DZ Bank AG – India Representative Office vs. DCIT International Taxation Circle 2(1)(2), Mumbai [TS-632-ITAT-2020(MUM)] dated 05th December, 2020

Facts:

- DZ Bank AG, a company incorporated under the laws of Germany, was engaged in the business of banking. It had a representative office in India.
- The assessing officer (AO) considered DZ Bank India Representative Office as a permanent establishment (PE), of the head office, in India.
- The AO proceeded to tax entire interest income earned from foreign currency loans as income of the assessee.
- The AO was of the view that as the assessee had a PE in India, and all these amounts pertain to the said PE, these amounts are taxable in the hands of the assessee as business receipts under Article 7 of the India Germany Double Tax Avoidance Agreement (DTAA).
- The assessee carried the matter in appeal before the CIT(A) but without any success.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether the interest income earned by DZ Bank from its Indian clients can be taxed in the hands of the assessee under Article 7 of the Indian German DTAA?

Held:

- ITAT held that once interest income earned by assessee (a German bank with Indian Representative Office) from Indian clients is taxed under Article 11 of India – Germany DTAA, nothing survives for taxation under Article 7 as business profits in respect of these interest revenues.
- ITAT noted that the income being sought to be taxed under Article 7 has already being taxed under Article 11.
- ITAT observed that as long as income is taxable under any other specific provisions of the treaty, [such as article 10 (dividends), article 11(interest), article 12 (royalties and fees for technical services), article 13 (capital gains)], and unless it is excluded from the operation of such specific provisions [such as under article 10(4), article 11(5) , article 12(5)], it cannot be taxed under article 7."
- ITAT concluded that DZ Bank AG and DZ Bank India Representative Office are only one taxable unit. The same income cannot be taxed in the hands of the same assessee twice once under Article 11 and then under another article of the treaty i.e. Article 7
- Accordingly, ITAT ruled in favour of the assessee.

Kapil Dev Ranwan vs. DCIT. [TS-594-ITAT-2020(DEL)]dated 5th November, 2020.

Facts:

- The assessee was salaried employee of IBM India Pvt Ltd and was on international assignment to UK during previous year 2011-12.
- The assessee filed Income Tax Return in India, claiming relief u/s 90 of the IT Act read with article 24 India-UK DTAA for taxes paid in UK.
- AO invoked Article 16(2) of DTAA and did not allow the reliefs claimed by the assessee.
- Aggrieved, the assesse filed an appeal before Delhi ITAT.

Issue:

- Whether the assessee was liable to avail tax credit u/s 90 of the IT Act r.w article 24 of India-UK DTAA.

Held:

- The Assessee was resident of India hence Article 16(2) does not apply in the present case.
- As per Article 24 of India-UK DTAA, were income of an Indian Tax resident is also reliable to tax in UK, India shall allow a credit for the taxes paid in the UK against the Indian Taxes payable in respect of the double tax income.
- Further, the tax credit would be limited to the proportionate taxes payable on the double tax income in India. Hence, as the assessee's income has been double tax i.e. in India as well as in the UK, the provisions of the India-UK DTAA would be applicable to him as the same are more beneficial and he should be eligible to claim tax credit of taxes paid in UK.
- Accordingly, ITAT ruled in favour of the assessee.

M/s. ABB AG Vs Deputy Commissioner of Income-tax (International Taxation) [TS-612-ITAT-2020(Bang)] dated 24th November, 2020

Facts:

- The Assessee is as Company incorporated in Germany.
- M/s ABB India Limited had availed testing and inspection services from assessee and had created provision for the same in its books of accounts.
- However, assessee had not raised invoice as it follows cash basis of accounting. Also it had not offered it as income in India as the same was not received by them as per Article 12 of India-Germany DTAA.
- AO did not accept the contention of Assessee of taxability of FTS in the year of receipt and accordingly assessed the same as Income of assessee u/s 9(1)(vii) of IT Act.
- Hence, Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether FTS can be considered as taxable in India on accrual basis under India-Germany DTAA.

Held:

- It is settled proposition of law that the DTAA provisions shall override the Income tax provisions unless the provisions of Income tax Act is beneficial to the assessee. As per article 12 of India-Germany DTAA, royalties and Fees for technical services are taxable when it is paid to resident of contacting state.
- Relying on the case of UHDE GMBH of Mumbai Tribunal, M/s. Siemens Aktiengesellschaft of Bombay High court and Johnson & Johnson of Mumbai Tribunal, Tribunal held that FTS is taxable only in the year of receipt as per the provisions of DTAA.
- Accordingly, ITAT Ruled in the favour of assessee.

Ecorys Netherlands B.V. V/S ADIT [International Tax] [TS-5771 -HC-2010(DEL)]dated 11th November, 2020

Facts:

- The assessee – Ecorys Netherlands B.V., is a Netherlands Co. which has a Project Office (PO) in India and had made payment of salary to its employees
- The assessee company, had not deducted tax on salary paid to employees and hence, revenue had disallowed the said expense u/s 40(a)(iii) of the Income Tax Act, 1961
- It was noted that the salary was paid abroad by the foreign Co., and the HO had only apportioned a part thereof to the assessee which was reimbursed to HO without any mark-up

Issue:

- Whether the above mentioned expense shall be disallowed u/s 40(a)(iii)?

Held:

- ITAT accepted assessee's contention that neither the employees came to India for providing the services nor the payment was received in India or from any source in India
- Further, the ITAT relied on High Court's ruling in case of Mother Dairy Fruit, Vegetables (P). Ltd., where the High Court had held that since the services were rendered outside India, in respect of which the employees received salary outside India, it could not be said that same accrues or arises in India and thus the provisions of Section 40(a)(iii) would not be applicable since the salary is not taxable in India
- Hence, the assessee's stand was accepted and ITAT deleted the disallowance of salary expense u/s 40(a)(iii) of the Income Tax Act, 1961.
- Accordingly, ITAT ruled in favour of assessee.