INTERNATIONAL TAXATION

CA. Hinesh Doshi, CA. Pramita Rathi

Pr. Commissioner and Deputy Commissioner of Income Tax Circle-5(1)(2), Bangalore vs. M/s. Puma Sports India Pvt. Ltd. [TS-221-HC-2021(KAR)] dated 12th March, 2021

Facts:

- The assessee company, along with being primarily engaged in the business of wholesale trading, had international transactions and was also functioning as a sourcing agent in India for identifying suppliers required by a Hong Kong company, which was the global sourcing agent for the holding company of the assessee. The assessee received commission for performing such services.
- During the course of assessment, AO passed an order under Section 143(3) r.w. section 144(C)(13) of the Income Tax Act, 1961 by making transfer pricing adjustment on the basis of the order passed under Section 92CA of the Act along with other additions.
- The assessee's objections were rejected by AO.
- Aggrieved, the assessee appealed before ITAT wherein the assessee was granted relief.
- Distressed over the order, the Revenue appealed before the High Court of Karnataka.

Issue:

- Whether the commission income earned by the assessee was taxable in India?

Held:

- ITAT observed that the assessee being an associated enterprise (AE), rendered services outside India in the form of placing orders with manufacturers and the stated commission was remitted abroad.
- ITAT held that the income of the non-residents by way of commission could not be considered as accrued or arose or deemed to accrue or arise in India as the services of such agent were rendered/utilized outside India and the commission was paid outside India.
- ITAT held that although the assessee rendered services in India in the form of placing orders with the manufacturers, it was undisputed that the services were rendered outside India and the commission was paid outside India.
- Relying on the SC ruling in Toshuku and GE India Technology, ITAT held that the TDS was not deductible from commission payment to a foreign agency on foreign soil.
- Karnataka HC upheld the ruling given by ITAT, thus allowed deletion of disallowance u/s 40(a)(i) of the Act.
- Accordingly, Karnataka HC ruled on favour the assessee.

M/s. Jyoti Limited vs. Deputy Commissioner of Income Tax (International Taxation) [TS-198-ITAT-2021(Ahd)] dated 22nd March, 2021

Facts:

- The assessee, a public limited listed company, was engaged in the business of manufacture and sale of electrical and engineering items, particularly connected with hydraulic, irrigation, power and heavy engineering industries.
- During the assessment proceedings, AO observed that the assessee had deducted TDS at 10% on a remittance to a Czech Republic based company, even though it had not furnished its PAN for such deduction. AO issued a show cause notice for non-deduction of TDS at 20% on such payment.
- AO rejected assessee's contention and made an addition of TDS at 20% of the total payment.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether TDS was liable to be deducted at the rate of 20% as per section 206AA of the Income Tax Act, 1961?

Held:

- ITAT held that though the Act specifies deduction of TDS @ 20%, DTAA would override the provision of this particular domestic Act since the provision of DTAA are more beneficial to the assessee.
- ITAT, cited Circular No. 333 dated 02.04.1982 issued by CBDT, stated that specific provisions made in DTAA would prevail over general provisions contained in the Act as per the cardinal principle of law that when an agreement having been entered into between two Sovereign states, then the provision beneficial to the assessee as per the said sovereign agreements become applicable.
- Relying on the judgement passed by the Hon'ble Apex Court in the matter of Union of India & Anr. vs. Azadi Bachao Andolan & Anr., ITAT stated that the provision of Section 206AA of the Act cannot be invoked by the Revenue as Section 206AA of the Act does not override the provision of Section 92 of the Act.
- ITAT further stated that TDS was deducted rightly on applying the tax rate prescribed under the DTAA and not as per Section 206AA of the Act, having regard to the more beneficial provision in the rate of tax made in the DTAA.
- Accordingly, ITAT ruled in favour of the assessee.

Atos Information Technology Singapore Pte Ltd, Mumbai Vs. Dy. CIT (International Taxation) Range-1(1)(2), Mumbai [TS-229-ITAT-2021(Mum)] dated 30th March, 2021

Facts:

- The assessee, a Singapore based company, provided certain services to its group concern in India, in pursuance to agreements between them, and received payment.
- In course of the assessment proceedings, AO observed that the assessee did not offer the payment to tax.
- AO, rejecting the assessee's submissions, opined that said payment would be taxable in India under section 9(1)(vi) as well as under Article 12(3) of the India-Singapore DTAA as the payment was for the use of or right to use of information concerning industrial, commercial, scientific experience and copyright.
- AO also held that the amount received could be treated as FTS under Article 12(4) of India-Singapore DTAA because the assessee has provided managerial and technical services to the Indian entity.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether the payment fell under the ambit of Royalty/FTS and was liable to tax in India?

Held:

- ITAT observed that while rendering such services, none of the employees of the assessee had visited India, but worked remotely in Singapore, and that the servers and other hardware were located outside India.
- ITAT noted that the assessee provided mailbox hosting services and data centre services through servers maintained by it and that there was nothing on record to suggest that the assessee had either rented out its servers or allowed access to the servers to the Indian company or any other party independently.
- Relying on the ruling in Edenred Pte. Ltd., ITAT noted that the payment received by the assessee would not qualify as royalty under Article 12(3) of the India-Singapore DTAA.
- ITAT also observed that there was nothing on record to suggest that the Indian company could use any technical knowledge, experience, skill, know-how or process, etc. independently on its own without requiring the involvement of the assessee and therefore the tests and conditions of Article 12(4)(b) for FTS were not satisfied.
- ITAT observed that the article 12(2) of India Singapore DTAA should be read in conjunction with 12(1), 12(3) and 12(4) and since the payment received towards various project-related services did not qualify as royalty and FTS under the treaty provisions, it cannot be charged to tax.
- Accordingly, ITAT ruled in favour of the assessee.

Interworld Shipping Agency LLC [2021] 127 taxmann.com 132 (Mumbai - Trib.) dated 30 April 2021

Facts: The Assessee, a limited liability company incorporated in UAE and a tax resident of UAE, was engaged in the business of services like ship chartering, freight forwarding, sea cargo services, shipping line agents. The Assessee charters the ships for use in transportation of goods and containers in international waters, including ports in India and elsewhere. While the Assessee has been in operations since 2000, it has started the operations of ships to and from India only from 2015.

During the year under consideration, the Assessee earned India sourced income on account of freight collection, including prepaid collections. However, the Assessee claimed that as the Assessee is a tax resident of the UAE and as, under the India-UAE tax treaty, the profits derived by an enterprise of a UAE or India from the operation by that enterprise of ships in international traffic shall be taxable only in the respective jurisdiction, the Assessee is not liable to pay any tax in India. Thus, relief was sought under Section 90 read with the India-UAE tax treaty.

The AO observed that the Assessee had taken vessels on the time charter, for transportation of good by ship in the international traffic, as also the Assessee's commercial licence issued by the Government of Dubai, and a tax residency certificate. However, the AO also noted that almost 80% of the profits of the Assessee entity were to be remitted to a Greek national. Hence, the AO held that since this beneficiary of the income was a Greek national, it could be safely concluded that the business was not managed or controlled wholly from the UAE.

Accordingly, the AO held that the only purpose of the assessee company was to avail of the benefits of the India-UAE tax treaty as it was a clear case of abuse of organization as the owner of the entity is a Greek national. The AO concluded that the Assessee is not entitled to the benefits of the India-UAE tax treaty, and, accordingly, issued a draft assessment order holding that the India sourced income is taxable in India. The DRP upheld the action of the AO.

Issue: Whether the Assessee is a 'resident' of the UAE under the India-UAE tax treaty? Whether the Assessee is entitled to the benefits of the India-UAE tax treaty?

Held: Article 4(1) defines a resident, inter alia, "in the case of the United Arab Emirates: ……..a company which is incorporated in the UAE and which is managed and controlled wholly in UAE". The Assessee is a limited liability company and has duly obtained the requisite licences under the UAE laws. Further, the AO did not controvert the evidences of the company incorporation and hence it was held that the status as a company is now beyond any dispute or controversy.

The court observed that the only test for a company being termed as 'resident of UAE' is that it should be incorporated in UAE and wholly managed and controlled in the UAE. The court held that when an entity is established in 2000, and the relevance of the India-UAE tax treaty comes into play only in 2015, it cannot be said that the "main purpose of creation of such an entity was to obtain the benefits" of the Indo UAE tax treaty. Unless the purpose of creating the entity in question is to avail the India-UAE tax treaty benefits, the Limitation of Benefits clause in Article 29 of the tax treaty cannot come into play. Further so as the assessee has expatriate employees who have been given a work permit to work in UAE for the assessee company, the main driving force of the company and its director is an expatriate resident in the UAE. and it has duly obtained the requisite licence under UAE laws, that its annual accounts and audits are in accordance with the UAE laws and that its memorandum of association and articles of association were also placed on record.

Accordingly, it was held that the Assessee is a 'resident' of the UAE and is also entitled to the benefits of the India-UAE tax treaty and hence is income is not taxable in India.