VERENDRA KALRA & CO
CHARTERED ACCOUNTANTS

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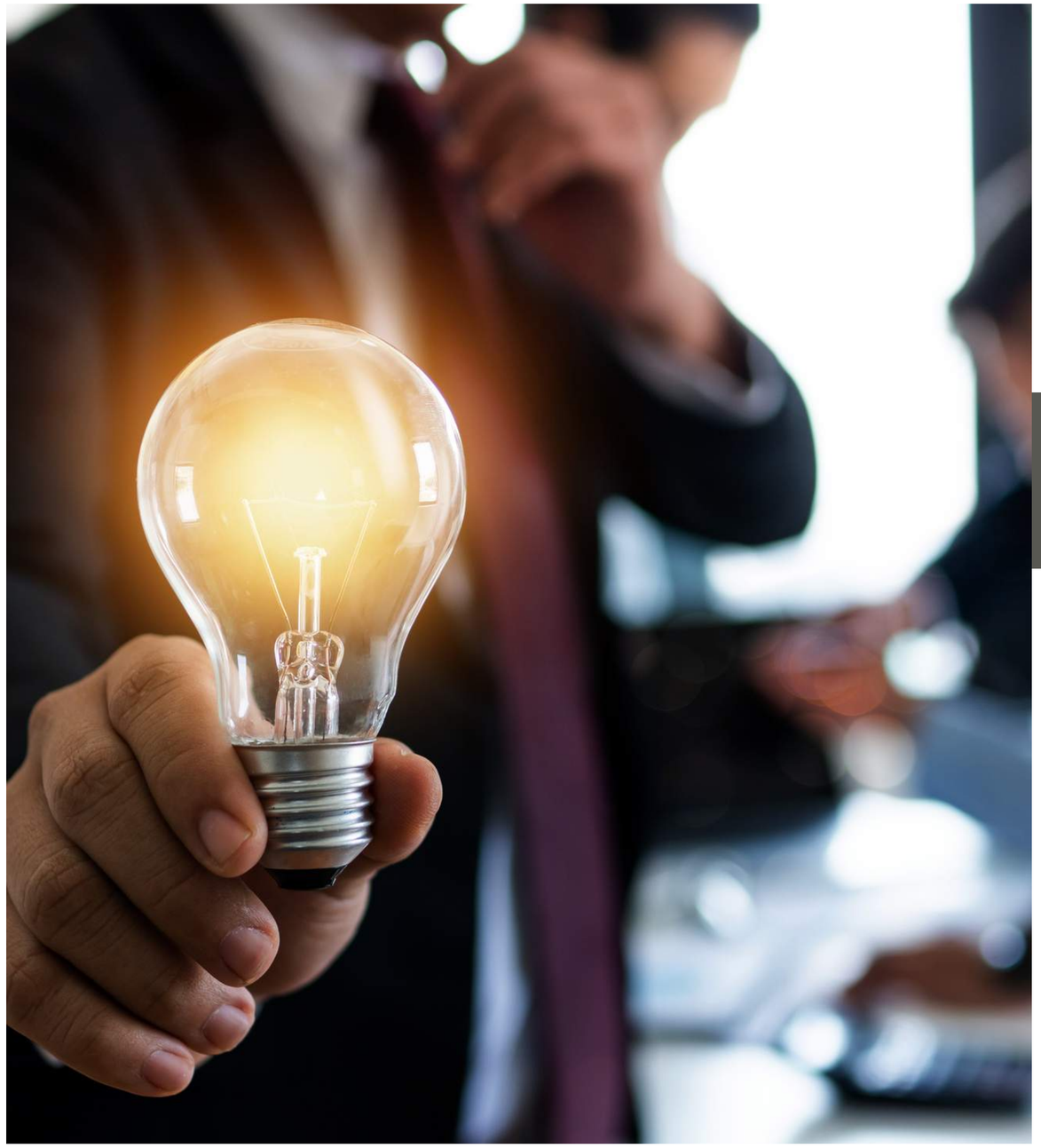

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Mauritian Co's Share Transaction Does Not Qualify as Capital Financing; DRP's Findings Based on Pure Assumptions and Conjecture

Facts

The assessee is a tax resident of Mauritius and was incorporated in Mauritius. The main object of the assessee was to do investment activities. During the period of FY 2008-09 to FY 2014-15, the assessee had made investments in Urbanedge Hotels & Holdings Pvt. Ltd. (Urbanedge), an Indian company. In this period, the assessee subscribed to 10122914 equity shares amounting to INR 93,68.67936. the assessee held 90% shares in Urbanedge. These shares were being held as capital assets by the assessee. The assessee sold the entire shareholding in Urbanedge to Sarim Holdings Private Limited (SHPL) for a consideration of USD 100. In this transaction, the assessee incurred a capital loss of INR 1,12,04,62,401.

During the FY 2015-16, the assessee filed a return of income declaring loss of INR 1,12,04,62,401. The AO, during the draft assessment proceedings, concluded that the assessee had earned capital gains of INR 12,96,82,280. The DRP re-characterized the transaction of investment in shares of Urbanedge as capital financing and estimate the rate of interest at 22% on this investment. Based on the findings and directions of the DRP, the AO computed interest of INR 68,49,22,942 and made an adjustment.

Consequently, the matter was brought before the tribunal.

Ruling

The Tribunal ruled in favor of the assessee. It observed that the observation of the DRP holding the assessee more in the nature of capital financing were based on conjecture and surmises and there was no supporting plausible material behind such hypothesis. The observations made by the DRP were relying on pure assumption. Furthermore, no reason or basis had been cited by the DRP to hold the 22% rate. The Tribunal opined that the rate was ***"adopted purely on adhocism."*** The Tribunal concluded the issue by holding that, ***"After having examined the orders/direction of the Assessing Officer / DRP, we are of considered view that it is a transaction of sale of shares by the assessee to SHPL. The DRP has erred in re-characterizing the transaction as that of capital financing. For the detailed reasons given above, the addition made by the Assessing Officer on the directions of the DRP are unsustainable, hence, liable to be deleted. We hold and order, accordingly."***

Source: Tribunal, Mumbai in CPI India Real Estate Ventures Limited vs. Deputy Commissioner of Income-tax vide ITA No. 4473/Mum/2019 dated March 10, 2021

ITAT Holds Microsoft License Fee Service Not Royalty or FTS; Relies on Past Supreme Court Ruling

Facts

The assessee is a company incorporated in USA, who was providing support services to its group companies in India, namely, Atos India Private Limited (Atos India). During the year, the assessee received INR 7,55,89, 549 from rendered to Atos India as:

- Cost recharge of Microsoft license fees
- Co-ordination services relating to Tower Watson project.

These services were provided by the assessee in enactment of the agreements entered into with Atos India.

The assessee filed a return of income however the above receipts were not reported and hence not offered to tax. The AO observed that as per the 26AS statement, the taxes were deducted on a total receipt of INR 5,55,75,255 /- @10.55% on an average and TDS of INR 58,67,358 was claimed in the return of income as refund. The AO further noted that since no income was offered to tax, during the assessment proceedings, the assessee was asked to explain why such receipts should not be taxed as Fees for Technical Services (FTS) or Royalty.

Among other relevant submissions, it was submitted that the Assessee had received payments from Atos India which were in the nature of 'Business Profits'. Hence, the same were taxable under Article 7 of the Double Taxation Avoidance Agreement between India and USA (India-USA DTAA). As per this article, Business Profits are taxable in India only if the non-resident has a Permanent Establishment (PE) in India. The assessee submitted that since there was no PE of it in India, such receipts were not taxable in India. However, the AO rejected all submissions made by the assessee and proposed an addition of INR 7,55,89,549 as receipts from Atos India held as FTS and Royalty. Aggrieved, the assessee approached the DRP which favored the AO. Consequently, the matter reached the Tribunal.

Ruling

The Tribunal ruled in favor of the assessee. With respect to the service (i) of Microsoft License Fee, the Tribunal observed that the assessee had entered into a global contract with Microsoft License Fees, based on which the assessee had entered into a separate agreement with the Atos India for recharge of costs regarding usage of the above licenses by Atos India. As such relevant invoices were raised to Atos India. It was found that these invoices were raised based on the actual utilization of the licenses and the Revenue Authorities had held these services as FTS or Royalty. The Tribunal reflected that ***"the license for usage of the copy righted products are with Microsoft only and the assessee has acquired global right and transferred the above said licenses to its group entities based on the requirements."***

To analyze whether such transaction fell under the scope of FTS or Royalty the Tribunal relied on past judicial precedents, namely, the case of Engineering Analysis Centre of Excellence (P.) Ltd. vs. CIT (2021) 125 taxmann.com 42 (SC)and the case of EY Global Services Ltd.

As such the Tribunal held that, ***"it is clear that the assessee has acquired the global license and allowed the group entities to use the above Licenses on the basis of requirements, the assessee has billed them according to their usage by properly documenting the usage and charged to them. As held in the decision of Hon'ble Supreme Court and Hon'ble Delhi High Court, the Microsoft Licenses are not falling under the category of Royalty or Copy Rights under the definition of respective categories."***

With respect to service (ii), relating to Watson Tower project, the Tribunal opined that, ***"As per the terms of agreement, the engagement clause clearly indicate that the assessee engages the services of Atos India to perform the services in accordance with the scope, delivery schedule, services levels and other essential factors as detailed in the services schedule (schedule no 2) of the sub contract agreement. The services provided by the assessee to the group entity are separate and nothing to do with the separate sub contract awarded to the Atos India, which is independent contract. The service desk services are provided to all the group entities to enable the common services provided to the Watson Group employees and there is nothing on record to indicate any independent service provided to Atos India or IT enabled services which gives knowledge made available to Atos India. Therefore, in our considered view, the services provided by the assessee is separate and it only collected the related cost to maintain the service desk. Therefore, it is a receipt which will fall under the Article 7 of the treaty."***

As such, all additions were directed to be deleted by the Tribunal.

Source: Tribunal, Mumbai in Atos IT Solutions and Services Inc C/o. Atos India Pvt. Ltd. vs. DCIT (IT)-1(1)(2) vide ITA No. 6841/MUM/2017(A.Y. 2014-15) dated March 1, 2023

ITAT Rules Custom Data More Reliable Under CUP Method; Upholds Order of Revenue Authorities by Relying on Past Precedents

Facts

The assessee had filed a return income declaring a loss of INR 64,17,81,731 which was later processed by the CPC. Subsequently, the case of the assessee was selected for scrutiny under CASS. A draft order under section 144C of the Act, dated December 21, 2019, was passed assessing the income of the assessee at INR 42,4943,801 after making an addition of INR 1,06,67,25,532 based on TP adjustment. Aggrieved, the assessee filed an objection against such order before the DRP.

However, a final assessment order was passed dated March 31, 2021, by making a TP adjustment of INR 18,57,18,810 and assessing the income of the assessee at INR 45,60,62,921 as against the returned loss of INR 64,17,81,731.

Aggrieved the assessee appealed before the Tribunal. The Grounds of Appeal raised by the assessee contended against the assessment order in enhancing income of the assessee by INR 18,57,18,810- by relying on the data from custom authorities by rejecting the Comparable Uncontrolled Price (CUP) analysis undertaken by the assessee.

Ruling

The Tribunal ruled in favor of the Revenue. In its analysis of the facts and circumstances of the case the Tribunal ascertained the issue at hand to be, “whether the prices published by industry associations and brokerages along with third party transactions constitutes a more reliable CUP compared to customs data for import/export transactions of such agri-commodities.”

The Tribunal found that under the circumstances of the case, the prices of comparable products on their respective invoice/ shipment date as considered in customs evaluation would yield a more reliable result. The Tribunal opined that, ***“Cutsoms data serves as a more reliable CUP as it compares the value of identical or similar goods imported/exported at or around the same time.”***

The Tribunal relied on the cases of *M/s Sinosteel India Pvt. Ltd. vs. DCIT vs. DCIT (I.T.A.No.- 175/Del/2012), Coastal Energy Pvt. Ltd. vs. ACIT (I.T.A. No.2099/Mds/2010), and Rohm And Haas India (P) Ltd. vs. ACIT (ITA No. 2199/Mum/2015)* and concluded by holding that, ***“we are of the opinion that the objections of the assessee against the use of customs data under CUP had been rightly rejected by the Authorities.”***

Source: Tribunal, Delhi in Louis Dreyfus Company India Pvt. Ltd. vs. DCIT vide I.T.A. No.808/DEL/2021(A.Y 2016-17) dated March 15, 2023.

Commissioning of Dryer Fans and Installation Services Not FTS; CBDT Circular Relied Upon By DRP Not Applicable

Facts

The assessee, a company Dieffernbacher GmbH Maschinen Und Anlagenbau, 20 is a tax resident of Germany and was incorporated there. It filed its return of income on November 30, 2018, declaring a total income of INR 56,01,540. The case was selected for scrutiny and notice under section 143(2) of the Act.

The assessee had entered into a contract with Greenply Industries Ltd. (Greenply) to render training, supervision and consultancy in connection with installation services to set up the HDF/MSF board production line machinery at Greenply's premises in India. The assessee had a PE in India as it had performed services in India for a period exceeding 90 days during the FY 2017-18.In accordance with Article 5 of the India-German DTAA, income attributable to service PE in India was offered to tax as business income. During the course of assessment proceedings, the AO noted that a payment of INR 17,13,81 in the nature of installation and supervision for the fan was made. This payment was made to Campagnie Belge De Venti lateurs S.A. (CBV) (subcontractor, Belgium) without deduction of TDS.

The AO held that being FTS provided in India TDS was to be deducted. The assessee's contentions of the same not being FTS were rejected by the AO, who categorized tit as FTS under the Act as well as Article 12(4) of the India-Belgium read with India-Portugal DTAA. As such, payment of the aforementioned remittance was held liable for TDS @ 10% (excluding surcharge and cess).

The DRP upheld the order of the AO, consequently the assessee appealed before the Tribunal.

Ruling

The Tribunal ruled in favor of the assessee. It observed that the DRP relied upon the CBDT Circular No. F No.503/1/2021. To arrive at a conclusion regarding the applicability of such circular the Tribunal referred to past case laws. On the basis of the cases GRI Renewable Industries S.L. vs. ACIT vide ITA No. 202/Pun/2021 and M/s. Essity Hygiene & Health vs. DCIT (ITA No. 778/Mum/2021), the Tribunal held that, ***"we are of the considered view that CBDT Circular No. 3/2022 dated 03.02.2022 is not applicable to the present appeal, therefore, assessee is entitled to claim the benefit of the restricted definition under India-Portugal DTAA. Since, the assessee have been found not to have made available any technical knowledge experience or skill or knowhow, therefore, the impugned services received by the assessee cannot be taxed under the provision. Accordingly, appeal of the assessee is allowed."***

Source: Tribunal, Mumbai in Dieffenbacher GmbH Maschinen Und Anlagenbau vs. ACIT vide ITA No. 556/Mum/2022 dated March 16, 2023

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