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ITAT Holds Salary for Services Rendered in Australia Not Taxable in India

Facts

The Assessee was an employee of Nokia Solutions and Networks India Private Limited ('Nokia India') on an overseas assignment to Australia who was exercising employment by rendering services in Australia with Nokia Australia from 23.08.2017 to 10.03.2020. While working with Nokia Australia, the Assessee was based in and was physically present in Australia during the F.Y. 2019-20. Accordingly, the Assessee qualified as a Resident of Australia as per Article 4(1) of the India- Australia DTAA between India and Australia for the relevant year.

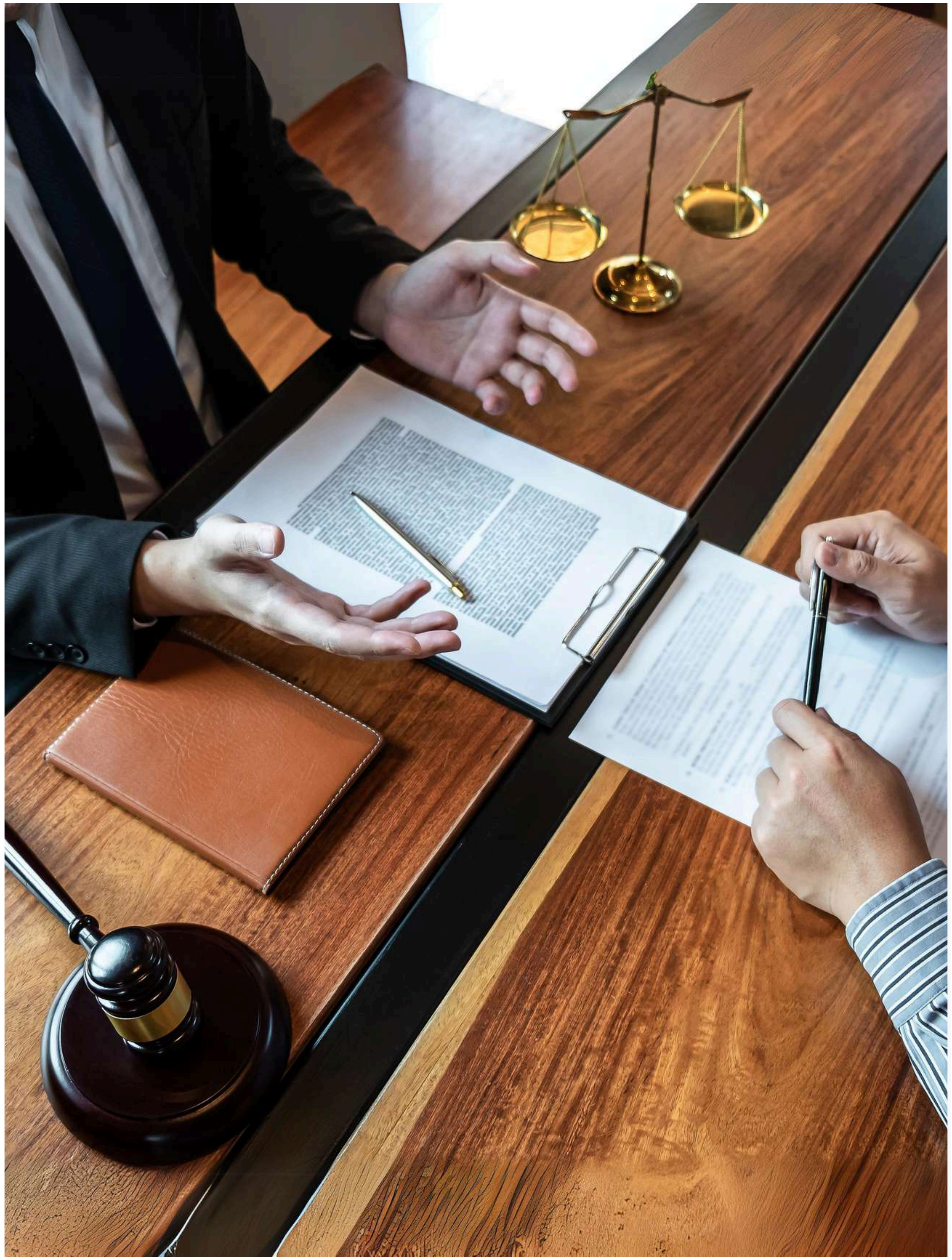
During the year, the assessee continued to receive salary income in India for exercising employment in Australia in respect of services rendered to Nokia Australia. The Assessee filed his original ROI of income on 30.12.2020 declaring the net taxable income of INR 66.19 Lakh. Once the Australia tax return of the assessee was filed, the assessee revised his India ROI on 27.03.2021 in accordance with Section 139(5) of the Act and claimed the exemption as per Article 15(1) of the India-Australia DTAA for the salary received in India for services rendered in Australia. Consequently, the AO initiated scrutiny assessment proceedings under section 143(2) of the Act to verify the reduction of income and claim of refund in the revised ROI filed by the assessee.

The AO concluded these proceedings vide a draft assessment order under section 144C wherein he disallowed the exemption of INR 55.37 lakh claimed under the DTAA on the grounds that the assessee had not submitted the TRC issued by the Australia tax authorities. Subsequently, the AO determined the assessed income at INR 66.19 as against the returned income of INR 10.82 lakh. Aggrieved, the assessee filed Objections before the ld. DRP against the Draft Assessment Order.

Additionally, since the assessee was unable to furnish the TRC during assessment proceedings and was not granted additional time sought to furnish the same, therefore the assessee had duly filed the application for admission of copy of the TRC issued by Australian Tax Authorities for the FY 2019-20 as additional evidence before ld. DRP on 29.04.2022 to enable adjudication of the appeal based on the facts and merits of the case as per Rule 9 of Rules.

However, the above was not considered by the DRP and the direction were issued in favor upholding the view of the AO. Thereafter a final assessment order was passed by the AO under section 144C (13) read with section 143(3) of the Act on 21.12.22 disallowing the claim for relief on the basis that the TRC and the Australian tax returns reflecting taxes paid in Australia had not been submitted.

Consequently, the assessee preferred an appeal before the Tribunal for relief.



Ruling

The Tribunal ruled in favor of the assessee. It found that the in the current case the assessee neither had any rest period nor leave period which is preceded and succeeded by the services rendered outside India. Since, the assessee has rendered services outside India, the salary could not have been taxable in India.

The Tribunal further observed that from the concurrent reading of Section 5 dealing with scope of total income, section 15 dealing with computation of total income under the head salary and chargeability thereof and Section 9 dealing with income arising or accruing in India with reference to the salaries and the services rendered in India, it was clear that no taxability arises on the salary/allowances received by the assessee since the assessee is a non-resident and had rendered services outside India. Thus, the Tribunal held the assessee eligible for exemption on his salary for services rendered in Australia during his Australia assignment period.

Source: Tribunal, Delhi in Yogesh Kotiyal vs. ACIT vide ITA No. 391/Del/2023 dated April 12, 2024.

ITAT Holds IUC Charges Not Taxable as Royalty under Both the Act and the DTAA

Facts

The assessee was incorporated in Japan and was also the tax resident of Japan as per Article 4 of the India-Japan DTAA. The assessee was engaged in the business of providing telecommunication services and provided fixed, mobile, wholesale and associated telecommunication services across the globe. Additionally, the assessee did not have any presence in India either in the form of an office, a branch or any other fixed place in India.

During the years under consideration, the assessee provided telecom interconnect facility to various Indian telecom operators including Vodafone South Ltd. and had received payment on account of interconnect usage charges as follows:

1. For AY 2013-14 INR 35.18 crores
2. For AY 2014-15 INR 36.53 crores
3. For AY 2015-16 INR 39.58 crores

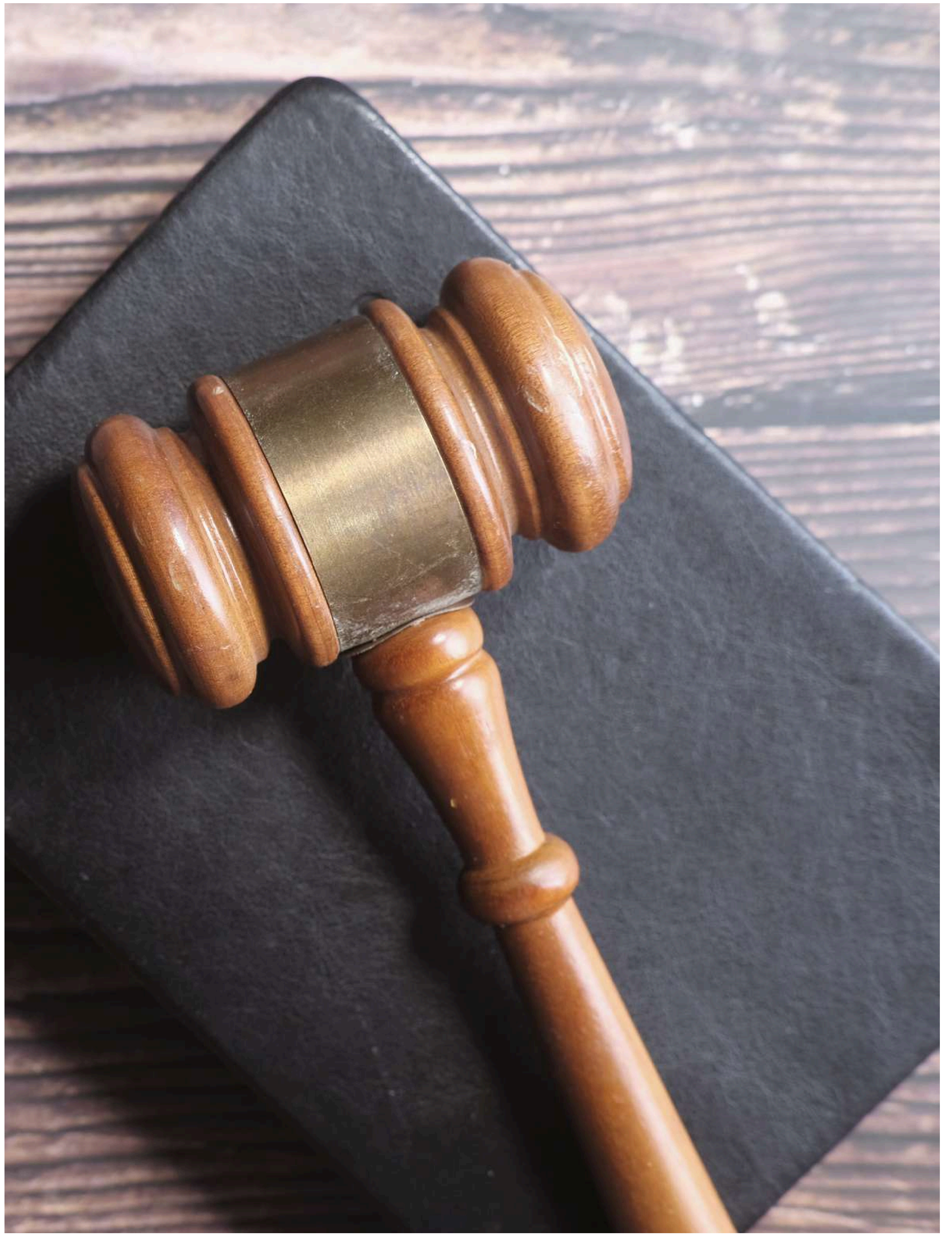
Proceedings under section 201 of the Act were initiated against Vodafone South Ltd. (VSNL) in respect of alleged non deduction of tax at source on payments made to its non-resident telecom operators for provision of bandwidth capacity and interconnect services. The said charges were considered as taxable by the revenue in case of VSNL both under the provisions of the act and the respective DTAAs.

On the basis of the proceedings initiated against VSNL, reassessment proceedings were initiated against the assessee for the years under consideration and notice under section 148 of the act was issued to the assessee.

The AO passed an order dated 29.03.2023 under section 144C (1) of the act holding that IUC received by the assessee were in the nature of ‘Royalty’ under the provisions of the act, as well under the India-Japan DTAA.

Aggrieved by this order, the assessee filed objections before the DRP. The DRP after hearing the submissions of the assessee, confirmed the stance of the AO to tax IUC as other income under Article 22 of India-Japan DTAA considering IUC is not specifically covered in the definition of royalty under Article 12 of tax treaty. Consequently, the AO passed the final assessment orders considering the receipt for interconnect utility charges as “royalty” in the hands of the assessee. Aggrieved by the final assessment order, the assessee preferred an appeal before the Tribunal.

Source: Tribunal, Bangalore in M/s. KDDI Corporation, Japan vs. DCIT vide S.P. Nos. 7 to 9/Bang/2024 dated April 15, 2024



Ruling

The Tribunal ruled in favor of the assessee. It noted that as per the facts of the case, at no point of time, had any possession or physical custody, control or management over any equipment was received by the end users/ customers. It was further observed that the process involved in providing the services to the end users/ customers was not "secret" but a standard commercial process followed by the industry players.

In view of the same, the process could not be classified as a "secret process" as required by the definition of "royalty" mentioned in clause 3 of Article 12 of the India-Japan DTAA.

Relying on a number of precedents, the Tribunal concluded that the payment received by the nonresident assessee amounted to be the business profits of the assessee which would be taxable in the resident country and would not be taxable under Article 5 of the DTAA as no case of PE existed in this case.

Source: Tribunal, Bangalore in M/s. KDDI Corporation, Japan vs. DCIT vide S.P. Nos. 7 to 9/Bang/2024 dated April 15, 2024

ITAT Holds Addition Unwarranted; Remits Matter back to De Novo Adjudication

Facts

The assessee was a non-resident corporate entity incorporated under the laws of Germany and a tax resident of Germany.The assessee was engaged in the business of design and manufacture of paper machines and had entered into four contracts with certain Indian entities for design, manufacture, supply, installation, commissioning etc. of paper machines.

During the year under consideration, the assessee received amount in Euros equivalent to Rs. INR 668.88 crores. Apart from these receipts, the assessee further received an amount of INR 5.03 crores from various Indian customers, which was offered to tax in India as Fee for Technical Services (FTS). Moreover, the assessee received an amount of INR 2.06 crores as royalty from Voith Paper Technology India Ltd. (VPT), which was also offered to tax in India although the amount received towards design, manufacture and supply of paper machines was not offered to tax in India.

The AO observed that the assessee itself had declared it’s project office in India, through which, onshore activities were being carried out. Referring to India-Germany DTAA, the AO observed that the Treaty defined PE as a fixed place of business, through which the business of an enterprise is wholly or partly is carried on.

The AO found that the assessee was involved in the entire activities starting from design to manufacture, supply, erection, commissioning, test run of the entire plant and machinery and it could not be denied that the assessee had a PE in the form of supervisory PE.

He further observed that the project office could be considered as fixed placed PE of the assessee in India, as the assessee carried out business of design, manufacture, supply, supervision of equipment from there. Thus, he proceeded to invoke the provisions of Rule 10 of the Rules and estimated profit at 10% on the income received from offshore supply of plant and equipment and other related activities and attributed 25% thereof as profit of the PE. In this process, he made addition of an amount of INR 16.72 crores.

Aggrieved, the assessee appealed before the CIT (A) which was dismissed. Consequently, the matter reached the Tribunal for adjudication.

Ruling

The Tribunal ruled in favor of the assessee due to technical reasons. It found that the departmental authorities had examined only one of the contracts and overlooked the terms of other contracts. In such circumstances, the estimation of profit at 5% by learned CIT was unwarranted. Furthermore, it was found that the Protocol to India-Germany DTAA had not at all been considered. Hence the Tribunal concluded by stating as follows:

"Since, various claims and contentions of the assessee have not been considered by the departmental authorities, while attributing part of the receipts from offshore supplies as income of the PE, we are inclined to restore the issue to the Assessing Officer for de novo adjudication after providing reasonable opportunity of being heard to the assessee. Grounds are allowed for statistical purposes."

Source: Tribunal, Delhi in J.M. Voith SE & Co. vs. DCIT vide ITA No. 4862/Del/2019 dated 23.04.2024

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