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International Tax- Recent developments through Judicial Prouncements

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Agenda

❖ Recent Judgements

- ❖ Progress Rail Locomotive Inc. v. Dy. CIT [2024] 163 taxmann.com 52 (Delhi)
- ❖ Hyatt International Southwest Asia Ltd. v. Addl. DIT [2024] 166 taxmann.com 466 (Delhi)
- ❖ International Management Group (UK) Ltd. v CIT [2024] 164 taxmann.com 225 (Delhi)
- ❖ CIT v. Telstra Singapore Pte. Ltd [2024] 165 taxmann.com 85 (Delhi)
- ❖ Tiger Global International III Holdings vs. AAR [2024] 165 taxmann.com 850 (Delhi)

Agenda

❖ **International Tax Overview**

- Existence of **subsidiary** can be treated a PE in India [Article 5 of DTAA]
- Allocation of **business profits** attributable to PE- On Entity level or at PE level [Article 7 of DTAA]
- Interplay of taxation of **business profits vis a vis Royalty**, FTS [Article 7 vs. Article 12]
- Interplay of **Royalty under section 9 (vi) vis a vis- Article 12 of DTAA**
- An Analysis of **beneficial ownership** in the taxation of Interest, Royality and Fees for Technical Services [FTS] Under Article 10,11,12 of Double Tax Avoidance Agreements [DTAA]
- Relevance of **Tax Resident Certificate [TRC]** for taking the benefits under DTAA
- Taxation of **Capital Gains vis a vis Grander fathering provisions** – under Article 13 of DTAA

1.

Progress Rail Locomotive Inc. v. Dy. CIT [2024] 163 taxmann.com 52 (Delhi)

1. Existence of subsidiary can be treated as Permanent Establishment [PE]

Progress Rail Locomotive Inc. V. Dy. CIT [2024] 163 taxmann.com 52 (Delhi)

Brief Facts

- The assessee a foreign company was a part of the Caterpillar Group. It was one of the largest integrated and diversified manufacturers of rolling stock, infrastructure solutions and engaged in providing solutions and technologies to rail customers across the globe and it was also engaged in supplying equipment directly to the Indian Railways including to the Diesel Locomotive Works (DLW), Varanasi. The assessee, however, had a **wholly owned Indian subsidiary** - Progress Rail which had a manufacturing unit at Noida and an office at Varanasi. As per the assessee, it had no income which could be said to accrue or arise in India under the provisions of the Act.

Analysis- [India- USA- Treaty]

Article 5- Permanent Establishment [Relevant Extract]

(1) For the purposes of this Convention, the term "permanent establishment" means a **fixed place of business through which the business** of an enterprise is wholly or partly carried on

1. Existence of subsidiary can be treated as Permanent Establishment [PE]

(2) The "term" permanent establishment" ***includes*** specially : (a) a place of management (b) a branch © an office….. *(l)*- the furnishing of services, other than included services as defined in Article 12, within a contracting state by an enterprises through employees or other personnel, but only if :

(i) activities of that nature continue within that state for a period or periods aggregating more than 90 days within any 12 months period

(ii) the services are performed within that state for a ***related enterprises [Article 9]***

(3) Notwithstanding the preceding provisions of this Article, the term 'PE' shall be **deemed not to include** any one or more of the followings:

(a- c)……..

(d) The maintenance of fixed placed of business solely for the purpose of purchasing goods or merchandise, or of ***collecting information,*** for the enterprise.

1. Existence of subsidiary can be treated as Permanent Establishment [PE]

(e) The maintenance of a fixed place of business solely for the purpose of advertising, ***for the supply of information***, for scientific research or for other activities which have a preparatory or auxiliary character, for the enterprises

(4) **Dependent Agents/ Independents Agents-** A person is acting in the contracting state on behalf of the other contracting state- shall be deemed to have PE in the first mentioned state

(c) he **habitually** secures orders in the first- mentioned state, **wholly or almost** wholly for the enterprise

(6) The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise) ***shall not of itself*** constitute either company a permanent establishment of the other.

Article 5, 5(2) clause (a) to (k)	-	acknowledged as constituting a Fixed Place PE
Article 5(2)(*l*)	-	concerned with Service PE
Article 5(4)	-	concerned with DAPE

1. Existence of subsidiary can be treated as Permanent Establishment [PE]

Arguments before the High Court

- Distinct line of products manufactured and supplied by the petitioner and its Indian subsidiary.
- Petitioner has not control or oversight over those factories or offices of the Indian subsidiary
- Indian Subsidiary has not played key role in relation to the core activities of the parent company
- Petitioner exercises no lien on the employees of the Indian subsidiary
- Mere existence of a wholly owned subsidiary would not ***ipso facto*** amount to an assumption of PE –***[Relying on E-funds IT solutions Inc]***
- A parent company's activities abroad as a ***shareholder*** in other companies cannot create a PE.
- Subsidiary PE may come in to existence where it is found that both the entities are in fact " alter egos" and undertake ***joint business activity***

1. Existence of subsidiary can be treated as Permanent Establishment [PE]

Arguments before the High Court

- Subsidiary can give rise to PE if the subsidiary allows the parent company to operate from its premises such that the primary test in article 5(1) is satisfied.

- When the subsidiary is merely an alter ego of the parent, being entirely dependent on the parent for its ***survival,*** it may result in a virtual projection of foreign enterprise in India thereby creating a PE in India.

Findings by the Hon'ble Court

A subsidiary would be deemed to become PE only if satisfies the tests as laid out in Article **5(1)**, **5(2)**, **5(4)** and **5(5)**

1. **Service PE** Periodic visits of employees of the petitioner to India were at best liable to be recognised as an extension of the right of the holding company to overseas India- called 'normal management contribution'. It cannot possibly be understood to constitute the rendering of service. ***No Service PE***

1. Existence of subsidiary can be treated as Permanent Establishment [PE]

2. Fixed Place PE The first function of the term '***through***' is to make it clear that the taxpayer has to ***control*** the PE.

- As long as the space in the establishment or premises placed at the constant "***disposal***" of the enterprise, it would satisfy the test of Fixed Place PE.
- Nowhere alludes to a particular space or a part of the premises situated in Noida or Varanasi have been placed under the exclusive or significant "***control or disposal***" of the petitioner.
- Subsidiary undertaking manufacturing activity in its ***own right*** and supplying products to various arms of the Indian Railways.
- This was therefore ***not*** a case where the subsidiary stood created solely for the purposes of the undertaking activities and discharging functions concerned solely with ***core business activity*** of the petitioner.
- A subsidiary PE could be said to have become a mere "alter ego" provided it were found that it had no independent business activity to undertake or were ***working only to sub serve the business interests*** of the petitioner.

1. Existence of subsidiary can be treated as Permanent Establishment [PE]

- If some of the functions were transferred to the Indian entity by way of handing over business or back-office operations, the same would not result in creation of Fixed Place PE. [Relying on **E-funds solutions Inc.by SC]** Hence, **No Fixed PE is in existence.**

3. Auxiliary or preparatory services - Subsidiary do not appear to have been established with a **commonality of general purpose** and Indian Subsidiary clearly do not appear to travel ***beyond*** being "preparatory or auxiliary".

- The expression "preparatory has been understood to mean work which is undertaken in contemplation of the essential and significant part of the principal activity of an entity.

- Following up purchase orders or gathering information with respect to tenders is work which is clearly of an "auxiliary or preparatory" character or concerned with the **supply or collection of information**. Indian Subsidiary would at best lead us to conclude the latter constituting a **medium of communication** between the petitioner and Indian Railways. In any case, those functions cannot possibly be countenanced as constituting the core business activity of the petitioner. [**Existence for Medium of communication- No PE**]

1. Existence of subsidiary can be treated as Permanent Establishment [PE]

4. DAPE Analysis- Both the petitioner and the Indian subsidiary had **independent dealings** with the Indian Railways. There was no material on record that the contracts were concluded by Indian subsidiary at the behalf of the petitioner.

- The Indian subsidiary ***was not*** thus a mere arm or an extension of the petitioner established to secure orders on its behalf and that too "wholly or almost wholly" for it. Hence ***No PE in existence***

Conclusion

- The exchange and collaboration between entities forming part of a larger conglomerate would clearly be intended towards sub serving the growth of the group as a whole and could relate to not only operations in India, but also to any market in the globe in which the petitioner may have a footprint. That however cannot be viewed as being sufficient to hold that the Indian establishment attains the character of PE. Hence ***No PE in existence***.

2.

Hyatt International Southwest Asia Ltd. v. Addl. DIT [2024] 166 taxmann.com 466 (Delhi)

2. Allocation of business profits to PE

Hyatt International Southwest Asia Ltd. v. Addl. DIT [2024] 166 taxmann.com 466 (Delhi)

Brief Facts

Hyatt International South west Asia Limited ["Assessee"] a UAE based entity constituted a PE in India under the **India-UAE** DTAA. During the impugned year the assessee incurred losses from global operation. However, the Tax Department attributed profits to the Indian PE based on taxpayers' operations in India. Assessee challenged the profit attribution by way of arguments that no profit should be attributed to the Indian PE as it had incurred losses globally.

- **CIT v. Nokia Solutions and Networks OY [2023] 147 taxmann.com 165 (Delhi)-** wherein, it was held that profit attribution to PE would be warranted only if the entity as a whole and PE constituting PE merely a component thereof, had earned profits.



- Seeing the complexity of the issues involved, the matter was referred to the **full bench to review** the propositions held in the case of **Nokia**

2. Allocation of business profits to PE

Analysis- [India- UAE- Treaty]

Article 7- Permanent Establishment [Relevant Extract]

(1) The profits of an enterprise of a Contracting State shall be taxable only in that State ***unless*** the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State ***but only so much of them as is attributable to that permanent establishment.***

(2) Subject to the provisions of paragraph (3), where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make ***if it were a distinct and separate enterprise engaged*** in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

2. Allocation of business profits to PE

Argument by the assessee in Court

- No income attribution can be made under the treaty when the foreign entity's overall global operations result in **a loss**. The income attributable to the PE can arise only when the foreign entity generates profit.

- **Profit** is a pre-condition for profit attribution. If the entity incurs a global loss, then no question arises of attributing any profit to the PE, which would be taxable in India.

- Reliance was placed on the ***Nokia case*** where the court held that no profit could be attributed to a PE in India if the foreign entity incurred global losses. The Delhi High Court placed reliance on the principles laid down by the Special bench of ITAT in the case of ***Motorola Inc*** and held that no profit can be attributed to India since the taxpayer suffered global loss.

- In ***Motorola Case*** it was held that global net profit rate should be applied to Indian sales to calculate the profits attributable to Indian PE.

2. Allocation of business profits to PE

Findings by the Court

- The court emphasized that profits should be attributable to PE as if it were a ***distinct and separate entity*** engaged in similar activities and independent of the entity of which it may be a part.

- The Court recognises that the PE constitutes a '***separate source of profit*** and it is incorrect to ignore the income generated by activities undertaken by a PE in a contracting state, and to make the exercise of attribution dependent on the overall profits or income earned by the entity at the global level.

- ***Article 7*** does not expand its gaze or reach to the overall operations or profitability of a transactional entity. The taxability of income earned by a PE existing in a source country ***is not even*** remotely linked or coupled to the overall operations of the entity of which it may be part. The argument of world-wide income is untenable.

- Decision of SB in ***Motorola case*** is misconstrued.

2. Allocation of business profits to PE

Findings by the Court

- The court held that profits can be attributed to PE even if the entity has never made profits and conversely, no profits may be attributed to a PE even if the entity has made profits.

- If the submission of the taxpayer was to be accepted the source country shall have power to tax even in a situation where although the entity is profitable, PE have incurred a loss. If the aforesaid logic were to be applied, in a converse situation, the source country may exercise taxing only if the taxpayer at a global level were found to have earned profit, which is not the correct interpretation as per Article 7.

- The distinction which needs to be borne in mind with regard to the income of non-resident as opposed to an entity domiciled and stationed in one of Contracting States duly acknowledged in Section 5 of the Income Tax Act and which subjects the ***global income*** of the resident alone to taxation. For non-residents, it is the principles of income accruing or arising which are deemed to govern, It is these broadly accepted and well recognised principles which imbue the DTAA. [***Interplay of Section 5 with DTAA].***

2. Allocation of business profits to PE

- Relying on the OECD and UN commentaries the court finds that the it would be wholly incorrect to found taxation on the basis of the overall activities or profitability of an enterprises. The Source state is ultimately concerned with the income or profit which arises or accrues within its ***territorial boundaries*** and the activities undertaken therein.

- **Conclusion**

- The attribution of profits to PE must follow the separate entity approach. Meaning it should be based on its local operations, regardless of the global performance of the entity.

3.

International Management Group (UK) Ltd. v CIT [2024] 164 taxmann.com 225 (Delhi)

3. Composite Contracts-Business profits vs. Royality- Article 7(9) vis a vis 13(6)

International Management Group (UK) Ltd. v CIT [2024] 164 taxmann.com 225 (Delhi)

Brief Facts

International Management Group (UK) Ltd.["Assessee"] had received Rs. 28 crores from BCCI for providing ***advisory and managerial services*** for operation of IPL. Adopting the profit split method, it had attributed revenue of Rs. 20.19 Crores to Indian PE. The net income of Rs …. crores attributable to activities undertaken in India had been offered to tax to net income basis in accordance with provisions of section 44DA along with the provisions of article 7 of DTAA. The remaining revenue of Rs. 7 crores according to the assessee, pertained to work done outside India and thus not attributable to the PE and consequently not liable to be taxed.

AO held that the receipts of Rs. 7 crores received for work done outside India was liable to be taxed as FTS.

3. Composite Contracts-Business profits vs. Royality- Article 7(9) vis a vis 13(6)

International Management Group (UK) Ltd. v CIT [2024] 164 taxmann.com 225 (Delhi)

Questions before the Court

- **Point no 1**- Divisible contracts- In terms of existence of PE in India, the taxation would arise only in Article 7
- **Point no 2**-Services provided would be in the nature of technical service by meeting the make available clause
- **Point no 3**-Services rendered by the IMG were utilized by BCCI outside India- **Section 9(i)(vii)(b) vs. Explanation of section 9**

Findings by the Court- Divisible contracts
Point no 1

Article 5 of DTAA neither serves as a head of taxation not **does it concern** itself with a categorization or classification of income. Rather article 5 is specifically concerned with defining the concept of PE and enumerate the criteria in which a non-resident entity's presence and activities in a contracting state would be sufficient to constitute a PE.

3. Composite Contracts-Business profits vs. Royality- Article 7(9) vis a vis 13(6)

- It is pertinent to note that the DTAA characterizes profits and income under various ***independent* Articles** which form part of the convention. This is evident from the perusal of article 6-defines the principle of taxation of income derived from immovable property, article 7 which speaks of business profits etc.

- Article 5 ***does not extend to categorization of income*** nor does it prescribe the specific article under which such income should be taxed. The article role is limited to defining the circumstances under which a PE could be said to exist and ***does not extend*** to the subsequent tax treatment of the income derived from the PE's activities.

- Merely because the assessee chose to treat the same as business profits, the respondents were neither estopped nor restrained from examining the issue independently and uninfluenced by the action of the assessee offering a part of the revenue to tax albeit under the head of business income.

Article – 7

- Article 7- is ***not intended*** to be an overriding, a non obstante or an umbrella provision which would eclipse all other independent articles of the convention . This is evident from para 9 of article 7 which in unequivocal terms

3. Composite Contracts-Business profits vs. Royality- Article 7(9) vis a vis 13(6)

- Speaks of items of income dealt with separately under other articles of the Convention being left untouched. Para 9 in unambiguous terms prescribes that in such a situation those other articles ***shall not*** be affected by Article 7.

- The structure of the DTAA ensures that each type of income is governed by the ***specific article*** and thus preventing an overlap or conflict.

- Article pertaining to business profits apply only till such time as the revenue earned by the non-residents entity ***does not*** pertain to categories of income explicitly covered by the other articles of the DTAA.

- Article 7 [business profits] is pertaining to ***income generation,*** the special articles of the DTAA lay emphasis on the ***economic character*** of a transaction.

- Para 9 clearly envisages contingencies where profits earned may comprise of more than one item of income and which would consequently require the taxing authority to deduce and identify the most appropriate Article under which the item of income would be liable to categorized. Thus it is unable to sustain the submission of the assessee.

3. Composite Contracts-Business profits vs. Royality- Article 7(9) vis a vis 13(6)

Interplay of Article 7(9) vs. 13(6)

Article 13(6)

- The provisions of paragraphs (1) and (2) of this Article shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, ***carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein,*** or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is ***effectively connected*** with such permanent establishment or fixed base. In such case, the provisions of Article 7 (Business profits) or Article 15 (Independent personal services) of this Convention, as the case may be shall apply.

Article 7(9)

- Where profits include items of income which ***are dealt with separately in other Articles*** of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article

(1) Court did not delve in the intricacies of the effectively connected with the PE-

3. Composite Contracts-Business profits vs. Royality- Article 7(9) vis a vis 13(6)

Point not 2

Fees for Technical Services [FTS]- 'Make Available'

- Mere furnishing of services would not suffice and a liability of tax would be triggered only if the technical or consultancy service were coupled with a transfer of the expertise itself.

- The expression "make available" must be construed as an enablement, conferral of knowledge and which would lead to the payer becoming skilled to perform those functions independently.

- Relying on the ***Bio Rad judgement*** it was held that the real test would be the transfer of technical knowledge, the knowledge and skills and expertise of the provider being absorbed by the payer and who would then have the capability to deploy that knowledge or skill without reference to the original provider.

- The tax is not dependent on the use of technology by the recipient.

- Mere usage or utilization of technical or consultative material in aid of business would not be sufficient to attract Article 13 of DTAA.

- The continued provisioning and rendering of service over a substantial period of time were factors which were duly recognised by the Court in ***Bio Rad*** as well when it observed that the same would clearly detract from an assumption that the technical or consultancy service had been made available.

3. Composite Contracts-Business profits vs. Royality- Article 7(9) vis a vis 13(6)

Point no 3

Inter play between Section 9 (1)(vii)- Exception and Explanation of section 9

Section 9(1)(vii)- Income by way of fees for technical services payable by-

(b) A person who is resident, ***except*** where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making earning any income from any source outside India.

Explanation- For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) shall be included in the total income of the non-resident, whether or not

(i) The non-resident has a residence or place of business or business connection in India; or
(ii) The non-resident has rendered services in India" [***w.e.f Finance Act, 2010***]

Question- Which one is override the other ?

3. Composite Contracts-Business profits vs. Royality- Article 7(9) vis a vis 13(6)

Findings by the Court

- Explanation which has come to be incorporated in section 9 neither erases nor overrides the exception which continues to exist in clause (vii). It is also pertinent to note that the ***exception*** forming part of clause (vii) existed on the statue book at the time when Finance Act, 2010 came to be introduced. Notwithstanding the above, Parliament in its wisdom chose not to delete or restructure clause *(vii)*.

- Accordingly, while the Explanation does declare that FTS earned by non-resident would be deemed to accrue or arise in India irrespective of whether it have a place of business or business connection therein or having rendered service in India, ***the same would not result in FTS paid by a resident for services utilized in connection with a business outside India or for the purposes of earning income from a source outside India becoming liable to tax.***

4.

CIT v. Telstra Singapore Pte. Ltd [2024] 165 taxmann.com 85 (Delhi)

4. Royality – Interplay of Section 9(vi) vis a vis Article 12

CIT v. Telstra Singapore Pte. Ltd. [2024] 165 taxmann.com 85 (Delhi)

Brief Facts

Telstra Singapore Pte. Ltd. ['Assessee'], a Singapore based company, was engaged in the business of providing digital transmission of data *i.e.* bandwidth services to facilitate high speed data connectivity. During the year under consideration, the assessee had entered into OSSSA and GBSA with various telecom operators in India for providing those services from outside India.

The Assessing Officer held that the amount received by the assessee from Indian customers for the provision of bandwidth services outside India being liable to be construed as constituting equipment/process royalty was taxable under section 9(1)(vi) read with article 12(3) of the DTAA.

4. Royality – Interplay of Section 9(vi) vis a vis Article 12

Analysis- Section 9 (vi)

Income by way of royalty payable by-

(a)……

(b) A person who is resident except where the royalty is payable in respect of any right, property or information used or services utilized for the purposes of business or profession…….

Explanations 2

(i) The transfer of all or any rights (including the granting of licences) in respect of a patent, invention, model, design , ***secret formula or process*** or trade mark or similar property ;

(iva) The ***use*** or ***right to use*** any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB.

4 Royality – Interplay of Section 9(vi) vis a vis Article 12

Explanation 5

For the removal of doubts, it is hereby clarified that royalty includes and has always included consideration in respect of any right, property or information, **whether or not**-
(a) The possession or control of such right, property or information is with the payer..
(b) …
(c) The location of such right, property or information is in India.

Explanation 6

For the removal of doubts, it is hereby clarified that the expression " **process**" includes and shall be deemed to have included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, **whether or not such process is secret**)

India-Singapore DTAA [Article 3]

(2)- As regards the application of the Agreement by a Contracting State, any ***term not*** defined therein shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the Agreement applies.

4. Royality – Interplay of Section 9(vi) vis a vis Article 12

India-Singapore DTAA [Article 12]

The term "royalties" as used in this Article means payments of any kind received as a consideration for the **use of, or the right to use**:(*a*) any copyright of a literary, artistic or scientific work, including cinematograph film or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, **secret formula or process**, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information ;(*b*) any industrial, commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(*b*) or 4(*c*) of Article 8.

Questions before the Court

a) Bandwidth services provided in connection with **use or right to use** of process or equipment whether to be taxed as per section 9(1)(vi) r.w.s Article 12 of DTAA ***[Meaning of use or right to use test]***

b) Interpretation of Royality under Article 12 r.w.s Article 3(2) as the word ***process*** is not defined in the DTAA

c) Interplay of Royality as per the Income tax Act with the explanation 4,5,6 [***as extended the scope of meaning of royalty and DTAA***

4. Royality – Interplay of Section 9(vi) vis a vis Article 12

Findings by the Court

1.Amendment made in the domestic law cannot be made unilaterally

- As held by this court in the ***Asia Satellite and New Skies***- Finance Act, 2012 will not effect article 12 of DTAA. It would follow that in the first determinative interpretation given to the world "Royalty" in Asia Satellite, when the definitions were in fact pari materia, will continue to hold the field for the purpose of assessment years preceding to the Finance Act, 2012 and in all cases which involve a DTAA, **unless the said DTAA are amended jointly by both parties to incorporate income from data transmission services as partaking of the nature or royalty, or amend the definition in a manner so that such income automatically become royalty.**

- It was significantly observed that an act of Parliament can neither supply nor alter the boundaries of the definition under Article 12 as confirmed in the ***Engineering Analysis*** by Supreme Court.

- Unilateral amendments introduced in a domestic law ***cannot*** be accorded an overriding effect over the provisions of DTAA.

4. Royality – Interplay of Section 9(vi) vis a vis Article 12

Findings by the Court

2.Analysis of 'Use or Right to use'

Use or right to use would necessarily entails the grant of a **right to exploit** or bring into effective use.

A mere advantage or benefit derived from a service provided **cannot** be fall with in the meaning of use or right to use as appear in Article 12

Usage of the equipment connotes that the grantee of right has possession and control over the equipment and the equipment is virtually at his disposal.

Even in the case of treaties that include the leasing of equipment's in the definition of royalties since the operator pays a charge under roaming agreements is **not paying for the use,** or right to use, the visited network to which it does not have physical access, but rather for the telecommunications services provided by the foreign network operator.

As per OCED and UN Commentaries the Royality provisions are not attracted to such agreements

4. Royality – Interplay of Section 9(vi) vis a vis Article 12

3. **Meaning of Process**

The word "process" being liable to be construed '*ejusdem generis*' is lent added credence employing the expression " or similar property" which follows. It thus clearly appears to be intended to extend to a host of intellectual properties.

4. Analysis Article 3(2)- "Process –Explanation 5

Explanation 5 was added to defining the meaning of '**Process**'

Article 3(2) would be trigged only if one was seeking to find a ***defining term*** for an expression appearing in the DTAA and which has not been explicated therein. Royality is '**term**' which duly defined by the DTAA

Amendment to the domestic law , in an attempt to contour restrict or **expand the definition** under the statute, **cannot** extend to the definition under the DTAA.

No one party to the treaty can ascribe to itself the power to **unilaterally** change the terms of the treaty and annul this economic bargain.

4. Royality – Interplay of Section 9(vi) vis a vis Article 12

Findings by the Court

Amendments comprised in Explanation 6 would not override the use and right to use test which form the bedrock of the royalty article comprised in the DTAA

The word "process" being liable to be construed '*ejusdem generis*' is lent added credence employing the expression " or similar property" which follows. It thus clearly appears to be intended to extend to a host of **intellectual properties.**

Conclusion

- Even if the Explanations 2 and 6 to section 9 of the Act applied, the position would remain unaltered.
- There was no transfer or conferment of right in respect of patent, invention or process.
- The customer and those availing services provided by Telstra were not accorded a right over the technology possessed or infrastructure by it.

4. Royality – Interplay of Section 9(vi) vis a vis Article 12

Findings by the Court

Conclusion

- Infrastructure remains under the direct control of Telstra. A person who is provided mobile communication services or access to the internet does not stand vested a right over a patent, invention or process.

- A person who is provided mobile communication services or access to the internet does not stand vested with a right over a patent, invention or process.

- The consideration that the service recipient pays also cannot be possibly be recognised as being intended to acquire a right in respect of patent, invention, process or equipment.

Hence, the appeal of the Revenue is rejected

5.

Tiger Global International III Holdings vs. AAR [2024] 165 taxmann.com 850 (Delhi)

5. Shell / Conduit Company – Tax Resident Certificate, Beneficial owners

Tiger Global International III Holdings vs. AAR [2024] 165 taxmann.com 850 (Delhi)

Brief Facts

The assessee is stated to be a private company limited by shares incorporated under the laws of Mauritius and having its principal office in that country. The primary objective of undertaking the investment activities with the intention of earing long term capital appreciation and investment income. The immediate shareholders of the assessee are also Mauritian companies whose shareholders in turn are private equity funds who had raised funds from several investors across the globe. Holding company was incorporated in USA was asserted to be the assessee's Investment manager.

Questions to be decided by Court [India-Mauritius -DTAA]

1. The assessee company was established in 'Mauritius' will be ***conduit company or not*** and whether disentitled to claim the benefits of the DTAA since the transaction lacks commercial substance and the establishment of an entity in Mauritus was principally aimed at deriving undue benefits under DTAA.

5. Shell / Conduit Company – Tax Resident Certificate, Beneficial owners

Questions to be decided by Court

2. Whether Tax Resident Certificate [TRC] would be the conclusive evidence to claim the benefits under DTAA

3. Whether Holding Subsidiary relationship will be reason to denying the benefits of DTAA

4. Who will be the Beneficial Owners for claiming the benefits under the DTAA.

Findings by the Court

Establish company in Mauritus- would lead to denial the DTAA benefits

- Mere establishment of an intermediary or subsidiary in the absence of negative factors ***cannot*** and **should not** be readily presumed to be lacking in bona fides or being an attempt to create an artifice lacking substance.

- Mere establishment of a subsidiary ***would not*** give rise to a general presumption of tax evasion or avoidance.

5. Shell / Conduit Company – Tax Resident Certificate, Beneficial owners

Favourable tax jurisdiction

- Law does not raise a presumption of illegality or disreputability to foreign investments that may be made through entities domiciled in Mauritius.

- As stated in ***UOI v. Azadi Bachao Andolan [2003] 132 Taxman 373 (SC)*** itself having acknowledged how nations seek to compete with others in seeking to attract capital investment by holding out the benefits that could be obtained from their treaty networks.

- Invocation of the substance over form principles to the confined and extremely ***narrow*** contingencies where the Revenue may be recognised as being justified in questioning the motives of an investment transactions

Tax Residency Certificates ['TRC']

- Upheld the Circular no 789/ 2000- clearly held out that the TRC issued by Mauritian authorities would constitutes sufficient evidence for determining fiscal residence and beneficial ownership. This circular further clarified that such certificate would suffice even in respect of capital gains on sale of shares.

5. Shell / Conduit Company – Tax Resident Certificate, Beneficial owners

Tax Residency Certificates

- In the context of piercing of the corporate veil and the extent to which the Revenue could enquire and investigate despite a TRC were confined to cases of tax fraud, sham transactions where the entity has no vestige of economic substance or the transactions is alleged to be aimed at illegality.

- Revenue should have a base for an allegation on cogent and convincing evidence.

Limitations of Benefits [LOB]

- Article 27A specifies the circumstances in which it would be impermissible to assume that the entity is a shell or a conduit company.

- LOB provisions being met would have to meet an extremely high, exacting and compelling standard of proof with the ***onus lying squarely upon the Revenue*** to establish that the substance of the transaction clearly warrants the entity being deprived of treaty benefits.

5. Shell / Conduit Company – Tax Resident Certificate, Beneficial owners

Limitations of Benefits [LOB]

- TRC as well the LOB provisions comprised in the DTAA more than adequately, comprehensively, address themselves to treaty abuse and it would thus be wholly impermissible for the Revenue to construct additional barriers or qualification standards for the purpose of extending benefits under DTAA.

Beneficial Ownership

- Beneficial Owner is he who is ***free to decide*** whether the capital or other assets should be used or made available for use by others.

- Power to decide on the use of assets or income as the main attribute of ownership relevant in determining beneficial ownership.

- Tested on the basic rule of substance over form, the concept of beneficial owner would get attracted to cases where the recipient of income or the holder of the asset is found to be merely the ostensible depository and which may hold the income either in the capacity of an administrator or even as a trustee.

5. Shell / Conduit Company – Tax Resident Certificate, Beneficial owners

Beneficial Ownership

- While the obligation to forward the income or gain may be either legal or contractual dependent upon the position of parties, it would certainly require a finding on fact that the income is held at the behest of another, is controlled and regulated by third party entity and the ostensible owner having no real or substantive control over the same.

- Allegation of income being beneficially held cannot be sustained on mere surmises. It would have rest on a sounder footing and shown to be plausible from material on record.

Conclusions

- Revenue would be clearly obliged to meet a high standard of proof when alleging avoidance and abuse.

- Mere ownership, parental control or management of a subsidiary would not be sufficient to pierce or lift the corporate view.

5. Shell / Conduit Company – Tax Resident Certificate, Beneficial owners

Conclusions

- Of significance is the legal fiction comprised in Article 27A and which forbids one from viewing an entity as a conduit once the conditions prescribed therein are satisfied and met. This further lends credence to the position that the states formulated LOB provisions , it would be ***impermissible for the Revenue to erect additional barriers.***

- Treaty benefits ***ought not be*** overridden by provisions and that the sanctity which attaches to a treaty restrains parties from attempting to subvert the same by way of unilateral amendments.

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