VERENDRA KALRA & CO
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HC Holds Date of Actual Drilling Not Deciding Factor for PE; Rig Undergoing Upgrades For Contract Purpose Hence it was Already in Contractual State.

Facts

The assessee is a company incorporated in Singapore and is a tax resident of Singapore. The assessee had into an agreement dated June 18, 2020 with Gujarat State Petroleum Corporation Ltd. (GSPC) for providing Jack up drilling Unit and platform well operations at the Block Kg-OSN 2010/3 offshore India, pursuant to the exploration contract awarded by the Government of India to GSPC.

During the year under consideration, the assessee earned contractual income of INR 64,88,90,227 from GSPC under contract. The AO noticed that the activities undertaken by the assessee as per the contract were covered under section 44BB of the Act and that unlike till AY 2010-11 the assessee had not offered if its income to tax in India under this provision in AY 2011-12.

The matter reached the Tribunal, which ruled in favor of the Revenue. Aggrieved, the assessee preferred an appeal before the Hon'ble High Court.

Ruling

The Court ruled decided in favor of the Revenue. It was noted that Article 5(5) of the India- Singapore DTAA required provision of service or facility for a period of more than 183 days in the fiscal year.

During its judgement, the court arrived at a single point consideration being, "when should have an enterprise be considered to have rendered services of facilities." In other words, when would the period of 183 days actually begin, from the date the contract beings or from the moment the rig enters Indian territory for the purpose in connection with exploration or extraction of mineral oil.

The Court concluded, ***"Therefore, it is quite clear that even though the actual contract was entered into with GSPC only on 18th June 2010, and accepting what Appellant states that the drilling work actually commenced on 03rd December 2010, still the fact that as on 27th April 2010 the rig was undergoing necessary upgrades / repairs to meet the GSPC requirements, in our view the rig was already in the contracting state for providing the services or facilities in connection with the exploitation, exploration or extraction of mineral oil as early as on 27th April 2010."***

Source: High Court, Mumbai in Deep Drilling 1 Pte. Ltd. vs. DCIT(IT)-2(1)(1) vide Income Tax Appeal No. 315 of 2018 dated July 5, 2023.

HC Holds Assessee Not Defaulter under Section 201 of the Act; Follows Engineering Analysis Ruling

Facts

The assessee holds an International Long Distance (ILD) License and provides telecommunication services and was responsible in providing connectivity to calls originating or terminating outside India. Assessee had entered into agreements with NTOs for international carriage and connectivity services. As per the agreement, assessee to pay inter connectivity charges to NTOs.

Assessee entered into a Capacity Transfer Agreement (CTA) with MIS Belgacom International Carrier Services (Belgacom) to acquire bandwidth capacity on Europe India Gateway (EIG) and M/s. Omantel Telecommunications Company (Omantel), a member of consortium which owns the EIG System. Following the agreement, Omantel had transferred certain portion of its of its capacity in the EIG System to Belgacom which in turn transferred a portion of its capacity to the assessee for consideration.

The AO issued a notice stating that the payments made by the assessee to NTOs and Belgacom for AY 2008-09 to 2015-16 were made without deducting TDS under section 195 the Act. The Assessee submitted that the NTOs are located outside India and they provide telecom services outside India and as such it was not necessary to deduct TDS. In response, the AO passed an assessment order holding assessee as defaulter for failure to deduct TDS. Moreover, the AO held that payments made to NTOs for provision are taxable under the head 'other income' and treated it as royalty/fees for technical services (FTS).

On appeal, the CIT(A) upheld the AO's order but held that internet connectivity usage charges could not be taxed as other income. The Tribunal partly allowed the assessee's appeal and confirmed the findings of the CIT(A). Aggrieved, the assessee appealed before the Hon'ble High Court.

Ruling

The Court ruled in favor of the assessee. It upheld the contention of the assessee that for subsequent year in the assessee's own case, the Tribunal held that tax is not deductible when payment is made to non-resident telecom operator. The Court held that such factual stance could not be disputed.

The Court, with respect to holding the assessee as "defaulter" under the Act, observed that the ITAT had been wrong in holding that an amendment to provisions of Section 9(1)(iv) inserting the explanations would result in amendment of DTAA. The Court relied on ***Engineering Analysis Centre of Excellence Private Limited vs. CIT wherein the Apex Court had held, "While deciding the scope of Section 195(2) it is important to note that the tax which is required to be deducted at source is deductible only out of the chargeable sum. This is the underlying principle of Section 195. Hence, apart from Section 9(1), Sections 4, 5, 9, 90, 91 as well as the provisions of DTAA are also relevant, while applying tax deduction at source provisions."***
Therefore, the court concluded that the assessee is entitled to obtain the benefits of the DTAA

Source: High Court, Karnataka in M/s Vodafone Idea Ltd. vs. DDIT (International Tax) and Ors. vide ITA No. 160 of 2015 dated July 14, 2023.

ITAT Holds No Profit Can be Attributed When Loss has been Incurred Globally; Follows Precedent of Nokia Solutions

Facts

The assessee, Hitachi Ltd., is a Japanese multinational engineering and electronics conglomerate company, headquartered in Chiyoda, Tokyo, Japan. It is one of the largest electronic companies in the world. Hitachi, Ltd. is the parent company of Hitachi Group which operates through several business segments including Social Infrastructure & Industrial System shaving Rail Systems Business Unit as part of the segment.
The income of the assessee, taxable in India for the relevant year, primarily consists of 'Income from Royalty and Fees for technical services (FTS)' and 'Business Income'.

For the assessment year under appeal, the assessee filed an appeal declaring a total income of INR 45,27,08,220. The case was selected for complete scrutiny. The AO after making his own observations and considering the submissions of the assessee regarding the offshore made by it during the relevant year, passed a draft assessment order proposing an addition of INR 50,42, 987 to the returned income.

The assessee appealed before the DRP who confirmed the proposal regarding profit attributable to India PE at 35% as computed at INR 50,42,987, resulting in AO passing a final assessment order.
Consequently, the matter reached the Tribunal.

Ruling

The Tribunal ruled in favor of the assessee. It greatly relied on the same judgement used by the assessee in its contention, CIT (International Taxation) vs. Nokia Solutions and Networks OY (2023) 147 Taxmann.com 165 (Delhi), wherein it was held that, “plain reading of the Article 7(1) would show, that the issue of taxability would arise qua the respondent/assessee only if profits accrue to the respondent/assessee, and that too only to the extent they can be attributed to its PE in India.”
In the relevant case, the Tribunal noted that the assessee had contended no profit could be attributable on account of loss.

The Tribunal further opined that since the Revenue had failed to bring forth any contrary material against the assessee’s contentions and the abovementioned judgement by the Hon’ble Delhi High Court, the lower authorities had been wrong to attribute profit to the assessee when there was a loss. As such, it directed the AO to delete the addition.

Source: Tribunal, Mumbai in M/s. Indian Oil Corporation Ltd. Vs. DDIT vide ITO No. 987/MUM/2008 dated July 19, 2023.

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