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ITAT Holds License Fee for Live and Non-Live Transmissions Not Taxable as Royalty; Follows Dictum of New Skies Ruling

Facts

The assessee filed its return of income dated October 31, 2018, declaring INR 68,66,110 as total income, following which the case was selected for scrutiny through CASS. Subsequently, a notice under section 143(2) was issued to the assessee on September 22, 2019. The scrutiny stemmed from the high ratio of refund to TDS relating to section 195 (Business ITR). The AO noted that the assessee had failed in offering the following incomes to tax:

1.License fee for live and non-live transmission rights amounting to INR 5,81,43,665, and;

2.Tournament fee amounting to INR 2,48,266.

As such a draft assessment order was passed under section 144C of the Act dated September 02, 2021, wherein the AO had proposed to assess the income at INR 5,83,91,931, by proposing an addition of INR 2,48,266 as royalty and INR 5,12,77,558 in respect of license fee.

In response to such order, the assessee filed objections before the DRP, which dismissed the same and ruled in favor of the revenue in respect of the license fee findings. However, in the matter of royalty the AO was directed to pass a speaking order in accordance with the law. The AO based on such findings of the DRP, passed the assessment order reflecting the above impugned addition.

Aggrieved, the assessee preferred an appeal before the Tribunal.

Ruling

The Tribunal ruled in favor of the assessee. It opined that the amendment of section 9 of the Act can only be affected in such case when such amendment had also been incorporated in the agreement, i.e. the DTAA.

It relied on the dictum of the cases ***Director of Income tax vs. New Skies Satellite BV [2016] 68 taxmann.com 8, Fox Network Group Singapore Pte. Ltd. vs. ACIT (International Taxation) [2020] 121 taxmann.com 330 and ESS (Formerly known as ESPN Star Sports) vs. ACIT ITA No. 7903/Del/2018,*** to support its findings.

The Tribunal noted that the AO had failed to point out if the corresponding amendment had been made in the DTAA, as such the Tribunal concluded that the addition should be deleted in accordance with the law.

Source: Tribunal, Delhi in Cricket Australia vs. ACIT vide ITA No. 1179/Del/2022 dated August 24, 2023.

ITAT Propounds the Viability of TRC; Allows Benefit of DTAA for Long Term Capital Gain from Sale of Equity Shares

Facts

The assessee is a non-resident corporate entity incorporated under the laws of the Mauritius and is also a tax resident of Mauritius. The assessee was incorporated mainly for the object of making investments in India in education space, agriculture, healthcare, microfinance institutions and other financial services.

As part of its business activities, the assessee made investment in Indian companies through equity shares. During the year under consideration, the assessee had sold equity shares of two Indian companies, Sewa Gruh Rin Ltd. and Veritas Finance Pvt. Ltd. and derived income under long term capital gains.

In its original return of income dated March 13, 2020, the assessee offered the income derived from sale of equity shares as capital gain, however it claimed the same as exempt under Article 13(4) of the India-Mauritius DTAA. Subsequently, on March 13, 2022, the assessee filed a revised return offering the long-term capital gain arising from sale of equity shares of Veritas Finance under Article 13(3B) of India-Mauritius DTAA.

During assessment proceedings, the AO examined the above Articles of the DTAA and after giving reasons, concluded that the assessee was not entitled to the benefits of the DTAA. Accordingly, the AO, in its draft assessment order, brought to tax the entire income under long term capital gains under domestic tax laws. On appeal, the DRP sustained the findings of the AO.
Consequently, the matter reached the Tribunal for adjudication.

Ruling

The Tribunal ruled in favor of the assessee. It opined that the AO had erred in holding the assessee as a non-resident of Mauritius, for the purposes of tax. It held that the position of the law was clear in such case and the assessee, in possession of a valid TRC, i.e. a Tax Residency Certificate, should have been treated as tax resident of Mauritius and as such available to claim benefit under the India- Mauritius DTAA.

With respect to the sale of shares of Sewa Gruh Rin Ltd. the Tribunal noted that such shares were acquired prior to April 01, 2017, and as such were well within the exemption provided to assessee under Article 13(4). The gain derived from such sale of equity shares, is therefore, taxable in resident country, i.e. Mauritius.

Regarding the sale of shares of Veritas Finance, the assessee had filed an additional ground before the Tribunal, reversing its stand taken in the revised return of income and had claimed exemption under Article 13(4) of the Tax Treaty. The assessee contended that it had acquired cumulative convertible preference shares (CCPS) of Veritas on March 18, 2016, and the CCPS had been converted into equity shares on August 4, 2017. As such, the Tribunal held that the shares were acquired by the assessee prior to April 01, 2017, and as such hey would be covered under Article 13(4) and not 13(3A) or 13(3B). the Tribunal allowed the additional ground raised by the assessee.

Source: Tribunal, Delhi in Sarva Capital LLC vs. ACIT vide ITA No. 2289/Del/ 2022 dated August 10, 2023.

Nostro Account Maintenance Charges Not subject to Sections 195 and 40(a)(i) of the Act; ITAT Upholds CIT(A) Order

Facts

The assessee is a non-resident banking organization incorporated and registered in Hong Kong and was engaged in the business of banking in India through its branch in India. The AO found that INR 2,78,35,306 claimed by assessee in respect of Nostro Account Maintenance charges paid by the assessee outside India had been disallowed under section 40(a)(i) for the Assessment Year 2013-14, as the assessee had failed to deduct tax under Section 195. Accordingly, proceedings under section 201(1) and 201(1A) of the Act were initiated against the assessee.

During the proceedings the assessee made an extensive submission dated January 27, 2021, contending that ***"the Assessee maintained Nostro Accounts with banks outside India as well as with branch offices of the Assessee outside India. The Nostro Accounts Maintenance Charges were levied by such overseas banks/branches on the Assessee were with respect to the Nostro Accounts maintained outside India. As a common practice, the Nostro Accounts Maintenance Charges were directly debited by the overseas bank/branches to such Nostro Account and therefore, there was no remittance made by the Assessee on account of the same. The overseas bank/branches were providing services, if any, outside India which were, in any case, not in the nature of managerial, technical or consultancy services."***

As such, the assessee claimed that there was no obligation to deduct tax under section 195 of the Act, as the Nostro charges were not in nature of interest defined in section 2 (28A) of the Act.

However, the AO disregarded all submissions and considered the assessee as an assessee in default and raised a demand of INR 1,72,50,730 under section 201(1) of the Act, being the amount of tax, which should have been withheld and also raised a demand of INR 1,96,33,817 being the interest computed at the rate of 1% per month on the tax worked out under section 201(1) of the Act.

Consequently, the assessee filed an appeal before the CIT(A), who, after considering the submissions of the assessee deleted the demands raised by the AO. Aggrieved, an appeal was filed by the Revenue before the Tribunal.

Ruling

The Tribunal ruled in favor of the assessee by upholding the order of the CIT(A). It observed that the decision of the CIT(A) was similar to that of the Mumbai Tribunal in the case of Oman International Bank SAOG vs. Deputy Director of Income Tax (International Taxation) ITA No. 6800/Mum/2010 bearing identical facts and circumstances. It was found that since the charges are in the nature of bank charges levied on transaction, the same were not subject to section 195 of the Act. As such, the provision of section 40(a)(i) could not be applied on deemed remittance of Nostro Account maintenance charges.

Tribunal examined section 2(28A) of the Act and concluded that the AO had failed to establish that the assessee had borrowed money or incurred debt or availed any credit facility and that the Nostro charges in contention had been charged in respect of the same.

As such the Tribunal found no error in the judgement of the CIT(A).

Source: Tribunal, Mumbai in Income Tax Officer vs. The Hongkong & Shanghai Banking Corporation Ltd. vide ITA No. 2190/Mum/2022 dated August 20, 2023.

ITAT Rules IUC Charges not Taxable as Royalty under India-Spain DTAA; Follows Past Precedents

Facts

The assessee is a telecom company incorporated and a tax resident of Spain. It is engaged in the business of providing telecommunications services, internet services, interconnection services. The assessee had entered into interconnect service agreements that allows subscribers of one telecom operator to call a subscriber of another operator in any part of the world. The interconnection services were entered into between two telecom operators to provide seamless service of delivering outbound and inbound calls.

The assessee received amounts towards interconnect charges (IUC) from Indian telecom operators, Bharti Infotel Limited (BIL), Tata Communications Ltd. (TCL) and Vodafone Essar South Limited (VESL) to provide seamless service of delivering outbound and inbound calls for the year under consideration.

The assessee, in the view that such income did not constitute royalty/ FTS but would be considered business income. Since the assessee did not have a Permanent Establishment (PE) in India, the same could not be attributed to any income earned in India. Therefore, no return was filed for AY 2010-11, AY 2011-12, and AY 2012-13 by the assessee.

Accordingly, for AY 2010-11, the AO issued a notice under section 147 based on the proceedings under section 201 initiated on Vodafone Essar. The AO was of the view that such receipt by assessee was Royalty/FTS and as such taxable in India. The DRP upheld the order of the AO, and based on such directions, the AO passed the final assessment order by making an addition of INR 2,19,91,082 in the hands of the assessee as FTS/Royalty and taxable at 10% for AY 2010-11.

The AO, relying on AY 2010-11, proceeded to issue notice under section 148 for AYs 2011-12, 2012-13 and made additions amounting to INR 4,39,32,565 and INR 7,53,24,996 as Royalty taxable at 10% in the hands of the assessee respectively.

Aggrieved by the actions of the AO in the final assessment order, the assessee approached the Tribunal for relief.

Ruling

The Tribunal ruled in favor of the assessee. It observed that the relevant law being Explanations 5 and 6 to section 9(1)(vi) is not incorporated in the definition of 'Royalty' under India-Spain DTAA. The meaning of royalty as under the DTAA was much narrower in its scope and coverage than the definition of it as covered in section 9(1)(vi) read with Explanations 2,5 and 6 of the Act.

Furthermore, the Tribunal referred to prior judicial precedents, namely, ***DCIT vs. PanAmSat International Systems Inc. (2006)9 SOT 100, Bharti Airtel vs. ITO (TDS) (2016) 67 taxmann.com 223,*** wherein it was opined that payments towards call interconnectivity charges for call transmission on foreign network cannot be classified as 'Royalty' in light of the cemented judicial position.

Source: Tribunal, Bangalore in M/s. Telefonica Depreciation Espana SA vs. The ACIT vide IT(IT)A No. 2657/Bang/2019 dated August 10, 2023.

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