contracts, or habitually maintained stock of goods or secured orders for the assessee.

6. ITO vs. Star Rays (ITA 725/SRT/2018) (Surat)

➢ *Relevant facts-*

- The assessee entered into an agreement with GIA, USA for certifying its diamonds.
- As per the agreement, diamonds were to be sent to Hong Kong and payment was to be made at assessee's offshore bank account in Hong Kong.
- While filing Form 15CA/15CB, assessee erroneously mentioned that remittance was being made to GIA, Hong Kong.
- Question regarding the binding nature of Form 15CA/15CB.

ITO vs. Star Rays (continued)

- *Assessee's contentions-*

- Transaction is between the assessee and GIA, USA.
- Details wrongly filed in Form 15CA/15CB do not bind the assessee.
- Since no technical knowledge, experience or skill is made available to the assessee, the income is not in the nature of 'Fees for included services' under Article 12 of India-USA DTAA.

- *Department's contentions-*

- Transaction is between the assessee and GIA, Hong Kong.
- Since there is no treaty with Hong-Kong, income is taxable under the Act as FTS.

ITO vs. Star Rays (continued)

- *Findings of the Tribunal-*

- Wrong statement made in Form 15CA/15CB cannot bind the assessee.
- As the agreement was between the assessee and GIA, USA, grading report was sent by GIA, USA and the amounts were credited in the bank account of GIA, USA, India-USA DTAA was to be applied.
- Income is not taxable in the hands of GIA, USA as no technical knowledge, experience or skill has been made available to the assessee.

7. Rajat Dhara vs. DCIT (2022) (ITA 1914/Kol/19)

- *Relevant facts-*

- The assessee, a resident of India, earned salary income from a company in USA. The assessee claimed the said income to be exempt from tax in India in terms of Article 16 of India-USA DTAA.
- Question before the Tribunal was whether an Indian resident can claim the benefits of India-USA DTAA to claim exemption from taxability in India.

Rajat Dhara vs. DCIT (2022) (continued)

- *Relevant provisions-*

- Article 16- *1….salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.*

- *2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State, if :*

(a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the relevant taxable year ;

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State ; and

(c) the remuneration is not borne by a permanent establishment or a fixed base or a trade or business which the employer has in the other State.

Rajat Dhara vs. DCIT (2022) (continued)

➢ *Assessee's contentions-*

- Salary income received from a US employer is not taxable in India in terms of Article 16 of India-USA DTAA as the assessee's stay in USA during the relevant year was less than 183 days (i.e., 165 days)

➢ *Department's contentions-*

- An Indian resident is not entitled to claim exemption from tax in India by invoking India's treaty with another country.

Rajat Dhara vs. DCIT (2022) (continued)

➢ *Findings of the Tribunal-*

- There is nothing in section 90 which stops an Indian resident from claiming exemption from tax in India by virtue of India's treaty with another country.
- In terms of Article 16 of the treaty, since the assessee's stay in USA was less than 183 days, the income is not taxable in India.

➢ *Points to consider-*

- Decision requires reconsideration.
- Meaning of 'may be taxed'.

8. OVID Technologies Inc. vs. DCIT (2022) (ITA 5171/Del/18)

- *Relevant facts-*

- Assessee, a resident of USA, received income for granting access to its database wherein information available in public domain was analysed for facilitating easy access.
- Question on characterisation of this income.

OVID Technologies Inc. vs. DCIT (continued)

➢ *Assessee's contentions-*

- The income is earned for granting the use of a copyrighted article/product and not the copyright itself. Therefore, it is in the nature of business income, and not royalty.

➢ *Department's contentions-*

- The income is earned for granting the right to use of a copyright. The income is in the nature of royalty.

OVID Technologies Inc. vs. DCIT (continued)

➢ *Findings of the Tribunal-*

- Relying on the judgement of the Supreme Court in the case of Engineering Analysis Centre of Excellence P. Ltd. vs. CIT (2021) (432 ITR 471), the Tribunal held that since the users only get access to the database and have no right to exploit the copyright in the database, the income cannot be characterised as royalty.
- It was further held that the Karnataka High Court's judgement in the case of CIT vs. Synopsis International Old Ltd. (2012) (28 taxmann.com 162) is no longer good law after the Supreme Court's judgement.

9. Microsoft Regional Sales Pte. Ltd. vs. DCIT (2022) (ITA 1553/Del/16)

- *Relevant facts-*

- The assessee received income for providing cloud based services to end users in India.
- The question before the Tribunal was regarding the characterisation of the income.

- *Assessee's contentions-*

- The income is in the nature of business profits and the same is not taxable in India as the assessee does not have a PE in India.

- *Department's contentions-*

- The income is for the right to use an equipment and, is therefore, in the nature of royalty.

Microsoft Regional Sales Pte. Ltd. vs. DCIT (continued)

- *Findings of the Tribunal-*

- The Tribunal held that the income was not in the nature of royalty. While the cloud infrastructure involves various copyrights and patents, but what the end user has access to is the product/service. He has no access to the underlying software or the equipment.

10. Invendis Technologies India Pvt. Ltd. vs. ACIT (2022) (ITA 986/Bang/19)

- *Relevant facts-*

- Assessee earned certain income from Ghana, on which the payer deducted tax at source for payment to tax authorities in Ghana.
- Questions regarding availability of tax credit under section 91 of the Act.

Invendis Technologies India Pvt. Ltd. vs. ACIT (continued)

- *Relevant provision-*

- Section 91(1)- *If any person who is resident in India in any previous year proves that, in respect of his income which accrued or arose during that previous year outside India (and which is not deemed to accrue or arise in India), he has paid in any country with which there is no agreement under section 90 for the relief or avoidance of double taxation, income-tax, by deduction or otherwise, under the law in force in that country, he shall be entitled to the deduction from the Indian income-tax payable by him of a sum calculated on such doubly taxed income at the Indian rate of tax or the rate of tax of the said country, whichever is the lower, or at the Indian rate of tax if both the rates are equal.*

Invendis Technologies India Pvt. Ltd. vs. ACIT (continued)

- Issue I- Whether 'Indian rate of tax' would include surcharge and cess?
- Findings of the Tribunal- Held that surcharge and cess are part of income tax, and, are therefore, to be considered in the calculation of Indian income tax.
- Issue II- How to calculate 'doubly taxed income'?
- Findings of the Tribunal- In the absence of assessment in the foreign country, the net profit percentage of Indian gross income can be applied to the foreign gross income to work out 'doubly taxed income'.
- Issue III- Whether 'other income' should be considered in working out the net profit percentage?
- Findings of the Tribunal- If the Indian rate of tax is calculated on total income including other income, then the same is to be considered in working out net profit percentage.

THANK YOU

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