INTERNATIONAL TAXATION

CA. Hinesh Doshi, CA. Pramita Rathi

DCIT vs. M/s. Olivia Impex Pvt Ltd [[TS-250-ITAT-2022(Mum)] dated 7th March, 2022

Facts:

- The assessee was engaged in the business of trading in soaps and soap based material.
- The assessee paid export commission to foreign agents without deduction of tax at source.
- AO was not satisfied with the explanation given by the assessee for non-deduction of tax and made additions wrt commission paid to foreign agents.
- CIT (A) deleted the addition of commission paid to foreign agents.
- Aggrieved by the order of the CIT(A), the revenue filed an appeal before Mumbai ITAT.

Issue:

- Whether the commission paid to foreign agents is liable for TDS u/s. 195 of the IT Act?

Held:

- ITAT rejected the contention of the assessee that tax was not liable to be deducted on commission paid to foreign agents.
- ITAT observed that the CIT(A) dealt elaborately with the issue after considering the submissions made by the assessee.
- ITAT observed that Revenue could not controvert the observations of the CIT(A) with any new cogent material or information.
- Accordingly, ITAT upholds the order of CIT(A) who deleted the disallowance wrt commission paid to foreign agents.
- Thus, ITAT ruled in favour of the assessee.

OVID Technologies Inc. vs. Dy. CIT (Intl. Taxation), New Delhi [TS-186-ITAT-2022(DEL)] dated 8th March, 2022

Facts:

- The Assessee company, a tax resident of USA, allowed access to centralised data/information to its customers for a consideration.
- The data is available on public domain, after making certain value addition such as analysis, indexing, description and appending notes for facilitating easy access.
- AO and CIT (A) considered that the assessee had granted license to access online database which falls within the definition of 'Royalty'.
- Aggrieved, the assessee filed an appeal before ITAT.

Issue:

- Whether the revenue from providing limited access to online database of text journals and books is taxable as 'Royalty' under Article 12 of India – US DTAA?

Held:

- ITAT stated that there is no transfer of legal title in the copyrighted article as the same rests with the assessee.

- ITAT explained that the user has no authority to reproduce the data in any material form to make any translation in the data or to make adaptation in the data.
- ITAT opined that the revenue derived by the assessee from granting limited access to its database was akin to sale of book, whereby the user only enjoys the content/ product in the normal course of business and does not receive the right to exploit the copyright in the database.
- ITAT held that consideration for accessing database of the Assessee cannot be considered as royalty under Article 12 of the India-US DTAA.
- Relying on SC ruling in Engineering Analysis, ITAT directed the revenue to delete the addition.
- Accordingly, ITAT ruled in favour of the assessee.

Hertz Software India Pvt Ltd vs. ACIT, Bangalore [TS-214-ITAT-2022(Bang)] dated 7th March, 2022

Facts:

- The assessee, a private limited company, was engaged in the business of software publishing consultancy and supply operating system software, business and other application software, computer games etc.
- The assessee claimed Foreign Tax Credit (FTC) on account of tax withheld by Japan as per India-Japan DTAA.
- AO disallowed the claim as the assessee failed to file form no. 67 on or before the due date of furnishing return of income u/s. 139(1)
- CIT(A) confirmed the disallowance made by the AO.
- Aggrieved, the assessee filed an appeal with ITAT.

Issue:

- Whether the filing of form no. 67 is mandatory to be filed within the prescribed due date for allowability of FTC as per India – Japan DTAA?

Held:

- The assessee submitted, before ITAT, that in absence of any condition in DTAA for disallowance of FTC over procedural non-compliance the claim for FTC could not be disallowed.
- ITAT held that one of the requirements of Rule 128 for claiming FTC was that Form No. 67 is to be submitted by the assessee before filing of the return.
- ITAT held that filing of form no. 67 before due date of return was not mandatory.
- ITAT thus held that FTC cannot be denied to the assessee.
- Accordingly, ITAT ruled in favour of the assessee.

Gulbrandsen Chemicals Pvt. Ltd. Vs. D.C.I.T

Facts:

- The assessee was manufacturing and selling different types of chemicals which were aggregated for purpose of determining the ALP. Assessee to benchmark the transactions with the associate enterprise has adopted internal TNMM.
- However the TPO was not satisfied with the method and TPO adopted cup method for determining ALP for each product separately and calculated upward adjustment, which were added to Income of assessee.
- Aggrieved assessee preferred appeal to learned CIT(A) who deleted the upaward adjustment made by TPO/AO by observing that the ITAT in own case has directed to adopt the TNMM method.

- Revenue being aggrieved filed an appeal to ITAT.

Issue:

- Whether in facts and circumstances of the case and law, the CIT(A) was justified in allowing the TNMM over CUP as the Most appropriate method as per the provisions of section 92C and Rule 10C.

Held:

- ITAT held that most appropriate method selection is completely based on particular fact situation and cannot be any single jacket formulas holding application of particular method.
- TPO has justified application of internal CUP on the basis, using one intra AE price to bench the other intra AE price, which is incorrect as an uncontrolled price is to be compared with the controlled price.
- Accurate adjustments could not be made to nullify the impact of fundamental difference in economic circumstance and contractual terms between intra -AE transactions and non- AE transactions for CUP method to be applied.
- The external CUP has not been even referred by the TPO.
- There is no specific defects found in the TNMM method applied by the assessee, Hence the ITAT upheld the plea of assessee and upheld the decision of CIT(A).

M/S ESPN Digital Media (India) Pvt. Ltd v/s The DCIT, International taxation 1(1), Chennai

FACTS:

- ESPN India entered in Re-seller agreement with ESPN UK for resale of advertisement space on websites owned by it, wherein ESPN India purchases the advertisement space from ESPN UK and subsequently sells to third parties.
- During the assessment AO noted that payment made by ESPN India to ESPN UK is "Royalty" and hence liable for deduction of tax. The word "use" was emphasized by the AO that it must be understood in broad sense combined with "Right to use" and "equipment".
- Relying on Hon'ble Madras High Court's decision of Verizon communications AO noted that in modern era geographical location is immaterial, further AO held that as prescribed in article 13 of India UK treaty the payment was made for "use of equipment and use of process" it amounts to royalty and AO held the assessee as assessee in default for not deducting TDS under section 195
- Aggrieved assessee filed appeal to CIT(A), wherein CIT(A) upheld the decision of AO and dismissed the appeal and assessee filed appeal to ITAT.

ISSUE:

- Whether agreement for providing space for advertisement will be considered as royalty as per section 9 of Income tax act read with India UK treaty.

HELD

- The assessee argued that there is no right, property, information, secret formula or imparting of any information concerning technical, industrial, commercial or scientific knowledge that is transferred from UK to ESPN India, also assessee argued that mere usage of facility cannot be any technical service.
- Reliance was made on case of M/s Facebook and Rocket science and Amazon web services, Also ITAT relied on case of Asia Satellite Telecommunications Co. Ltd which held that mere earmarking space doesn't gets control.
- ITAT noted that case on which AO and CIT(A) relied have different facts, in which the assessee was engaged in providing international connectivity services (bandwidth services) wherein right to use of equipment was transferred, whereas in case of assessee no right to use of any equipment is transferred .Also ITAT held that

reliance on explanation 5 & 6 to section 9(1)(vi) is misplaced, as held under supreme court decision and also as per sec 90 that tax treaty containing more favourable provisions will apply.

- Also, ITAT noted that Hon'ble supreme court held that obligation to deduct tax cannot be retrospective. Further the argument of assessee was held that as per Finance act 2016, Online advertisement is covered under the specified services and equalization levy is applicable on such case and assessee has duly paid the required EL.
- Based on all the facts and case laws, ITAT held that payment by ESPN India will not amount as "Royalty" under section 9 and accordingly assesses appeal was allowed.