Tax Hotline

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TREATY BENEFITS MAYBE AVAILABLE EVEN WITHOUT A TAX RESIDENCY CERTIFICATE: TRIBUNAL

- Tribunal rules that mere non-furnishing of TRC cannot disentitle a taxpayer from obtaining treaty benefits.
- Section 90(4) which provides for the requirement of a TRC can only be construed to benefit the taxpayer and not the other way round.

Recently, the Ahmedabad Bench of the Income Tax Appellate Tribunal ("**Tribunal**") ruled that mere non-furnishing of a Tax Residency Certificate ("**TRC**") cannot disentitle a taxpayer from claiming tax treaty benefits. It ruled that the requirement to furnish a TRC to obtain treaty benefits under the (Indian) Income Tax Act, 1961 ("**ITA**") is merely a procedural requirement. Therefore, absent a non-obstante clause, the provision for obtaining a TRC (section 90(4)) cannot be said to override section 90(2) of the ITA, which allows the taxpayer to avail treaty provisions if they are more beneficial than the ITA. While ruling so, the Tribunal significantly noted that the provision of the ITA dealing with obtaining TRC should only be construed to benefit the taxpayer and not the other way round.

BACKGROUND

Skapps Industries India Pvt. Ltd., a company incorporated under Indian laws ("**Taxpayer**") had availed the services of Teems Electric Inc. a company incorporated in the US ("**TEI**") for the installation and commissioning of certain equipments which it had purchased from another US entity ("**Services**") during financial years 2012-13 ("**FY13**") 2013-14 ("**FY 14**"). The Taxpayer having a bona-fide belief that the Services did not qualify the definition of 'fees for included services' ("**FIS**") under the India –US Double Taxation Avoidance Agreement ("**India –US DTAA**"), paid the consideration for the Services – amounting to INR 74, 70, 220 in FY13 and INR 2,97,45,710 in FY14 ("**Consideration**") without deducting any taxes in India.

ASSESSING OFFICER

The Assessing Officer ("**AO**") passed two separate orders for FY13 and FY14 each treating the Consideration paid as liable to tax withholding under section 195 of the ITA. The argument of the Taxpayer before the AO was two-fold:

1. the installation and commissioning activities were inextricably linked to the purchase of equipment and hence fell within the exclusionary clause of FIS (Article 12(5)(a) of the India – US DTAA); and
2. Since there was no transfer of technology or technology was not made available, the Services did not qualify the 'make available' test under the definition of FIS.

The AO, held that the Consideration being in the nature of 'payment of electrical labour and mechanical labour' constituted Fees for Technical Services ("**FTS**") as per section 9(1)(vii) of the ITA. It discarded the above arguments of the Taxpayer on the basis that:

1. Installation and commissioning were not inextricably linked to purchase of equipments as these were from different vendors and constituted separate commercial transactions; and
2. Since TEI was the only source of obtaining such a high level technical expertise for the said installation and commissioning, it clearly qualified the 'make available test' under Article 12 of the Indian –US DTAA.

Having concluded that the Services constituted fees for technical / included services both under the ITA and the India- US DTAA, it (AO) applied the lower withholding tax rate of 10% as provided under the ITA as opposed to a 15% under the India – US DTAA as the 10% rate was more beneficial to the Taxpayer in light of section 90(2) of the ITA.

COMMISSIONER OF INCOME TAX (APPEALS) ("CIT(A)")

The CIT (A) also passed two separate orders for each FY and confirmed the action of the AO. In addition to the claims of the AO (including the one on Services not being inextricably linked to the purchase of equipment and the Services qualifying the 'make available test'), the CIT (A) made the following claims to conclude that the Consideration paid was taxable in India: (i) as per section 90(4)[1] of the ITA, in the absence of a valid TRC, no treaty benefits can be claimed by the Taxpayer, (ii) based on a reasonable conclusion based on admitted facts, TEI formed an installation permanent establishment ("**PE**") in India as per Article 5(2)(k) of the India – US DTAA, (iii) since TEI has a PE in India, the fees earned by TEI in India will be taxable in India under section 44DA of the ITA.

Aggrieved by the order of the CIT (A), the Taxpayer approached the Tribunal. The Tribunal clubbed both the appeals and passed a consolidated order granting partial relief to the Taxpayer.

TRIBUNAL

Given that the primary argument of the Taxpayer - that no tax should be withheld from the Consideration amount - was based on availing the benefits under the India-US DTAA, the Tribunal was of the view that the question of eligibility to treaty benefits had to be analysed at the very outset. The Tribunal placed reliance on the provisions of section 90(4) and Section 90(2) of the ITA to rule on this issue. Section 90(4) provides that a Taxpayer will be allowed to claim treaty relief only if it provides a 'certificate of his being a resident' from the country it is a resident of. Section 90(2) which provides the Taxpayer the option to be taxed under the relevant tax treaty if the provisions of the treaty are more beneficial to the Taxpayer, was noted by the Tribunal to be a unique and unqualified provision. Accordingly, the Tribunal observed that absent a non-obstante clause, despite the fact that section 90(4) *prima facie* suggests that furnishing a TRC is a pre-condition to avail treaty benefits, it cannot override section 90(2). Further, the Tribunal held that Section 90(4) of the ITA should be construed as a provision beneficial to the taxpayer, in that, once the taxpayer furnishes a TRC, the AO cannot disentitle it from availing treaty benefits. However, the mere non-furnishing of it (TRC) cannot be ground enough to disentitle the taxpayer from obtaining treaty benefits. The Tribunal emphasized that such a construction of section 90(4) had been confirmed by the Punjab and Haryana High Court in *Serco BPO Pvt. Ltd. v. Authority for Advance Ruling*.[2] In the said Ruling (Serco BPO), while drawing reference to the clarification issued by the Finance Ministry regarding the TRC in 2013, it was held that a valid TRC establishes tax residence 'beyond doubt'. In that context, this ITAT judgment is instrumental in establishing that the standard of proof for establishing tax residence is not one of 'beyond doubt' and that any set of documents which reasonably prove tax residence should suffice.

Additionally, the Tribunal noted that while non-furnishing of TRC does not disentitle a taxpayer from availing treaty benefits, there has to be reasonable evidence of 'tax residency' of the payee (TEI in this case) for it to claim treaty benefits. Such evidence may be in the form of any document which establishes that the taxpayer is a tax resident of the country it claims to be. In the present case, considering the absence of a TRC, the only other evidence which the Tribunal could rely on was Form W9 submitted by the Taxpayer.

Form W9 is a self-declaration to be provided by a US citizen / person to the tax deductor to provide the tax identification number (TIN) and other inputs for the tax deductor to be able to fulfil its reporting obligations to the US Internal Revenue Services (IRS). Given that the said Form W9 was (i) merely a self-declaration and was not issued by any authority; (ii) wholly irrelevant in respect of tax withholding outside India; and (iii) even on the merits of the contents of it not sufficient to prove 'tax residency', the Tribunal ruled that it could not be considered to establish the 'tax residence' of TEI in the US.

While the matter was remanded back to the CIT(A) for fresh adjudication, the Tribunal noted that the CIT(A) should not deny the treaty benefits merely on the ground of non-furnishing of a TRC and shall make a determination based on totality of facts and evidences as may be submitted by the Taxpayer.

ANALYSIS

Even though in the facts of the present case, relief provided to the Taxpayer is rather hollow, the judgment of the Tribunal is a move in the right direction. In the current times - due to the aggressive nature of the Indian revenue department, Indian payors (tax deductors) have become quite stringent when it comes to furnishing of documents for availing treaty benefits. In respect of the TRC, it should be noted that the Income Tax Rules, 1962 ("**ITR**") provide for certain details that the TRC should contain for it to be a valid TRC. However, in case all the necessary details are not provided for in the TRC, the ITR provides the option to submit a form, namely Form 10F which should contain all the details which are not present in the TRC. While the law provides that Form 10F should be provided only to the extent of information missing in the TRC, the Indian deductors demand for Form 10F with all details irrespective of what the TRC provides for. This begs the question that if Form 10F has to be provided with all details in spite of a TRC having been provided, how relevant is the TRC? In this respect, this judgment provides clarity that the TRC is not the only document which will allow foreign payee to claim tax treaty relief. Any document which shows that the foreign payee is a tax resident of the foreign country should suffice to claim treaty relief. While the ruling provides that Form W9 will not suffice as the document evidencing residency, it will be interesting to see which other documents can fulfill this rest.

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Lastly, while noting the unique and unqualified nature of section 90(2), the ruling also re-establishes the fact that the only provision which can override section 90(2) – the treaty override provision – is section 90(2A) which deals with general anti-avoidance provisions (GAAR).

– Afaan Arshad & Ashish Sodhani
You can direct your queries or comments to the authors

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[1] An taxpayer, not being a resident, to whom an agreement referred to in sub section (1) applies, shall not be entitled to claim any relief under such agreement unless a certificate of his being a resident in any country outside India or specified territory outside India, as the case maybe, is obtained by him from the Government of that country or specified territory".

[2] [(2015) 379 ITR 256 (P&H).
