Latest Judicial Developments International Taxation

ICAI Committee on International Taxation
Date: 2 July 2010,Friday
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Advocate Delhi High Court

Outline

- Advance Rulings in E-Trade Mauritius 230 CTR 428 ; STAR cases 229 CTR 7
  - Tax Avoidance concept (SC in Azadi Bachao; Vodafone cases 263 ITR 706- latest applied P&H High Court Porrits and Spencer)
- Bangalore Bench of ITAT ruling in Sun Microsystems 39 DTR 69
- Bangalore Bench of ITAT Ruling in Modilal Orient Ltd 37 DTR 267
- AAR in LS Cables (scope of advance ruling…)
- Delhi Bench of ITAT on Service PE in Lucent case 120 TTJ 929

Outline

- Mumbai Bench of ITAT in Perroy A.G. 5 Taxmann.com 8 (16/4/2010)- Royalty – India Swiss DTAA
- Delhi High Court in Sahara case – Royalty – India Canada DTAA 232 CTR 114
- Delhi Bench of ITAT in Pioneer Overseas Corpn. India USA DTAA 37 SOT 404
- AAR in Seagate (India Singapore DTAA) PE Warehouse 230 CTR 110
- Mumbai Bench of ITAT in Valentine Maritime (India Mauritius DTAA) & J Roy Mc Dermott (Same DTAA)
- Mumbai Bench of ITAT in Techmark Global (23/2/2010) India US DTAA

Outline

- Bang Bench ITAT in CGI Information Systems ITA No. 1376/Bang/08 & AAR in ABB Ltd ; E&Y – BHC in Krupp GmBH; Information Architects and Gujarat High Court in Scarlet Devices
- Delhi Bench of ITAT in Maruti Udyog 130 TTJ 66 & AAR in HMS Real Estate 230 CTR 340
- AAR in FICCI 230 CTR 126 (2); Real Resourcing 230 CTR 120;
- Delhi Bench of ITAT in Parasrampuria Synthetics and Jaipur Vidyut cases
- Mumbai Bench in Cartier Shipping; Airlines Roatables
- Mumbai Bench in Hindalco (section 163)
- AAR Dessault and Airport Authority of India
- Karnataka High Court in Illions 231 CTR 449

Outline

- **Taxability of Offshore Supply Contracts Joint Stock Company Foreign Economic Association "Technopromexport"** 2010-TIOL-10-ARA-IT

- **Applicability of Circular 23 dated 23.7.1969 and Circular 786 dated 7.2.2000 after withdrawal vide Circular 7 of October 22, 2009 - DDIT Vs. Siemens Atkiengesellschaft** 2010 TIOL-102-ITAT-Mum

- AAR Hyundai and Mistubishi AOP- Consortium concept

Tax Avoidance: SC Azadi Bachao

- Overall, countries need to take, and do take, a holistic view. The developing countries allow treaty shopping to encourage capital and technology inflows, which developed countries are keen to provide to them. The loss of tax revenues could be insignificant compared to the other non-tax benefits to their economy. Many of them do not appear to be too concerned unless the revenue losses are significant compared to the other tax and non-tax benefits from the treaty, or the treaty shopping leads to other tax abuses.

- There are many principles in fiscal economy which, though at first blush might appear to be evil, are tolerated in a developing economy, in the interest of long term development. Deficit financing, for example, is one; treaty shopping, in our view, is another. Despite the sound and fury of the respondents over the so called 'abuse' of 'treaty shopping', perhaps, it may have been intended at the time when Indo-Mauritius DTAC was entered into. Whether it should continue, and, if so, for how long, is a matter which is best left to the discretion of the executive as it is dependent upon several economic and political considerations. This Court cannot judge the legality of treaty shopping merely because one section of thought considers it improper. A holistic view has to be taken to adjudge what is perhaps regarded in contemporary thinking as a necessary evil in a developing economy.

Tax Avoidance: SC Azadi Bachao

- The basic assumption made in the judgment of Chinnappa Reddy,J. in McDowell that the principle in Duke of Westminster has been departed from subsequently by the House of Lords in England, with respect, is not correct

- With respect, therefore, we are unable to agree with the view that Duke of Westminster is dead, or that its ghost has been exorcised in England. The House of Lords does not seem to think so, and we agree, with respect. In our view, the principle in Duke of Westminster is very much alive and kicking in the country of its birth. and as far as this country is concerned, the observations of Shah,J., in CIT v. Raman are very much relevant even today.

- It thus appears to us that not only is the principle in Duke of Westminster alive and kicking in England, but it also seems to have acquired judicial benediction of the Constitutional Bench in India, notwithstanding the temporary turbulence created in the wake of McDowell

Tax Avoidance: SC Azadi Bachao

- We are unable to agree with the submission that an act which is otherwise valid in law can be treated as non-est merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interests, as perceived by the respondents.

Tax Avoidance: E-Trade

- E*Trade Mauritius Ltd. ("**ETM**") is a wholly owned subsidiary of US based Converging Arrows Inc ("**CAI**"), which is in turn a wholly owned subsidiary of E*Trade Financial Corporation ("**ETFC**"), also a US company. ETM was holding shares of an Indian company, IL&FS Investmart ("**IL&FS**"). The transaction in question was the sale of the entire stake of ETM in IL&FS to HSBC Violet Investments (" **HSBC**"), also based in Mauritius.

Tax Avoidance: E-Trade

- ETM received the funds for this transaction from CAI, its parent company. Taking benefit of the capital gains tax benefit under the Treaty, ETM sought a certificate from the Indian tax authorities ("**Revenue**"), authorizing payment of consideration by HSBC sans any withholding tax.
- Surprisingly, the Revenue refused to grant a nil withholding tax certificate. In this connection ETM filed a writ petition before the Bombay High Court, wherein the High Court without examining the merits of the case directed ETM to file a revision application before the Revenue. After the Bombay High Court's order ETM approached the AAR to determine the Indian tax implications of sale of an Indian company's shares by a Mauritius company and the applicability of Treaty benefits.
- The Revenue claimed that though the legal ownership of the shares in IL&FS resides with ETM, the real and beneficial owner of the capital gains is ETFC, and ETM is merely a facade developed to avoid tax on capital gains in India. To support this contention, the Revenue also stated that the transaction was funded indirectly by the ultimate parent company, ETFC. Last but not the least, the Revenue also argued that since the beneficial ownership of the IL&FS shares was with ETFC, the India-US Tax Treaty should be applied instead of the India-Mauritius Tax Treaty.

Tax Avoidance: E-Trade

- The AAR reiterated the Supreme Court's decision and stated that the motive of tax avoidance was not relevant so long as the same was within the framework of law. It held that 'Treaty Shopping' was not against law and the corporate veil cannot be lifted to deny treaty benefits.
- The AAR also stated that since ETM was recognized as a shareholder of IL&FS and also received dividends in its capacity as a shareholder, merely because the transaction may have been indirectly funded by ETFC cannot lead to an inference that ETFC owned the shares in IL&FS. To take such a view would blur the mutual business and economic relations between a holding and subsidiary company.

Tax Avoidance: E-Trade

- An important point made by the AAR is also that a subsidiary has its own corporate personality and the fact that ETFC exercises acts of control over ETM does not in the absence of compelling reasons dilute ETM's separate legal identity.

- Lastly, on the argument with respect to beneficial ownership, the AAR held that the concept of '*beneficial ownership*' which is used in the Treaty in connection with Interest and Dividend was irrelevant in the context of taxability of Capital Gains. Again, relying on *Azadi Bachao Andolan* and Circular No. 789[3] and 682[4] of the Central Board of Direct Taxes ("**CBDT**"), it concluded that a certificate of residence issued by the Mauritian authorities will constitute sufficient evidence for accepting the status of residence as well as beneficial ownership of shares. Further the Revenue also alleged that ETFC had ownership rights over IL&FS, as some directors were found to be common between ETFC and IL&FS. However, the AAR observed that the executive control over IL&FS was never exercised by the common directors and ETM's status as a shareholder of IL&FS is not in any way affected by the overall control exercised by the US parent company.

Tax Avoidance: E-Trade

- In fact, the AAR had recently held in KSPG Netherlands Holdings BV that while the concept of 'beneficial ownership' has no relevance in case of capital gains, even if it did apply, to the extent the intermediary has a distinct corporate personality with an independent board of directors and management systems, the intermediary cannot be considered as a sham entity deliberately set up to avoid capital gains tax liability.
- Further, although the AAR has not really gone into the cases where the corporate veil can be lifted, it is now a settled law that the corporate veil can be lifted only in cases of fraud or sham transactions where tax is sought to be evaded. With this ruling coupled with the legendary *Azadi Bachao Andolan* case, there seems to remain no doubt that capital gains tax benefits under the Treaty will be available to a tax resident of Mauritius.

Tax Avoidance: E-Trade

- Bombay High Court in IAL Shipping Agencies : In context of separate-legal entity approach, BHC has observed that: *"It cannot be said that the assessee company and the UK company, which were under the same management, are the same entity. Both of them are separate companies incorporated under the respective statutes of their countries and merely because the shareholding is held by the same group, the companies do not loose their separate entitles and the conclusion of the assessing officer that they cannot act as principals and agents is bad in law especially when it is not in dispute that the assessee companies were incorporated in India whereas the said IAL Container Lines (UK) Ltd. was incorporated under the provisions of the Companies Act prevailing in UK. The UK company was already carrying out its activities of shipping business in India prior to the incorporation of the assessee "" …..*

Tax Avoidance: E-Trade

- Supreme Court decision in the case of Mrs Bacha F Guzdar (27 ITR 1), which held that the company is a legal entity, separate and distinct from its shareholders and there is nothing in the Indian law to warrant the assumption that a shareholder who buys shares buys any interest in the property of the company

Tax Avoidance: STAR AAR

<u>…..</u>Be that as it may, the premise on the basis of which the Revenue has built up its argument that amalgamation is just a colourable device or subterfuge to avoid the tax liability on account of capital gains and there is no other business purpose or expediency behind the purported amalgamation, is not, in our view, sound and acceptable…..

Tax Avoidance: STAR AAR

HELD: …. It is in the light of this legal position expounded by the Supreme Court and the High Courts on the subject of tax avoidance that the approach to the interpretation of the words in clause (iii) of the proviso to Section 245 R(2) has to be channelled**. The expression "transaction designed to avoid income tax" cannot be understood to mean that in the course of entering into a transaction, the tax payer is precluded from taking into account the tax implications involved and to minimize its tax burden. It is within the legitimate freedom of the contracting parties to enter into a transaction, which has the effect of extending to the party the benefit of exemption under the taxation statute. The contracting party is not bound to enter into a transaction in such a way that it results in tax liability while foregoing the benefit of exemption under law…**

Tax Avoidance: P&H Porrits..

- On Subject of Judicial Discipline: Accordingly, we take it as well settled that if a smaller Bench has lateron explained the judgment of a larger Bench of Hon'ble the Supreme Court then the later is binding. Examined in the aforesaid perspective, the view expressed by Hon'ble the Supreme Court in the case of
- **Azadi Bachao Andolan (supra)**, has to be accepted as binding. Therefore, it cannot be said that the principle of law laid down by the House of Lords in **Duke of Westminster's case (supra)**, as followed, explained and applied in the case of **Azadi Bachao Andolan (supra)**, is no longer applicable. The principle is found applicable in its native country and cannot be deemed to have been abandoned. Moreover, no such principles having been laid down in the case of **McDowell & Co. Ltd. (supra)** by the majority judgment, it is not possible to accept the argument advanced by the revenue-respondent... It is well settled that if a smaller Bench of Hon'ble the Supreme Court has lateron explained its earlier larger Bench then the later judgment is binding on the High Court..

Tax Avoidance: P&H Porrits..

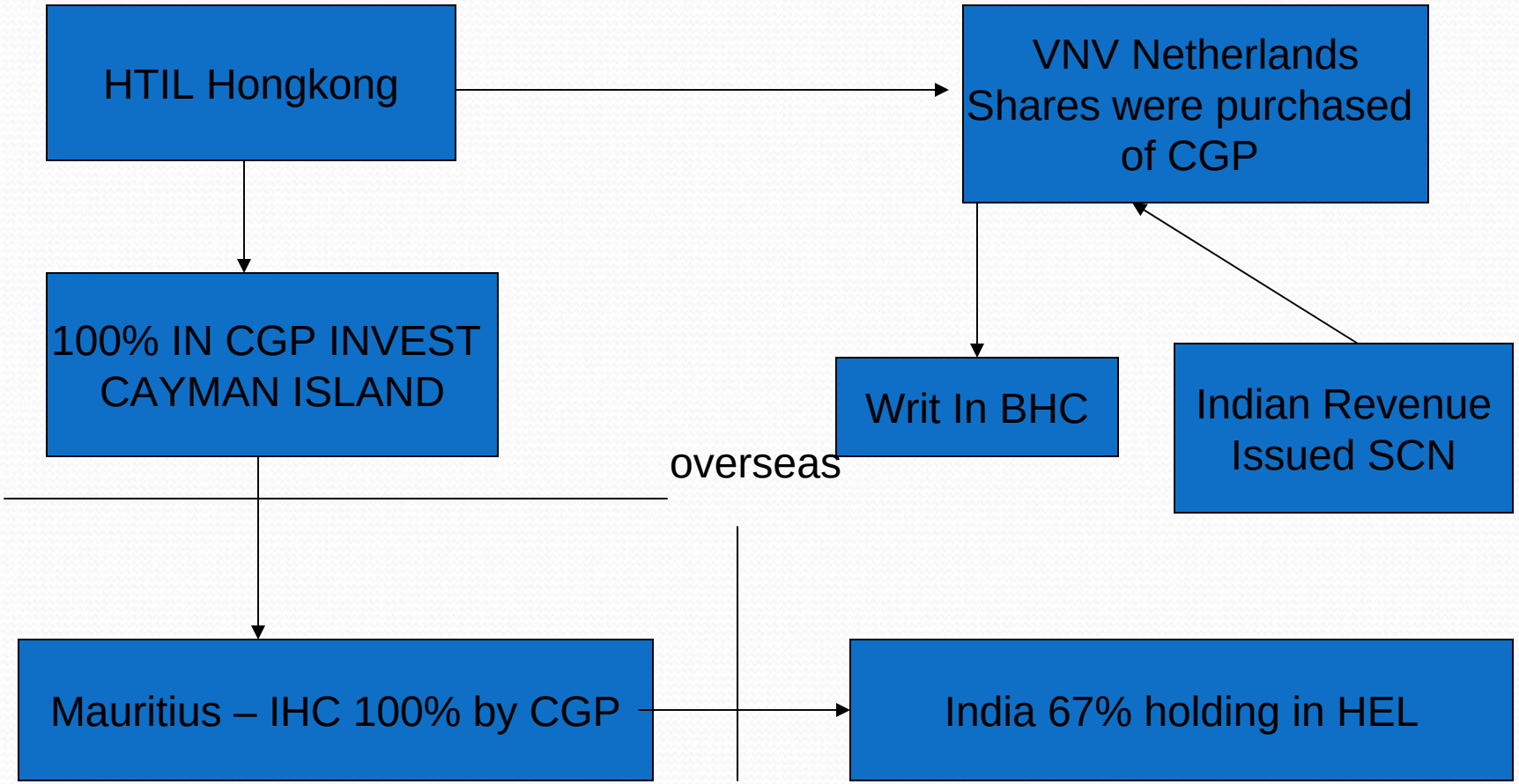
- …. **<u>On Tax Avoidance and Motive etc</u>**: ..The aforesaid discussion would show that once the transactionis genuine merely because it has been entered into with a motive to avoid tax, it would not become a colourable devise and consequently earn any disqualification... It has ready support from the Division Bench judgment of this Court rendered in the case of **Satya Nand Munjal (supra)** and the Division Bench judgment of Orissa High Court in the case of **Industrial Development Corporation of Orissa Ltd. (supra)** and various other judgments of Delhi and Madras High Courts (supra). (**Commissioner of Income Tax v. Hindustan Tin Works Ltd., (2009) 226 CTR (Del) 42** and **Commissioner of Income Tax v. Vikram Aditya and Associates P. Ltd., [2006] 287 ITR 268** and also a Division Bench judgment of Madras High Court in the case of **Commissioner of Income Tax v. Lakshmi Mills Co. Ltd., [2007] 290 ITR 663..)**

Tax Avoidance: Vodafone case

Ist Round : BHC ruling at 311 ITR 46 …SC ruling at 221 CTR 617

IInd Round: BHC matter coming **WRIT PETITION (L) NO.1308 OF 2010 Final hearing on 8 July 2010**

Tax Avoidance: Vodafone case



Tax Avoidance: Vodafone

- *Facts:*
- *HTIL Sold the shares of CGP Investments Cayman Islands to NV Netherlands*
- *Effectively, HTIL sold controlling stake of Indian companies through indirectly selling shares of Indian Companies*
- *The transactions was concluded outside India and payment was also made outside India*
- *NV Netherlands did not withhold any taxes from payments made to HTIL as the transaction was executed outside India in relations of shares of overseas company*

Tax Avoidance: Vodafone

- *Issue: Whether NV Netherlands defaulted in not withholding tax from payments made to HTIL*

Tax Avoidance: Vodafone BHC Initial order observations

- Subject matter of transaction between Vodafone and HTIL is transfer of interests, tangible and intangible in Indian companies of Hutch Group in favour of Vodafone and not an innocuous acquisition of shares of CGP
- Prima facie, HTIL has earned income liable for capital gains tax in India as the income was earned towards sole consideration of transfer of its business / economic interest as a Group, in favour of Vodafone
- Under the share transfer agreement, FIPB approval was mandatory and Vodafone reserved the right to cancel agreement if FIPB does not grant approval
- Under FIPB approval, Vodafone bound to comply with all Indian laws including Indian Income-tax Act
- Although shares may be an asset, they also may be merely a mode or vehicle used to transfer some other asset(s) (as in the present case)
- Vodafone becomes a successor in interest in the JV between HTIL and Essar Group and also becomes a co-licensee with the Essar Group to operate mobile telephony in India

Tax Avoidance: Vodafone BHC Initial order observations

- Purpose of transaction was:
  - To enable Vodafone to acquire controlling interest in HEL by acquiring direct and indirect equity and loan interest
  - To acquire the right to manage HEL by appointing its own directors on the board
  - To enable Vodafone to successfully pierce the Indian mobile market to enlarge global presence
- Controlling interest must necessarily be preceded by extinguishment of right, title and interest in the shares of the Indian group
- Divestment in interest of enormous value in shares by HTIL would result in enduring benefit and acquisition of a capital asset in India by Vodafone, resulting in capital gains in the hands of HTIL chargeable to tax in India
- On question of extra-territorial jurisdiction, Reference to 'Effects Doctrine" in US – any state may impose liabilities, even upon persons not within its allegience, for conduct outside its borders that has consequences within its borders which the state represents
- Having admitted that HTIL has transferred 67% interest in HEL qua shareholders, FIPB, statutory authorities in USA/ Hong Kong, neither Vodafone not HTIL can take a different stand before Indian tax authorities

Tax Avoidance: Vodafone BHC Initial order observations

- Vodafone has not submitted primary / original agreement, subsequent documents / agreements with HTIL; constitutional validity of the income tax provisions cannot be gone into
- Question on taxability can be gone into only by concerned authorities and cannot be determined on the basis of affidavits / counter affidavits in writ proceeding.
- Vodafone has not been able to demonstrate that show cause notice is totally non-est in law for absolute want of jurisdiction of the authority to even investigate into the facts, by issuing a show cause notice
- The case involves investigation into voluminous facts on the basis of which the question of chargeability to tax and the question of duty to deduct tax can be determined
- Rights of Vodafone are fully safeguarded u/s 195(2), 195(3) and 197 of ITA
- Show cause notice cannot be termed extraneous/ irrelevant / erroneous/not based on any material at all

Tax Avoidance: Developments to look For:

- *Impact of SC ruling in Eli Lily & Co (if any) 312 ITR 225 on Extra territorial operation*
- *Position in case of transfer of Minority stake (in trenches)? Position in case of Participatory Notes?*
- *SC awaited ruling in Wallfort (Dividend Stripping case) (underlying BHC ruling at 310 ITR 421 & ITAT Special Bench (in favor of assessee))*

Tax Avoidance: Developments to look For:

- *Section 112 & Section 114 & Section 161 of Direct Tax Code Bill 2009 (latest revised discussion paper 2010)*

- *Protocol in India- UAE DTAA and India Singapore DTAA on Tax Avoidance etc*

Bang ITAT – Sun Microsystems

- *India Singapore DTAA – Article 7 & Article 12 – FTS –*
- *Logistic Services do no make available any technology*
- *There is no evidence on record to show that service provider company made available any technology*
- *Revenue has not examined any employee of service recipient Indian Co to show that it could have utilized the experience gained by itself…*
- *Rulings referred: BHC in Diamond Services 216 CTR 120; AAR in Intertek 307 ITR 418, Raymond 86 ITD 791*

Changes in DTC in FTS and Services taxation

- *Additional entries?*
  - *Software Taxation*
  - *Technical Design etc*

- *Transportation Services added as new entry in deemed category of present section 9(1)….*

Bang ITAT Mondial Orient

- *Indian Branch officer of assessee a hongkong based company undertaking the activities of identification of suppliers, quality control, pre-production meeting, online inspection, handling of logistic under an agreement with another hongkong based co MSL for providing assistance to its customers in connection with purchase of goods from India…..Held covered by Expl-1 clause b to section 9(1)*

- *Changes in DTC on Business Connection definition ….*

Bang ITAT Mondial Orient

- *AAR Conclusion in Aramco Overseas 230 CTR 209… adverse conclusion to ITAT ruling..*
- *Impact of Withdrawal of CBDT Circular No 786 of 2000 (refer AAR in Spahi – commission not FTS and SC in 39 ITR 775; SC 106 ITR 11 & 5 ITR 216 Cal HC..etc)*
- *Impact of CBDT Circular No 23 of 1969 withdrawal…(import of goods etc)*

AAR in LS Cables

- *The question arising from the application is related to contract with DTL which is not pending before any Income Tax Authority Tribunal or court. The question before the High Court was confined to the aspect of whether the contract with PGCL was a composite contract and that the question before AAR was wide in its scope…*
- *In other words, application would be maintainable unless the question relates the specific transaction for which application has been made before AAR….*

Delhi ITAT Lucent Service PE

Held: A perusal of article 5(2)(1) clearly shows that it is not only the employees through whom if services are provided the PE is to set to come into existence. It also includes other personnel. Obviously, the term other personnel has to be read with reference to the earlier words as provided in the said article 5(2)(1). The other personnel specified here would be persons over whom the enterprise would be having a control. In the present case undisputedly employees of the affiliates of the assessee had been employed through LTIL the services of installation, commissioning, testing and bringing up to operation of the hardware and the software sold by the assessee to Escotel through its contract in regard to GSM project to be completed on a turnkey basis. ……Delhi ITAT Lucent Technologies International Inc Vs. Deputy Commissioner of Income Tax, New Delhi

Delhi ITAT Lucent case

Held:……*These employees of the affiliates over whom the assessee as a control would fall within the term "other personnel" and consequently, it would have to be held that a PE did exist as per the inclusive term as provided in article 5(2)(1) of the DTAA between USA and India. A copy of the returns of the expatriates which have been placed in the paper book also clearly show that they have been in India for more than 90 days within the 12 month period from April, 1996 to March, 1997. Consequently, the terms of article 5(2)(1)(i) of the DTAA between USA and India are fulfilled. Consequently, it would have to be held that LTIL in fact was a service PE of the assessee . ……***Delhi ITAT Lucent Technologies International Inc Vs. Deputy Commissioner of Income Tax, New Delhi DHC on assessee's appeal has admitted question of law in ITA 760/2009**

BHC in Krupp GmbH

- The learned Counsel appearing on behalf of the Revenue has stated that the first and second question relate to the same issue namely whether reimbursement of expenses would be liable to be included in the income and hence they are taken up together Held
- In so far as the issue of reimbursement is concerned, the Tribunal held that though there was a conflict between the judgment of the Kerala High Court, which was relied upon by the Commissioner of Income Tax (Appeals) and the judgment of the Calcutta High Court in the case of CIT V/s. Dunlop Rubber Company Limited….

BHC in Krupp GmbH

- It would follow a view which was favourable to the assessee, consistent with the judgment in Vegetable Products Limited The question as to whether a reimbursement for expenses would form part of the taxable income is not resintegra in so far as this Court is concerned. In Commissioner of Income Tax V/s. Siemens Aktiongesellschaft5, a Division Bench of this Court held that it was in agreement with the view taken by the Calcutta High Court in Dunlop Rubber Company Limited (supra) and by the Delhi High Court in Commissioner of Income Tax V/s. Industrial Engineering Products (Private) Limited.

BHC in Krupp GmbH

- Further refer:

  a) Delhi Bench ITAT in Grand Prix (in context of section 194C reimbursements to CHA etc) 34 DTR 248 & Expeditors International 118 TTJ 652

  b) BHC in Information Architechts

  c) DHC in Fortis & Lear Automotives

  d) Gujarat High Court in SCARLET DESIGNS PVT LTD

  e) Bang Bench in International Airport Ltd 116 ITD 446

Bang ITAT in CGI Info..

6.2 Based on the above observations, Hon'ble ITAT, Bangalore Bench, concluded that the agreement clearly provides that payments are to be made to reimburse the cost incurred by CGI Group of Canada for development of its software, which may be utilized by the members of the Group worldwide and that such services are known as intranet services. CGI Group is the absolute owner of the facility and also holds the Intellectual Property Rights and no license is transferred to the assessee in India. Reliance was placed on the decision of the Hon'ble Tribunal, Delhi Bench in the case of ACIT vs Modicon Network (P) Ltd. (14 SOT 204)…

Bang ITAT in CGI Info….

….wherein it was held that reimbursement of expenses had no element of income and therefore cannot be considered as fees for technical services. Hence, there was no liability to deduct tax u/s 195(1) of the Act …. In the present case, on a perusal of the agreement of cost sharing, we have already noticed that the payments were made by the assessee for reimbursement of the expenses incurred by CGI Canada. It has been clearly mentioned in the agreement that the cost incurred does not include any mark up for income and that is limited to the actual cost. No material was brought on record by revenue that the cost reimbursed by the assessee includes element of income. Therefore, the decision of the Delhi Tribunal in the case of Modicon Network (supra) squarely applies in the present case ".

Mumbai ITAT Tekmark Global Solutions LLC

- *Indo-US Treaty : Persons deputed by an American Company to an Indian company cannot be considered as its PE in India when services rendered by them are independent and not under control of that American company*
- *No income would arise to the American company in India in the course of deputing personnel to an Indian company who work under the control and supervision of the Indian company and carry out the work allotted to them by the Indian Company and the American company is reimbursed by the Indian company*

Nathpa Jhakri Joint Venture vs ACIT Mumbai ITAT 37 SOT 160

5. Now we turn to consider as to whether the reimbursement of expenses by the Indian assessee to the non-resident is taxable in the hands of the payee or not. An amount is chargeable to tax if it is pure income or contains some component of income in it. It is axiomatic that tax is charged on income and not on receipts. When a particular amount of expenditure is incurred and that sum is reimbursed as such, that cannot be considered as having any part of it in the nature of income. Recently the Special Bench of the Tribunal in Mahindra and Mahindra Ltd. v. Dy. CIT[2009] 30 SOT 374 (Mum.) considered similar issue

Nathpa Jhakri Joint Venture vs ACIT Mumbai ITAT 37 SOT 160

……and came to the conclusion that the payment towards reimbursement of expenses is not in the nature of income and resultantly there was no obligation to deduct tax at source under section 195. As admittedly the amount in dispute is reimbursement of expenses, the ratio of the Special Bench order in Mahindra and Mahindra. Ltd. scase (supra) will apply and resultantly the amount will not be taxable in the hands of the non-resident. In that view of the matter, since there is no element of income in the reimbursement of expenses in the hands of payee, it will not attract taxation.

BHC in Information Architects

- In Information Architects: Alleged Non TDS on reimbursements and Disallowance u/s 40(a)(iii)

  "17. In so far as the second issue is concerned, it relates to the amounts paid by the assessee to its employees towards overseas maintenance allowance. These amounts were paid towards expenses at the rate of IEP 50 per day per employee. The Tribunal has correctly held that these amounts constitute only reimbursement for the expenses incurred by the employees at a particular amount per day and would not form part of the salary in the hands of the recipients. Hence the question of applying sub clause (iii) of subsection (a) of Section 40 would not arise. The view of the Tribunal is correct and would not raise any substantial question of law."

Mumbai ITAT Royalty Perroy

- **Indo-Swiss Tax Treaty – Consideration for information concerning industrial, commercial and scientific experience is to be regarded as royalty, only if it is received from imparting know-how**
- Providing strategic consulting services, which may entail the use of technical skills and commercial experience by a strategic consultant, does not amount to know-how being imparted to the buyer of the strategic consulting services.

Contd Mum ITAT Royalty….

25. It is clear from the above commentaries that consideration for information concerning industrial, commercial and scientific experience is to be regarded as royalty, only if it is received from imparting knowhow. However, providing strategic consulting services, which may entail the use of technical skills and commercial experience by a strategic consultant, does not amount to know-how being imparted to the buyer of the strategic consulting services.

26. We have already seen the nature of services rendered by the Assessee. The Assessee was only rendering consultancy services. The Assessee did not impart any know-how to STPL. The assessee retained the experience required to perform the services. Therefore the receipts in question cannot be said to be in the in the nature of royalty.

DHC Sahara Royalty

- Facts: The respondent/ assessee had entered into an agreement, as aforesaid, on 10.07.1996 with IMG. As per clause 2(a) of the said agreement, IMG was to provide to the assessee “the benefits” for the tournaments, subject to ICC regulations, in connection with the protected categories. The expression “benefits” has been defined in Clause 1(i) of the said agreement to mean the title sponsorship benefits in connection with the tournament set out in the Schedule. The word “tournament”, in turn, was defined in Clause 1(vi) to mean, inter alia, the Friendship Cup, to be known as “the Sahara Cup”, which would consist of a series of five one day international cricket matches to be played in Canada between the full Indian and Pakistan national cricket teams, as selected by the cricket authorities of their respective countries. The matches were to be recognized by the ICC as having full one day international cricket status …

DHC Royalty Sahara…

- Appellant/ Revenue's Contention: The revenue insists that the payment made by the respondent/ assessee to IMG Canada for the said rights of title sponsorship amounted to a royalty payment under Article 13 (3) of the said DTAA … Held:

- "We have also examined the terms of the agreement between the respondent/ assessee and IMG Canada. It is clear that what has been paid for by the respondent / assessee is the right of title sponsorship and the benefits connected therewith, which have been set out in the Schedule to the said agreement and to which we have already referred to above ….

  What the Commissioner of Income Tax (Appeals) failed to note was that there was no transfer of a copyright or the right to use the copyright flowing from IMG Canada to the respondent / assessee and, therefore, any payment made by the respondent/ assessee to IMG Canada would not fall within Article 13(3)(c) of the said DTAA. The reference in Article 13(3)(c) is to "any copyright" and it is not a reference to "any right". 9. In these circumstances, we feel that the findings of fact and law and the conclusions arrived at by the Tribunal are correct"

Delhi ITAT Maruti Udyog India France DTAA FTS

11.4 From plain reading of above letter one may find that the impact test to be conducted by UTAC were purely technical in nature. After carrying out the impact tests in above manner testing reports were submitted to assessee which were utilised for the purposes of modification of the products. This in our considered opinion will amount to rendering of technical services/ information in form of impact testing reports by UTAC France to the assessee. Accordingly, the amounts paid by the assessee to UTAC would be in nature of technical or consultancy services. (wide FTS Clause- MFN there)

refer latest Mumbai ITAT ruling in Bureau Veritas 131 TTJ 29 on India France DTAA- MFN applied

Mum ITAT Ashapura Bauxite Testing India China DTAA

- The assessee, an Indian company, entered into an agreement with a Chinese company for bauxite testing services in its laboratories (outside India) and for preparation of test reports. The assessee filed an application u/s 195(1) in which it argued that as the services were rendered outside India and the recipient did not have a permanent establishment in India, the payments were not chargeable to tax under the India-China DTAA and no tax was required to be withheld at source. The AO took the view that the payments constituted “fees for technical services” u/s 9(1)(vii) and Article 12 of the DTAA and tax was required to be withheld at 10%. This was upheld by the CIT (A). The assessee appealed to the Tribunal. HELD appeal DISMISSED

AAR Real Resourcing case

Held "Catering to the function of referring the potential Indian candidates to the Indian based recruitment company without creating any commitment to recruit them does not, without anything more, give rise to an inference of PE. *For rendering such services, a fixed place of business in India or dependent agent need not necessarily be there. The applicant has clarified that it has really no office or business place in New Delhi and that the address in New Delhi is basically a 'virtual office'. Evidently, it means that the address and phone number is given so as to serve as a contact point and for some routine work of inconsequential nature*. **However, as and when the applicant starts extending its referral services to India, the factual position will be notified to the Commissioner herein so that inquiries could be made as to the role if any played by the so-called office in India. At the same time, the Department is bound by the legal position clarified herein and in Cushman and Wakefield. Subject to this observation, we are of the view that the receipts in the nature of referral fee from the Indian based recruitment company cannot be subjected to tax as business profits in view of the provisions of the Treaty." INDIA UK DTAA**

AAR FICCI – INDIA US DTAA

- Held " 10. As regards the entrepreneurial workshop which is an additional feature in the present case and in respect of which certain doubts have been entertained by us initially, we are unable to reach a different conclusion after going through the relevant material placed before us. Having regard to the short duration of the course, the contents and pattern of the modules presented, it is difficult to infer that any technical knowledge, experience, or skills were shared with and made available to the participant – innovators, much less it can be said that there was a transfer of technical know-how/knowledge. The contents of the modules and topics presented in the course of the workshop were sourced by and large from University's course of study for post-graduation in technology. There is nothing like sharing the trade secrets or imparting skills in a practical manner. No doubt, the workshop an enlightening exercise, opening up new vistas of thinking. The participants will benefit by the lectures and deliverables and they may be better motivated or equipped to deal with the problems in the field of commercialization/marketing of the technology. But, on that account, it cannot be said that the definition of FTS as explained earlier has been satisfied in the instant case. Orientation towards business and inculcation of entrepreneurial outlook does not really amount to "making available" the technical knowledge, experience or skills of the experts of IC

Delhi ITAT SNC Lalvalin

- India Canada DTAA

- The second limb in clause (b) of sub article (4) of Article 12 of DTAA can be invoked when the amount is paid in consideration for rendering of any technical or consultancy services and if such services consists of the development and transfer of a technical plan or a technical design also. the condition of making available technical knowledge is not sin qua non for considering the question as to whether the amount is fees for included services or not particularly when the payment is only where the technical or consultancy services consists of development and transfer of a technical plan or technical design only. This will be considered as "fees for included services" within the meaning of Article 12 (4) of the Act and hence, in terms of Article 12(2), tax rate should be charged.

AAR in HMS Real Estate

- HMS real Estate case: India US Treaty
- It is significant to note that the latter part of clause (b) of para 4 speaks of "development and transfer of a technical plan or technical design. This limb of clause (b) is squarely attracted to the present case because technical services rendered by HOK resulted in the development and transfer of technical plan and design to the applicant. If an out-right transfer of a design or plan for consideration has to be treated as an independent transaction unrelated to the services, the scope of latter part of clause (b) will be considerably diluted and the very purpose for which the said words were included in the definition of FTS will be defeated. In one sense, there could a transfer of designs and in another sense the development and transfer of technical plan/design can be viewed as a sequel to and integral part of the services undertaken by HOK. In the present case, clause (b) of para 4 is attracted having regard to the true nature and purport of the Agreement. …

HMS Real Estate AAR

…..The architectural services rendered by HOK can also be brought within the fold of the first part of clause (b) starting with the expression “make available”. *8. We are, therefore, of the view that basic(design) services which include preparation of Master Plan, concept design, schematic design, design development and construction documents, assistance in bidding and contractors’ selection process and consultancy during construction phase are all part of architectural services undertaken by HOK as per the Agreement and the payment received by HOK for furnishing all these documents and services to the applicant fall appropriately within the meaning of ‘fees for included services’ under Article 12.4(b) of the India-US Treaty…On* the facts presented by the applicant, we must hold that the receipts by HOK on account of consultancy fee payable to consultants in USA on actual basis will not give rise to taxable income in India.

AAR in Airport Authority case

- Though in the 3rd ruling (304 ITR), certain reasons are given, it appears that the line of reasoning adopted by AAR in that case is apparently at variance with the latest ruling in Dassault Systems. In Dassault Systems (AAR No 821/2009)2 case, we have exhaustively considered various aspects of copyright in the context of royalty definition in the I.T.Act and Treaty. ***However, it must be pointed out that in Dassault Systems, the nature of software was different. It was standardized software of special purpose which had the intrinsic potential to generate the output without any further steps being taken before it is put to use, whereas in the present case, the software of the automation system does not by itself give rise to an output which can directly be put to use. The applicant has stated that the software is customized in the sense that it requires site specific modifications/adaptations, which are done at the spot. However, this point of distinction alone would not help us to distinguish the ruling in AAI's case and in Dassault Systems. Suffice it to state that some of the points and legal aspects highlighted in Dassault Systems have missed the attention of this Authority and to the extent it goes against the principles laid down in the latest ruling in Dassault case, it is not safe to decide the matter on a mere reiteration of the view taken in the 3rd Airport Authority case….***

AAR Software: Airport Athority case..

- The crucial question is: What is the real nature and substance of the contract with which we are concerned? Can it be considered to be primarily a contract for the supply of customized software or is it a contract that falls within the scope and sweep of royalty and included services dealt with under Art.12 of the India-US Treaty ? Section 9(1)(vi) & (vii) of the Income Tax Act corresponds to Art.12 of the Treaty

AAR Software : Airport Authority case

We are of the view that the receipts under the contract attributable to software and installation and other services are definitely covered by cl.(b) of para 4. we are of the view that the said payments fall within the purview of Art.12 and therefore we reaffirm the conclusion reached by this Authority, though for different reasons. First, it must be noted that the contract is for automation upgrade of the existing automation system of the 3rd runway, Delhi. “Automation system” means the software system delivered to the AAI under the contract. Raytheon grants the AAI a “licence on non-transferable, non-exclusive, royalty-free basis to use the executable software code and technical documentation for use in the automation system at Delhi”…… The software of the automation system is the mechanism through which the informations and inputs concerning various technical aspects based on the expertise and experience of Raytheon are made available to the AAI personnel which in turn equips them with the necessary technical skills and operational efficiency. By means of various technical services provided by Raytheon’s personnel and the sharing of their technical knowledge and experiences with AAI personnel at the time of integration with the existing system and the site acceptance test and the technical manuals and data furnished for putting the system to effective use, Raytheon is making available to AAI its technical knowledge and skills. In ultimate analysis, the recipient of service is enabled to apply the technology. …

AIRPORT AUTHORITY AAR

….*Viewed from another angle, the transfer of a technical plan is also involved in devising and activating the upgraded automation system*….The fact that the applicant – AAI itself has not been provided with the technology for developing the software as such does not really make a difference. The expression used is: “make available technical knowledge, experience or skills”. The substance of the transaction, in our view, is rendering of technical and consultancy services which make available to AAI the technical knowledge, experience and skills possessed by Raytheon in the field and the provision of software system is only part of that exercise. The delivery of software and the specification of the cost of software cannot be viewed in isolation. Viewed in this background, we are of the view that the payment made towards software can be legitimately brought within the fold of Art.12(4)(b) of the Tax Treaty, if not Art.12(3).

AAR Seagate: India Singapore DTAA

- Applicant/ Petitioner/ It is engaged in the business of manufacture and sale of Hard Disk Drives. It has been supplying Disks to Original Equipment Manufacturers (OEMs) in India. The applicant states that in order to minimize the delays in the procurement of inputs (sic from the applicant), the OEM has proposed to put in place a Vendor Managed Inventory (VMI) model. Under the VMI model, the applicant would enter into agreements with 'Independent Service Providers' (ISPs) in India who would stock disks in India on behalf of the applicant and deliver the same to the OEM on a 'Just-in Time' basis ...

AAR Seagate: India Singapore DTAA

- It is the contention of the applicant that it does not have a fixed place PE or agency PE within the meaning of Art.5 of DTAA and therefore the business profits derived by it on account of supplies of goods to the customers in India through the media of ISPs or YCH are not liable to be taxed in India. The Department in its comments takes the stand that the applicant has a PE in India and that the warehouse of the ISPs or YCH shall be treated as PE. In the alternative it is submitted that an agency PE exists. These contentions were reiterated by the departmental representative in the course of hearing.

AAR Seagate: India Singapore DTAA

- 6.1. The applicant contends that it has no premises or facilities or installations owned, leased or kept at its disposal in India nor does it have any other kind of physical presence in India. It only has its goods stored in India in a warehouse owned and operated by Independent Service Providers and the applicant has only a restricted right of entry into the warehouse for the purpose of inspecting the goods during business hours. We find it difficult to accept this contention. It seems to us that the applicant does have a fixed place of business which is the focal point of its business operations in India. The fact that the fixed place of business is owned or possessed by the logistics service provider does not detract from the position that the applicant has a distinct, earmarked and identified place which caters to its business. In one sense, it is the business place of warehouse/service provider and in another sense, it is also the fixed place of business of the applicant from where the sales activities are carried on. Both the applicant and the warehouse/service provider act in cohesion to ensure the product delivery to the customers promptly. ……

AAR Seagate: India Singapore DTAA

- ….By merely outsourcing the operations leading to supplies of products, it cannot be said that the applicant does not carry on any business in India from a fixed place. The ground realities cannot be disregarded. The question whether the person carrying on business operations on behalf of or pursuant to the instructions of the applicant is a dependent or independent agent is not very material in considering the applicability of Art.5.1. The business of the applicant at a fixed place is being carried on through the media of the warehouse provider who can also be characterized as service provider. Having regard to these facts and features, we have to accept the contention of the Revenue that the demarcated space in the warehouse of ISP constitutes the fixed place of business within the meaning of Art.5.1 of DTAA.

Delhi ITAT Parasrampuria Synthetics (20 SOT)

- Assessment year 1999-2000 - Whether rendering services by using technical knowledge or skill is different than charging fees for technical services inasmuch as in latter case technical services are made available due to which assessee acquires certain right which can be further used - Held, yes - Assessee made certain payment to a contractor in respect of inspection and maintenance support agreement, fabrication of chilled water line, work order for thermal insulation/erection, conversion of Partially Oriented Yarn (POY) into polyester textured yarn and twisted yarn - Whether such payment could not be treated as 'fees for technical services' as technology or technical knowledge of persons were not made available to assessee, but only by using such technical knowledge, services were rendered to assessee - Held, yes - Whether therefore assessee would not be liable to deduct tax at source as per provisions of section 194J, on such payments - Held, yes - Dy. CIT v.Parasrampuria Synthetics Ltd. (Delhi)

- Applied in Jaipur Vidyut case Held Operation and Maintenance Services held do not amount to FTS u/s 9(1)(vii) as they do no make available scientific knowledge, skill etc and hence no TDS required to be deducted thereon u/s 194J (ALSO REFER DELHI ITAT IN LUFTHANSA CASE: REPAIRS AND MAINTANENCE)

Mumbai ITAT Star Cruise

- Income of a non-resident shipping company can not be charged to tax in India unless either passengers, who have booked cruise package, are traveling from or to any port in India

- Merely because assessee is doing booking of different cruise tour packages for a foreign company, that cannot per se be decisive for holding that said foreign company is having “business connection” in India within the meaning of section9(1)(i)
- ITA No. 6499/Mum/2006 (Also see DHC in UAE Exchange centre)

AAR IN Royal Bank of Canada

- There is yet another angle from which the issue can be viewed. Irrespective of the provisions of the domestic law i.e. IT Act, the applicant can also seek the benefit of the treaty provisions. If the income derived by the applicant can be characterized as business income rather than the capital gain, such income cannot be taxed in India in the absence of permanent establishment. If, on the other hand, the income is in the nature of capital gains, the same is liable to be taxed under the IT Act. Thus the classification of income for the purpose of treaty is necessary. Such classification has to be done in accordance with the ordinary and well settled principles. A special provision in the Income-tax Act cannot be pressed into service to deny the benefit which is otherwise due to FII under the tax treaty provisions notwithstanding their conflict with the domestic law of income tax. Viewed from this perspective, we come back to the issue of characterization of income irrespective of section 115AD. The Revenue's argument is liable to be rejected for this additional reason also.

AAR Royal Bank of Canada

14.

We are therefore of the view that the first question has to be answered in the affirmative. The third question in so far as it is related to question no. (1) is also answered in the affirmative. That means, the business income of the applicant arising from the ‘derivative transactions’ is not liable to be taxed in India by virtue of article 7(1) of the DTAA between India and Canada.

Kar High Court Illions case

- Kar High Court Section 195: Non resident Payee: Imparting Education by USA based institution through the assessee in India did not amount to BUSINESS/COMMERCE and the USA co having no PE in India, assessee is not liable to TDS u/s 195 while remitting Payment to USA

- Indian presence (respondent –ILLions) acted as facilitation and coordination centre in India – held no BC/PE

[2010] 3 taxmann.com 10 (AAR - New Delhi) “Technopromexport”,

- On the facts and circumstances of the case, whether the amounts received/receivable by Joint Stock Company Foreign Economic Association “Technopromexport” (‘Applicant’ or ‘JSC Technopromexport’) from National Thermal Power Corporation Limited (‘NTPC’) under Contract No. CS-9558-102-2-FC-COA-4520 dated 25 March 2005 (‘Offshore supply contract no. 4520’), for Offshore supply of all plant and equipment including mandatory spares are liable to tax in India under the provisions of the Income-tax Act, 1961 (Act) and the 2.Agreement for Avoidance of Double Taxation between India and Russia (‘India-Russia tax treaty’)?

“Technopromexport” HELD

11. In view of our above analysis, perusal of documents and case laws, we find that no portion of consideration is received by the applicant in India. Further, no income accrues or arises in India to the applicant as all the transactions took place outside India. The materials were shipped outside India , the title and property passed outside India (on high seas) and the payment was received outside India and therefore the applicant is not liable to pay income-tax in India (Madras High Court in Ansaldo distinguished; AAR in Huosung applied and SC in IHI 288 ITR)

“Technopromexport” HELD

- Thus, the decision in the case of Ishikawajma was distinguished by the learned judges of Madras High Court. It is of course debatable whether the points of distinctions made out are correct. But, the fact situation in the present case is quite different. Firstly, at the initial stage itself, the bids were invited by NTPC for three separate works viz. offshore supply, onshore supply and onshore services. Three separate contracts were executed. There is no basis to think nor is there any allegation that the contracts were split up at the instance of the applicant or that there was price imbalance. In any case, we find no distinguishing feature that makes the Ishikawajma case inapplicable to the facts of the present case, as discussed earlier and this Authority is bound by that decision (supplement by Justice Reddi)

“Technopromexport” HELD

- As observed earlier, even if the PE was involved in carrying on some incidental activities such as clearance from the port and transportation, it cannot be said that the PE in connection with the offshore supplies could be inferred. With this supplement, I concur with the conclusion of the learned Member that the question has to be answered in the negative (supplement by Justice Reddi)

Mumbai ITAT Siemens

- For off-shore supply contract (AY 1998-1999), ITAT concluded that withdrawal of CBDT Circular no 23 of 1969 by circular no 7 of 2009 is prospective and is applicable post october 22,2009 Ker HC in 119 ITR 334 applied

- Applying said circular concluded that off-shore supply not taxable

AAR in Hyundai and Mistubishi AOP Concept: Consortium

- **2010-TIOL-22-ARA-IT**
- **Merely coming together and acting in cooperation with each other for the purpose of executing the work while each member carries on its own scope of work independently does not reasonably lead to the conclusion that an AOP has been formed.**
- **The scope of work of each member of MRMB consortium is specifically defined and it is mutually exclusive to each other. There can be no interchangeability or overlapping of the work to any substantial extent.**

AAR in Hyundai and Mistubishi AOP Concept: Consortium

- The scope of work of each member of MRMB consortium is specifically defined and it is mutually exclusive to each other. There can be no interchangeability or overlapping of the work to any substantial extent.
- Specific mention in consortium agreement - Intention was not to constitute JV or partnership and each party does not act as agent of other
- Original bid amount was reduced in which each member worked out is own independent percentage of discount
- Cases referred to Interalia
    1. Van Oord Acz BV (248 ITR 399 AAR)
    2. Geoconsult ZT GmbH Vs DIT (2008 304 ITR 283 AAR)

Mumbai ITAT in Valentine 3 taxmann.com 92

- Indo-Mauritius Tax Treaty - Various business activities performed by one and same foreign enterprise, none of which constitutes a PE, cannot lead to a PE, if combined

- * For the purpose of computing the threshold time limit under the provisions of article 5(2)(i) of the Indo-Mauritius Tax Treaty, what is to be taken into account is activities of a foreign enterprise on a particular site or a particular project, or supervisory activity connected therewith, and not on all the activities in a tax jurisdiction as a whole.

- * When aggregation is not specifically provided for in the relevant PE definition clause, as in the case of Indo-Mauritius Tax Treaty, normally it cannot be open to the Tribunal to infer the application of aggregation principle.

J. Ray McDermott 5 TAXMANN.COM-22

- It is for the revenue authorities to establish beyond a reasonable degree of doubt that there is an abuse of treaty provisions by so artificially contriving the affairs as to wrongfully entitle the assessee to treaty benefits.

- Unless that exercise is conducted, it cannot be open to disregard the claim of the assessee by simply making vague and generalized claims about artificial splitting of contracts and about the sham arrangements to defeat the treaty provisions

Delhi ITAT Pioneer India USA DTAA 1 taxmann.com 48

It, thus, makes it clear that activity carried out in India contributes directly or indirectly to the earning of profits or gains by the Head Office from developing and producing hybrid seeds and, therefore, the income to the extent of the contribution made by the branch office in India to the Head Office is to be taxed in India. Since the preparation or production of hybrid seeds and its sale by the Head Office or other branch offices all over the world is taken place outside India, only the profit which is attributable to the activities earned out in India i.e. use of the result of the research provided by the branch office in India to H.O., will only be taxable in India.

Delhi ITAT Pioneer India USA DTAA 1 taxmann.com 48

……However, in the light of the view we have taken above holding that research activities carried out by the branch office in India are not an independent and distinct activity to the activity of producing and sale of parent seeds sold to joint venture company, and the said research activities are core business activities, the decision of Hon'ble Supreme Court in the case of Morgan Stanley and Co. 292 ITR 416 (SC) is not applicable to the facts of the present assessee's case in as much as the research activities of developing and producing hybrid breeder seeds, which are used as input or seed for producing parent seeds, cannot be held to held to be the functions of back office supporting the business

Thank You

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