Communiqué

International Tax

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ITAT Rules Corporate Guarantee Commission Stands as an International Transaction; Affixes Rate of 0.50% with Support of Past Precedents

Facts

The assessee is a company engaged in the business of manufacture and trading of edible oils and agro based products, and filed its return of income on November 30, 2014, for AY 2014-15. Subsequently, the assessee filed a revised return of income on November 25, 2015, declaring a total income of INR 9,06,97,982. The case was selected for scrutiny under section under CASS and a notice under section 143(2) was sent to the assessee.

During the course of assessment proceedings, the Ld. AO, after examining the details furnished by the assessee, found that during the AY 2014-15, the assessee had entered into several transactions with its Associated Enterprise (being the subsidiary companies situated outside India). The assessee filed form no. 3CEB as under section 92E, which was forwarded to the Joint Commissioner of Income Tax (Transfer Pricing), Hyderabad for computation of (Arm's Length Price) ALP of the aforementioned transactions. Upon perusal of information obtained from State Bank of India under section 133(6) on rates charged for corporate guarantee and after consideration of the assessee's submissions, the Ld. TPO made an adjustment of INR 97,77,312 calculated at the rate of 1.60% as corporate guarantee charge on INR 61,10,82,000. Consequently, the assessee preferred an appeal before the Dispute Resolution Panel (DRP) which upheld the order of the Ld. TPO. As such, the final assessment order under section 143(3) was passed on July 31, 2018, wherein TP adjustment of INR 97,77,312 was added to the income of assessee.

Aggrieved, the assessee approached the Tribunal for relief.

Ruling

The Tribunal ruled partly in favor of the assessee. It referred to the cases of *CIT vs. Redington India Ltd. (2021) 430 ITR 298, CIT vs. Everest Kanto Ltd. 378 ITR 57 and M/s. Devi Sea Foods Limited vs. DCIT Circle 3(1), Vishakhapatnam in ITA No. 75/Viz/2022.* With support from these judgements the Tribunal concluded that, *"In view of the above discussions and by respectfully following the ratio laid down in various judicial pronouncements as discussed above, we are of the considered view that the corporate guarantee commission is an international transaction and should be charged @ 0.50% on the corporate guarantee amount given to the AEs. We therefore partly allowed the grounds raised by the assessee."*

Source: Tribunal, Vishakhapatnam in 3F industries Limited vs. The Assistant Commissioner of Income Tax vide ITA No. 473/Viz/2018 dated February 16, 2023

Assessee Did Not Utilize Brought Forward Losses, Application of Section 79 Not Sustainable; AO Passed Impugned Order by Taking Plausible View

Facts

The assessee is a company who filed a return declaring a total loss of INR 1,19,90,902 which was selected for assessment proceedings. On December 6, 2019 assessment order under section 143(3), an addition was made of INR 48,24,302 (on account of disallowance under section 36(1)(va) of the Act), resulting in total loss to arrive at INR 71,65,790. From the record, the Ld. PCIT observed that 75% and 25% of the shares of the assessee were held by Sodexo Services Asia Pte Ltd and Sodexo S.A., France, respectively. On March 31, 2017, it was found that the latter held 99.99% shares of the assessee, while the former held none. The Ld. PCIT noted that as compared to the shares held on March 31, 2016, there was a substantial change of more than 51% in the shareholding pattern. Additionally, it was noted that as per section 79 of the Act, the assessee could not set off its brought forward business loss of proceeding assessment years to the tune of INR 12,05,10,296.

This rendered the assessment order erroneous "insofar as it is prejudicial to the interest of the Revenue."

The Ld. PCIT dismissed all the contentions raised by the assessee and set aside the said order on the ground that the "Assessing Officer has failed to conduct all enquiries which made the assessment order erroneous insofar as it is prejudicial to the interest of the Revenue."

Consequently, the matter reached the Tribunal for adjudication.

Ruling

The Tribunal ruled in favor of the assessee. It noted that "no set off" of business loss incurred over the earlier years, carried forward from the earlier years was claimed or allowed in the assessment year by means of the impugned assessment order. As such, the Tribunal held that, *"In these circumstances, question of invoking provisions contained under section 79 of the Act vis-à-vis the change in shareholding during the year is unwarranted, not sustainable,"*.

The tribunal further observed that the ultimate holding company was Sodexo SA, France. It noted that when an ultimate holding company has beneficial ownership, then loss cannot be disallowed. The Tribunal found that the assessee had not claimed any such loss. Consequently, the Tribunal held that, *"we are of the considered view that the Ld. PCIT has proceeded on wrong premise that the Assessing Officer has failed to do and did not conduct any enquiry qua the issue flagged by him."*

Furthermore, the Tribunal also held,

"we are of the considered view that Assessing Officer has passed the assessment order after enquiry and due verification on the basis of submissions and details furnished by the assessee by taking plausible view. Hence, assessment order is neither erroneous nor prejudicial to the interest of the revenue. Resultantly, impugned order passed by the Ld. PCIT being not sustainable in the eyes of law, is ordered to be quashed."

Source: Tribunal, Mumbai in Sodexo India Services Private Limited vs. PCIT, Mumbai-5, Circle 13(2)(2) vide I.T.A No. 930/Mum/2022 dated February 23, 2023

IT and SAP Support Services Not Considered as Fees for Technical Services; Department Mistaken in Holding Assessee Had Not Furnished Sufficient Evidence to Establish Claim

Facts

The assessee is a non-resident corporate entity incorporated in Israel and is a tax resident of Israel. During the previous year relevant to the assessment years under dispute, the assessee had entered into various international transactions with its Indian subsidiary, Netafim Irrigation India Pvt. Ltd. (NIPL) including provision of IT and SAP services. In the course of assessment proceedings, the assessee submitted that as per the protocol to India- Israel Treaty, in case India enters into a DTAA with any other country after January 1,1995 and in this treaty the FTS scope is more restricted, then such restricted terms shall also apply to the India-Israel DTAA. The assessee further put forth that as per the India – Portugal and India – Canada DTAAs the definition of FTS is more restricted as it imposes 'make available' condition. The assessee further submitted that only when technical knowledge, skill, knowhow, etc. is made available to the recipient of service, the payments received will fall within the definition of FTS.

However, the Ld. AO dismissed the assessee's contentions and treated the amounts received towards provision of IT and SAP services as FTS under Article 13 of India-Israel DTAA. Consequently, he added back INR 1,07,03,993 and INR 1,06,93,808 in AY 2010-11 and 2011-12 respectively. On appeal, the DRP accepted the submissions of the assessee, however it ruled that the 'make available' condition stood satisfied even then and upheld the additions.

Aggrieved, the assessee appealed before the Tribunal.

Ruling

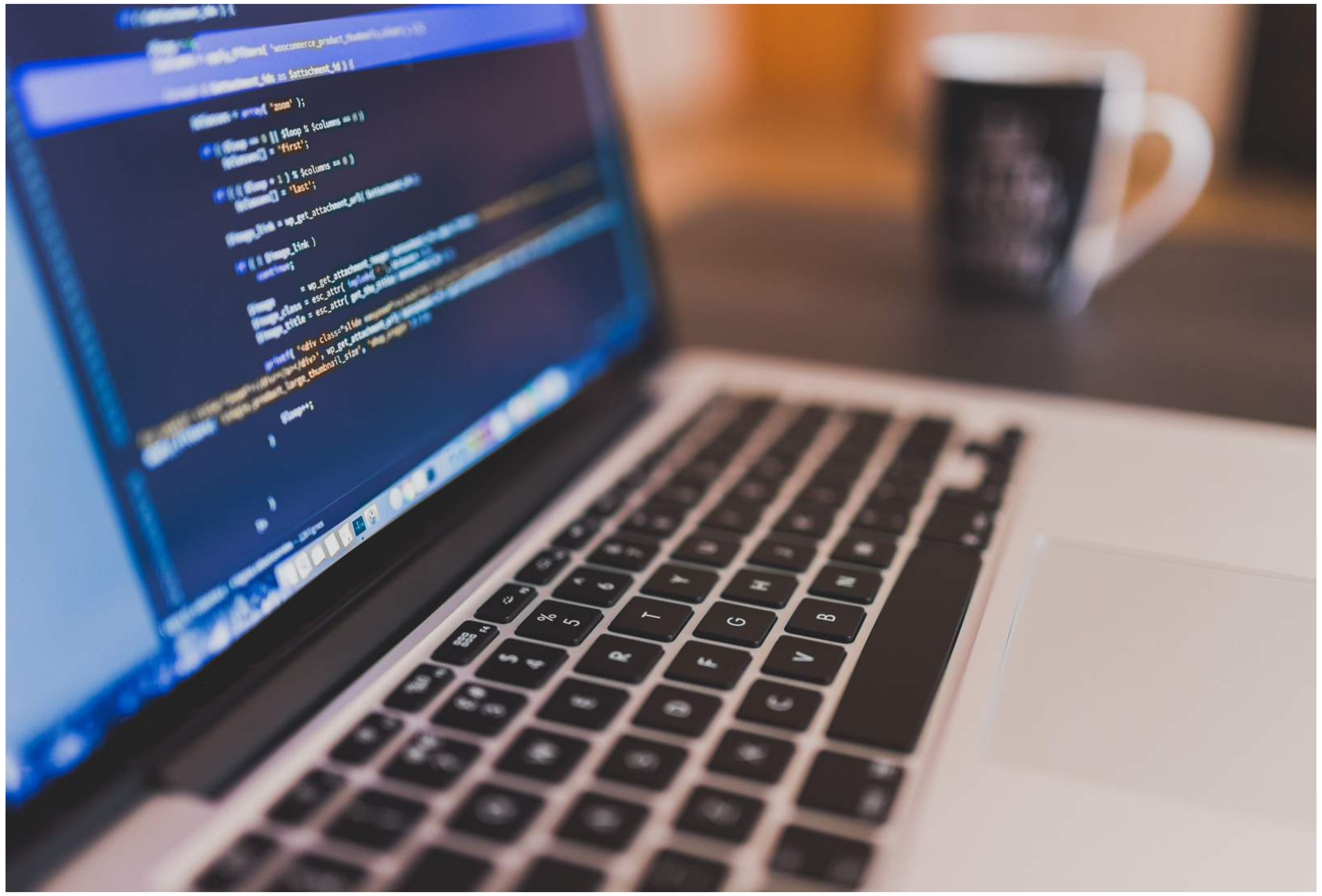
The Tribunal ruled in favor of the assessee. It observed that as per Article 13(3) of the India-Israel DTAA, FTS is 'payments of any kind received as a consideration for services of managerial, technical or consultancy nature, including the provision of services by technical or other personal'. However, the same did not include payment for services mentioned in Article 16 of the Convention. The Tribunal noted that it was imperative to examine whether *"themake available condition as per the definition of FTS in India – Portugal DTAA would apply. Article 12 of India - Portugal DTAA defines FTS to mean technical or consultancy services and if such services make available technical knowledge, experience, skill, knowhow processes to the recipient enabling it to apply the technical content therein."*

The Tribunal opined that it was evident that the assessee had provided the services on a recurring basis in terms with the agreement. It was further observed that even the departmental authorities have also not disputed these facts. As such, it was held that the assessee had not made available technical knowledge, experience, skill knowhow etc. which could have enabled the recipient of such services to apply the technology independently without the aid and assistance of the assessee while rendering services to NIPL.

The Tribunal held that the allegation of the departmental authorities of "absence of material/evidence furnished by the assessee to establish its claim was not sustainable. The Tribunal noted that on the contrary, the agreement mentioned in depth the nature of services to be provided by the assessee and the assessee had additionally furnished materials such as invoices raised for reimbursement of costs.

The Tribunal concluded by ruling that, *"in our view, the Revenue has failed in proving that the make available condition is satisfied. Therefore, applying the restricted meaning of FTS as per India – Portugal and India – Canada DTAAs, we hold that the amounts received by the assessee from providing SAP and IT support services are not in the nature of FTS, hence, not taxable in India in absence of a Permanent Establishment (PE)."*

Source: Tribunal, Delhi in Netafim Ltd. vs. DCIT Circle 2(2)(2), International Taxation vide ITA No.975/Del/2016 dated February 20, 2023.



Seconded Employees' Salary Reimbursement Does Not Fall Under FTS, No Tax Payable on the Same; Reliance Placed on Flipkart Ruling

Facts

The assessee, Google LLC, is a foreign company incorporated in USA. The Ld. AO issued notices under section 148 of the Act for the assessment years 2010-11 and 2012-13 respectively. The notice was based on the fact that the assessee had received certain payments from GIPL (Google India) and returns of income were not filed.

During the course of assessment proceedings, the matter of the assessee was transferred to the Ld. TPO to determine the ALP of the payments received by the assessee. The Ld. TPO held that as the international transactions with the Associated Enterprises (AE) were at ALP, there was no need for any adjustments to be made. However, the Ld. AO found that the assessee was receiving payments from GIPL for seconding its employees to GIPL. As such, the Ld. AO passed a draft assessment order by bringing to tax a sum of INR 20, 63,50,635 and a sum of INR 39,48,22,872 for the assessment years 2010-11 and 2012-13 respectively.

Consequently, the assessee appealed before the DRP. However, the objections and contentions of the assessee were dismissed. Following such dismissal, the final assessment orders were passed dated March 23, 2021, and July 8, 2022, respectively.

Aggrieved, the assessee appealed before the Tribunal.

Ruling

The Tribunal ruled partly in favor of the assessee. From the facts and circumstances of the case, the Tribunal found that the payment made by the assessee to GIPL to the assessee is nothing but reimbursement of cost relating to remuneration on certain employees who were seconded to GIPL from the assessee. It was further noted by the Tribunal that the assumption of the Ld. AO, being that the service agreement between the assessee and GIPL existed for provision of services by assessee to GIPL, did not correspond with the facts on record. The Tribunal held that as per the facts of the case, it was more than evident that the seconded employees were working solely under the control and supervision of GIPL and not on behalf of the assessee during the period of secondment. The assessee's role had merely been to facilitate payment of salary on behalf of GIPL, which was reimbursed by GIPL on actual.

The Tribunal relied comprehensively on the case of Flipkart Internet (P.) Ltd. vs. DCIT 488 ITE 268 to hold that the amount paid by GIPL to the assessee did not fall under the ambit of FTS.

Source: Tribunal, Bangalore in M/s. Google LLC vs. JCIT (OSD) (IT)/DCIT (IT) Circle 1(1) vide IT(IT)A No. 167/Bang/2021 dated February 20, 2023

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ITAT Extends DTAA Benefit on Capital Gains, Follows Past Precedent; Dismisses GAAR

Facts

The assessee's return was selected for complete scrutiny due to the high ratio of refund of TDS. The tax deducted at source by M/s M/s. VIC Enterprises Private Limited was on account of sale consideration of the sale of shares of Dr. Fresh Healthcare Private Limited by the assessee.

The assessee had acquired these shares on August 22, 2016, and had sold the same on January 2, 2018, resulting in short term capital gain worth INR 1,92,63,473. The assessee asserted that such short-term capital gain which had arisen due to sale of shares of Dr. Fresh Healthcare Private Limited would not be held taxable as per Article 13 of India- Singapore DTAA. As such, the whole of TDS amount, INR 1,09,39,285 was claimed as refund.

The Ld. AO as well as the DRP denied the assessee the benefit under Article 13 (4A) of the India- Singapore DTAA, holding that the assessee had no economic substance or commercial substance and that it was a "shell" or a "conduit" company. Thereupon, Article 3(1) of the 2005 protocol to the India- Singapore DTAA was invoked (now stands incorporated as Article 24A(1) of the India- Singapore DTAA). Due to the same, short term capital gain of INR 1,92,63,473 was declared as taxable in India in the hands of the assessee.

Consequently, the matter reached the Tribunal for adjudication.

Ruling

The Tribunal ruled in favor of the assessee. The Tribunal opined that the Ld. AO and the DRP had entirely overlooked relevant details including, the tax residency certificate of the assessee as issued to him by Singapore Tax Authority, the tax assessments carried out by the Singapore Tax Authority for the year assessment between 2016 and 2018 as well as the financials for the assessee for the years ending March 31, 2016, March 31, 2017, and March 31, 2018. The Tribunal held that on the basis of undisputed facts if was axiomatic that the assuming domestic GAAR provision would be applicable, however for the facts of the case, the treaty benefit could not be denied to the assessee.

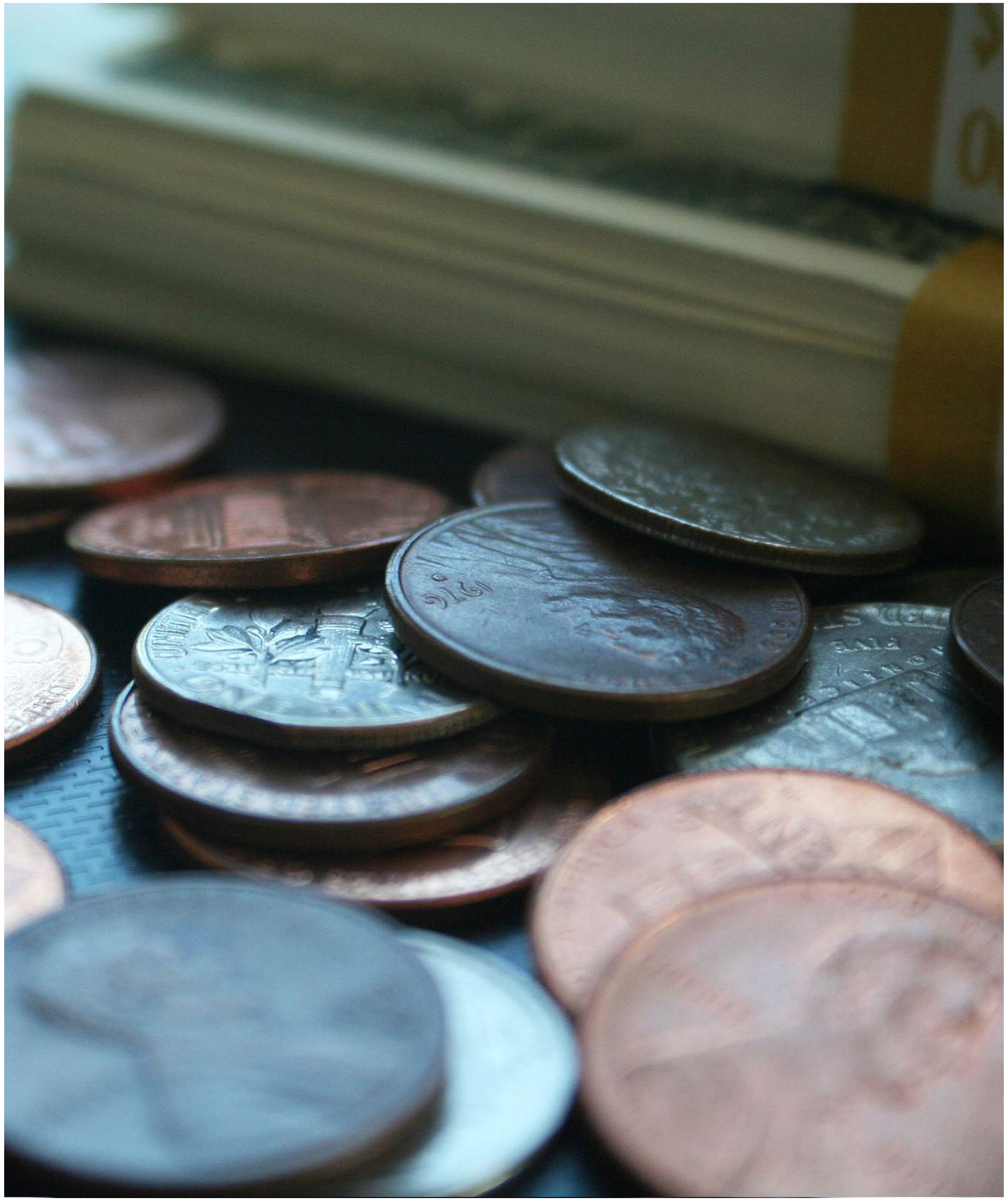
The Tribunal further held that, "The AO / DRP have also invoked the doctrine *"substance over form" to deny the benefit of Article 13 (4A). In our considered opinion the said doctrine is prior to the codification of domestic GAAR and the legislators were conscious enough when they were providing exemptions under Chapter X-A of the Act."*

Moreover, the Tribunal found that the treatment of the assessee as a "shell" or "conduit" company did not hold any weightage.

The legitimacy of the expenditure incurred by the assessee had been the subject matter of tax scrutiny in Singapore and the same had been declared genuine by the Singapore tax authorities. The Tribunal concluded by opining that,

"To conclude it is not in dispute that the assessee has furnished a valid tax residency certificate issued by Inland Authority of Singapore, audited financial statements and return of income filed alongwith tax assessment orders by Singapore Tax Authority, therefore, in the light of the binding decision of the Hon'ble Jurisdictional High Court of Delhi in the case of Black Stone Capital Partners (supra) we direct the AO to delete the impugned disallowance and allow the treaty benefit to the assessee as per the relevant provisions of the law/treaty."

Source: Tribunal, Delhi in Reverse Age Health vs. DCIT, Circle 3(1)(1) international Taxation vide ITA No. 1867Del/2022 dated February 17, 2023



ITAT Holds Sale of Shares to be Benchmarked Under Section 92 A (2); Section to be Interpreted Literally till No Absurdity or Unjust Result Arises

Facts

The assessee, Palmer Investment Group Ltd., was established in British Virgin Island and is primarily engaged investment activities. The assessee is a wholly owned subsidiary of M/s United Spirits Ltd. (USL). The assessee filed a return of income for the AY 2014-15 on March 31,2015 declaring a total income of INR 6,30,25,50,240 under the normal provisions of the Act. The case was selected for scrutiny and notice under section 143(2) of the Act was issued on August 28, 2015.

During the course of assessment proceedings, the case was referred to the Ld. TPO under section 92CA pf the Act. An upward transfer pricing adjustment in respect of the shares sold by the assessee was proposed. Following, the Ld. TPO's order, the Ld. AO passed the draft assessment order on December 26, 2017. This order incorporated the TP adjustments proposed by the Ld. TPO. It also applied the rate of 20% to the capital gains brought to tax (the assessee had adopted the rate of 10%).

Aggrieved, the assessee appealed before the DRP. However, the DRP disposed off the objections of the assessee through order dated July 20, 2018. Consequently, the final assessment order was passed totaling the income of the assessee at INR 8,92,53,30,261contrary to the amount of INR 6,30,25,50,240 that was declared by the assessee.

Aggrieved, the assessee approached the Tribunal for relief.

Ruling

The Tribunal ruled majorly in favor of the Revenue, only favoring the assessee in the issue of corporate tax (being contention raised with respect to the rate of tax adopted by the Ld. AO on the long term capital gains). The Tribunal stated that in the instant case Relay BV held more than 26% controlling stake in USL in the relevant previous year. It was held that section 92A (2) uses the expression *"if at any time during the previous."* And a literal interpretation of the same leads to no absurdity or unjust result. As such the contention of the assessee's counsel to not adopt the literal interpretation was incorrect. As such *"the impugned transaction had been rightly put through the test of benchmarking."*

The Tribunal referenced the landmark judgment of the Hon'ble Supreme Court in *Vodafone International Holdings B. V. vs. Union of India (2012) 341 1TR 1 (SC)* wherein the interplay between transfer of shares and the resultant host of consequences which inter alia included the notion of controlling interest. The Tribunal studied the observations of the DRP in tandem with the aforementioned case law and concluded that Relay BV had indeed intended to acquire controlling interest in USL through the SPA. The Tribunal held that,

"In the present case, the share purchase agreement was entered into for transfer of 25.1% of shares of USL. If non associated enterprises had entered into similar agreement, they would not have agreed for the transfer of shares at the stock exchange price as it involves transfer of control. Transfer of shares in stock exchange cannot be equated with transfer of shares involving transfer of control. Therefore, the price determined by the TPO is upheld for the above reasons."

Source: Tribunal, Bangalore in M/s. Palmer Investment Group Ltd. vs. DCIT (IT), Circle -2(1) vide ITA No.2930/Bang/2018 dated February 24, 2023

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