Nanubhai Desai & Co.

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INCOME TAX

Domestic Taxation

General

Substitution of Rule 6DD

- Vide Notification 97 of 10th October, 2008 amendments have been made to the Income Tax Rules in as much as the existence Rule 6DD is substituted by new Rule 6DD. The Rule seeks to list out the case and circumstances in which a payment exceeding Rs. 20,000/- made otherwise then by account payee cheque shall be disallowed.

Case laws

1. HCL COMMET SYSTEMS & SERVICES LIMITED (SUPREME COURT OF INDIA)

Background and facts of the case

- The assessee is engaged in the business of trading in data communication equipment and satellite communication services. For the purposes of computing the amount of book profit under section 115 JA, for the assessment year 1997-98, the assessing officer added a sum on account of provisions for bad debts debited to the profit & loss account. The CIT (A) deleted the said addition and the said decision of CIT (A) was also upheld by the Tribunal as well as the Delhi High Court.

Questions

- The Revenue challenged the deletion by the CIT (A) of the addition of provisions for Bad Debts made by the assessing officer for the purpose of computing books profit.

Decision

- The Hon'ble Supreme Court analyzed the provisions of section 115 JA and also examined its own decision in the case of Apollo Tyres Limited and concluded that the assessing officer was not justified in making the

said addition. The Apex Court brought out the distinction between a mere provision viz a viz provision for liability.

2. REAL IMAGE MEDIA TYRES (P) LTD (CHENNAI TRIBUNAL)

- The assessee is engaged in business of running a recording and dubbing studio production of advertisement films and software development and other activities. For the previous year relevant to assessment year 2002-03, the amount of service tax was shown as liability by the assessee. During the course of assessment proceedings, the assessing officer made an addition of the amount of service tax appearing as liability in the balance sheet as at the end of the year. The said addition was made by the assessing officer by invoking provision of section 43B on appeal by the assessee before CIT (A), the said addition was deleted. Aggrieved by the same the Revenue preferred an appeal before the Tribunal. The Tribunal examined the basis of deletion of the said addition and conquered to the view of the CIT (A) that before invoking section 43B, the assessee should have first claimed the said sum. It is respectfully observed that while examining the issue the provisions of section 145A were not examined.

3. GLOBAL SERVICES INDIA (P) LTD. v. DEPUTY CIT (BANGALORE TRIBUNAL)

- During the previous year relevant to assessment years 1998-99 and 1999-2000, the assessee had made payments to a third party. As a result of such payment, the assessee was absolved from making recurring revenue payments for substituting contractual payments. The assessing officer as well as CIT (A) took a view that such payment has created a benefit of capital nature resulting into creation of a capital asset. Such payment was therefore considered as a capital expenditure and added back to the income of the assessee. Aggrieved by the same, the assessee preferred an appeal before the Tribunal. The Tribunal examined the facts of the case and held that the payment shall be regarded as revenue expenditure since the payment has not resulted into creation of any asset.

4. MRS. MEENA S. PATIL v. ACIT (BANGALORE TRIBUNAL)

- During the previous year relevant to assessment year 2002-03, the assessee purchased immoveable property from a Non-Resident. While making payment of the said consideration, as provided in the said

agreement, the assessee did not deduct any tax as provided under section 195 of the Act. Before the end of the assessment year, the Non-Resident seller paid the tax together with interest u/s. 234B and 234C upto the date of payment. Subsequently, the assessing officer invoked provision of section 201 / 201 (1A) and charged interest on the assessee for not complying with the provision of section 195. CIT (A)s confirmed the said matter of the assessing officer. Aggrieved by the same the assessee preferred an appeal before the Tribunal. The assessee contended the status of the Non-Resident was not made known to the assessee at the time of entering into the agreement. The Tribunal however, held that assessee was in default in not complying with the provision of section 195. The Tribunal however, did not agree to the stand of the assessing officer to levy interest on the assessee for the period beyond the date of payment of tax together with interest by the Non-Resident.

International Taxation

General

New Tax Treaties

- India has entered into a tax treaty with Latvia for avoidance of double taxation. The tax treaty shall help to improve the flow of capital, technology and personnel between the two countries.

- India has also entered into a tax treaty with Tajikistan. The important feature of this tax treaty is the taxing rules for the income arising under the head capital gains. The treaty provides that capital gains arising from shares of a Company, deriving its value principally from immoveable property, will be taxed in the country where such Company is resident and not where the immoveable property is situated. The double taxation will be eliminated through credit method.

Notification to clarify concept of "may be taxed" under the tax treaties

- Vide Notification no.91 dated 28th August, 2008, the Government has notified that particular income of a resident of India shall be included in its total income chargeable to tax even if the relevant tax treaty provides that such income "may be taxed" in the source country.

Case laws

1. ANAPHARM INC (ADVANCE AUTHORITY RULINGS)

Background and Facts

- The applicant is a Company incorporated in Canada. The applicant undertakes research activities and provides clinical and bio-analytical services to Pharmaceutical Companies. Agreements were entered by the applicant with few Indian Pharmaceutical Companies to render such services. The applicant produces reports on comparison of the new proposed drug with reference to similar drug already available in the market. The applicant observes various methods and protocols to produce such reports that are in conformity with the international standards in this regard. The reports produced are also recognized by

regulatory authorities across the world. The method and protocols developed by the applicant are its own property. The agreements entered by the applicant with Indian Companies set out in detail the nature of services to be provided as well as the role & method to be followed by the applicant. As per terms of the agreement the applicant is required to provide a report consisting on factual analytical results of sample in tabulated form. As per the terms of the agreements, the applicant is entitled to receive fees from the Pharmaceutical Companies in lieu of the services rendered by it.

Questions raised before the Authority

- The applicant sought ruling from the authority inter alia determining the character and nature of fees received by the applicant from Indian Pharmaceutical Companies for providing various services in terms of the agreement, having regard to the provisions of the Act as well as the tax treaty signed between India and Canada.

Contentions of the Applicant

- The Applicant contended that final reports / conclusions of the evaluation of the proposed drug undertaken by the applicant for the Company in terms of the agreement are only furnished. The methods / protocols observed by the applicant are product specific and cannot be used for carrying out similar evaluation for other drug. The applicant further contended that evaluation of every new drug would require fresh exercise. The applicant further contended that no technical plan or research process was "made available" to the Companies. The applicant thereafter referred to the provisions of the tax treaty signed between India and Canada. Having regard to the definition of the "fees for included services" appearing under article 12 of the tax treaty, the applicant contended that payments under consideration shall not be regarded as "fees for included services". The applicant contended that the technology could be considered to have been "made available" only when the recipient was enable to apply the technology independently. Since this condition was not fulfilled under the factual pattern of this case, the fees cannot be regarded as "fees for included services". The applicant contended that "business profits" could be taxed in India only if the applicant had a PE in India, as per the article 7 read with article 5 of the tax treaty. The applicant contended that in absence of such PE in India, no part of such fees could be taxed. The applicant also furnished affidavits of Indian Companies to substantiate its submissions with regard to the nature of services to be rendered by the applicant. The

applicant also thereafter referred to various legal precedents supporting its contentions.

Contentions of the Revenue

- The Revenue referred to the several clauses of the agreement entered into by the applicant with the Indian Companies and observed that the Indian Company shall have all rights in any invention, technology, know how or other intellectual property, directly or solely, resulting from the services provided by the applicant. The revenue also observed that the Indian Company shall remain the owner of the tested sample, test compound and also patents arising from the said services. The revenue contended that services rendered by the applicant were of very high order and were on account of technical expertise. The revenue contended that the services provided by the applicant would fall within the definition of the term "fees for technical services" as defined u/s. 9 of the Act as well as under "fees for included services" under article 12 of the tax treaty. The revenue therefore contended that the said fees were subject to tax and provisions of section 195 of the Act shall get attracted.

Ruling of Advance Authority Rulings

- The authority referred to the contents of the relevant agreements, the provisions of the Act and article 12 of the tax treaty. The authority also referred to the protocol annexed to the tax treaty signed by India and US. The said protocol also contains various examples to interpret/clarify the term "fees for included services". The authority also referred to the OECD Commentary as well as commentary of Professor Klaus Vogue on double tax conventions. The authority ruled that the applicant was in the business of providing such services to various pharmaceutical Companies and the income arising from the same shall be its business income. The authority observed that no PE of the applicant exists in India. The authority also concluded that the fees under consideration shall not be regarded as "fees for included services".

2. CUSHMAN & WAKEFIELD (S) PTE LTD IN RE (ADVANCE AUTHORITY RULINGS)

Background and Facts

- The applicant is a Company incorporated at and resident of Singapore. The applicant is part of a multinational group. The applicant is engaged in the business of rendering services in connection with acquisition,

sales and dealing in Real Estate and other services. The applicant has developed certain International client relationship. One of the group Company is incorporated and registered in India (hereinafter referred to as the Indian Company). As per the general practice followed by the group, vide an agreement entered into by the applicant with the Indian Company, the applicant agreed to refer / recommend potential customers, desirous of obtaining Real Estate consultancy and associated services in India. As per the terms of the agreement, the applicant was entitled to receive referral commission from the Indian Company as a percentage on the amount earned by the Indian Company from such customers. The applicant merely refers potential customers and all other services & negotiations and collection of fees are done by the Indian Company.

Questions raised before the Authority

- The applicant raised several questions before the authority inter alia inquiring on the taxability of such referral fees, applicability of the provisions of section 195 at the time of payment of such referral fees and ascertainment of existence of PE / business connection of the applicant in India, having regard to the provisions of the Act as well as tax treaty entered into between India & Singapore.

Contentions of the Applicant

- The applicant contended that the referral fees are now taxable u/s 5 of the Act as well section 9 of the Act. The applicant contended that as there is "no business connection" of the applicant in India, receipt from referral services cannot be brought to tax u/s. 9. The applicant contended that the referral fees are not taxable as "fees for technical services" on a combined reading of section 9 with article 12 of the tax treaty, since applicant shall not "make available" technical knowledge, skill, know how or processes. The applicant contended that in absence of a PE in India, no business profits arising from the referral fees could be brought to tax in India under article 7 of the tax treaty. The applicant also contended that the receipt of referral fees cannot be characterized as Royalty, since the payment is not as a consideration for "imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill" as laid down under section 9 of the Act as well as under article 12 of the tax treaty. The applicant also relied on the judicial precedents. The applicant also placed reliance on the OECD Commentary in this regard. The applicant therefore contended that the referral fees can not be brought to tax in India (neither as business income nor as royalty nor as technical services) & the provisions of section 195 shall not be attracted at the time of making

payment of referral fees by the Indian Company as no "business connection" exists of the applicant in India.

Contentions of the Revenue

- The Revenue questioned the authencity of the claim of the applicant with regard to "referring" the customers to Indian Company. The applicant raised objection to the collusive arrangement and also questioned hefty referral fees at the rate of 30%. The revenue objected to the application itself and sought to reject the same as filed before the authority. The revenue contended that referral fees can be termed as Royalty income and should be taxed accordingly. The revenue also contended that the transaction should be examined by the transfer pricing officer having regard to the relationship of the applicant and Indian Company.

Rulings of the Advance Authority Rulings

- The Authority examined the provisions of section 5, section 9 and relevant articles of tax treaty. The authority concluded that the referral fees are neither received in India nor accrued or arose in India. Accordingly, the same falls outside the purview of section 5. As regard to the existence of "business connection" of the applicant in India, the authority referred to the provisions of section 9 as well as the decision of Supreme Court in the case of CIT v/s. R.D. Aggarwal & Co. [1965] 56 ITR 20. The authority concluded that no real and intimate relation existed between trading activities carried on outside India by the applicant and the activities in India which contribute to the earning of income and therefore no "business connection" of the applicant in India existed in India. The applicant then referred to the OECD Commentary as well as Memorandum appearing to India US tax treaty for determination of the character of the fees "Royalty" / "fees for technical services". The Authority concluded that the referral fees shall not be regarded as "Royalty" or "fees for technical services". The Authority further ruled that the Indian Company shall not be required to withhold any tax while making payment of the referral fees u/s. 195 of the Act. The Authority further ruled that the applicant did not have a permanent establishment / "business connection" in India.

3. A.B. HOTEL LIMITED (RADISSON HOTEL) (DELHI TRIBUNAL)

Background and Facts

- The assessee is an Indian Company. During the relevant assessment years, the assessee had made payment of commission to Foreign Company controlled and managed at USA. The Foreign Company and the assessee are part of one Multinational Group. At the time of making payment of commission to the Foreign Company, the assessee did not deduct any tax at source since the commission had arisen on account of performance / rendering of the services by the Foreign Company outside of India. The provisions of section 9 were therefore not attracted and consequently, the assessee did not deduct any tax whilst making payment of commission to the Foreign Company. The assessing officer, however, denied the deduction of the said payment of commission by invoking provisions of section 40 (a) r.w.s.195. The learned CIT (A) held that services were rendered in India by the Foreign Company since the person making reservations/booking outside of India through the Foreign Company visited India & stayed at hotel situated in India. In the opinion of the CIT (A) this would tantamount to rendering of services by the Foreign Company in India. CIT (A) therefore held that the provisions of section 40 (a) were applicable and consequently, confirmed the disallowance made by the assessing officer.

Issues

- The assessee preferred appeal before the Tribunal against the decision of CIT (A) and contended that no tax was required to be deducted at source by the assessee company and therefore the disallowance made of the commission payment was illegal.

Contentions of the assessee

- The assessee contended that it was not liable to deduct tax at source on the amount of commission paid to Foreign Company for providing services with regard to hotel reservation services outside India. The assessee contended that no services and facilities were provided by the Foreign Company in India to the assessee. The Foreign Company had no operations in India and the transactions were entered into between the assessee and the Foreign Company under “principal to principal” relationship. Having regard to the provisions of the tax treaty signed between India and USA, no PE existed in India of the Foreign Company.

The assessee further contended that having regard to the method and manner of performance of service by the Company outside of India, no business connection of whatsoever nature existed in India of the Foreign Company as envisaged under section 9 (1) (i) of the Act. The assessee contended that merely because of customers or clients booking hotels through Foreign Company outside India and subsequently, staying in the hotels in India of the assessee cannot be the criterion to conclude that Foreign Company had rendered services to the assessee in India. The assessee company referred to the CBDT Circular as well as various judicial precedents in this regard.

Contentions of the Revenue

- The revenue contended that the assessee should have deducted tax at the time of making payment of commission to the Foreign Company for the reasons and discussions made by the assessing officer and CIT (A) in their respective orders.

Decision

- The Tribunal examined the scope of section 195 of the Act and concluded that the obligation to deduct tax at source at the time of making payment to a Non-Resident would be required to be fulfilled only in relation to that part of income which was chargeable to tax under the Act. The Tribunal, in other words, concluded that if the sum paid to a Non-Resident was not chargeable to tax under the Act, the person making the payment would be under no obligation to deduct tax at source. The Tribunal therefore further concluded that section 40 (a) (i) will not be attracted under such circumstances. The Tribunal referred to the ration in this regard laid down in the case of Millennium Infocom Technologies Limited v Asst. CIT (2008) 21 SOT 152. The Tribunal thereafter examined the factual aspect of the case and it observed that the Foreign Company had provided services as a commission agent wholly outside of India. The Tribunal further noted that the services and facilities to the customers (who made reservations or booking through Foreign Company outside India) provided by the assessee in India cannot lead to a conclusion that Foreign Company had rendered any services to the assessee in India. The Tribunal also opined that no income accrues or arises or deemed to accrue or arises to a Non-Resident agent in India where services were made by them outside India. The Tribunal therefore deleted the disallowances made on account of commission payment. The Tribunal further held that the assessee had no liability to deduct tax at source u/s. 195 (1) r.w.s. 40 (a) (V).

4. PREROY AG (MUMBAI TRIBUNAL)

Background and Facts

- The assessee is a Company incorporated under the laws of Switzerland. The assessee is a tax resident of Switzerland and is entitled to the concessional tax treatment provided for certain items of income under the tax treaty signed between India and Switzerland. The assessee was engaged in the business of providing services in the area of Finance, Business Strategies, Negotiations, Structuring New Joint Venture, Assisting in technology Transfer, Identifying Investment particulars, etc.. The services of the assessee were availed by an Indian Company. The assessee provided various services from time to time to the Indian Company. At the time of filing of the return of Income for various assessment years (for and prior to assessment year 2001-02), the assessee contended that fees received from the Indian Company were in the nature of "Fees for included Services" as defined under article 12 of the tax treaty. In absence of PE in India, no profits could be brought to tax in India under article 7 of the tax treaty. During the course of the assessment proceedings, the assessing officer examined the facts of the case and came to the conclusion that services rendered by the assessee were technical in nature and having regard to the nature of services rendered, payments arising from the services rendered should be considered as "Royalty" under the provisions of article 12 of the tax treaty. The assessing officer further held that an Indian Company should be regarded as a dependent agent in India of the assessee and therefore the profits arising from the services rendered by the assessee should be brought to tax as business profits under article 7 of the tax treaty. The assessing officer levied tax @ 20 % on the amount of such income earned by the assessee from the Indian Company. The learned CIT (A) did not agree to the assessing officer that payments made by an Indian Company to the assessee would give rise to income in the nature of "Royalty" under the article 12 of the tax treaty. The learned CIT (A) also held that the nature of income shall not be that of "Fees for included Services" as defined in the tax treaty for the relevant assessment years (viz. period prior to the protocol signed between India and Switzerland to amend several articles of the tax treaty). The CIT (A) also held that there was no PE in India of the assessee and accordingly, no tax was liable to be paid by the assessee in India.

Issues

- Aggrieved by the said decision of the CIT (A), the revenue preferred an appeal before the Tribunal challenging order of CIT (A) in as much as

the conclusion of the CIT (A) that payments under consideration were neither in the nature of "Royalty" nor in the nature of "Fees of included Services", having regard to the provisions of the relevant tax treaty.

Decision

- The Tribunal considered the contention of both the parties but however, refrained from giving its decision on the questions raised before it by the revenue. The Tribunal examined the scheme of the Income Tax Act and also referred to the provisions of section 90 in particular. The Tribunal felt that the correct approach to deal with a cross border transaction was to examine the tax incidence of the relevant transaction under the purview of the Act first and then to examine the taxing rules of the same provided for under the relevant tax treaty. The Tribunal also in this regard referred to the decision of Sheraton International Inc reported at 85 ITD 110. The Tribunal therefore re-adjudicated the matter and restored the matter back to the assessing officer for fresh adjudication.

5. INTERTEK TESTING SERVICE PRIVATE LIMITED (ADVANCE AUTHORITY RULINGS)

Background and Facts

- The applicant is a Private Limited Company incorporated in India. The applicant is a subsidiary of a UK Limited liability Company. The applicant is part of the group of Companies operating in several countries. The applicant provides testing and inspection services to its clients, based in India as well as outside India. Certain group Companies have special knowledge and expertise in the field of executive, commercial, financial, marketing and administrative management system and techniques. A comprehensive agreement was entered between UK Company and various group Companies (including the applicant) in an endeavour to pool the requisite resources and skills available among the members of group Companies. As per the terms of the said agreement, the Head Office at London was also going to provide services to the applicant. Such services are provided by the UK Company either directly or by deputing personnel of any other group Company subject to the control and supervision of the UK Company. The applicant contended that the nature of services provided under the said agreement by the UK Company to the applicant are broadly classified as 'Corporate Head Office Services', 'Divisional Global Services' and 'Divisional Regional Services'. The applicant would be

billed at a cost plus 7.5% mark up. The methodology of computing the cost for this purpose was also laid out in the said agreement.

Questions

- The applicant placed following questions before the authority:

i. Whether on the stated facts and in law the service fee paid by the applicant to UK company under the said agreement is taxable as "Royalties & Fee for Technical Services" as per the provisions of Article 13 of Double Taxation Avoidance Agreement between India & United Kingdom?

ii. Without prejudice and in alternative, if the answer to question number (i) is in negative, whether on the stated facts and in law the applicant is required to deduct tax at source on the service fee paid to UK Company at the rate of 10% plus applicable surcharge and cess as per the provisions of section 115A(1)(b)(BB) of the Income-tax Act, 1961.

Contentions of the Applicant

- The applicant contended that the payments made to the UK Company in pursuance to the agreement would not fall under the definition of "fees for technical services" appearing under article 13 of the tax treaty signed between India and UK and consequently, the applicant was not liable to deduct tax at source. The applicant relied on various decisions to support its contention. The applicant also pointed out that the word 'managerial' was omitted from the definition of fees for technical services in the new tax treaty signed between India and UK. The effect of such omission was that the receipt for 'managerial services' can no longer be taxed as fees for technical services.

Contentions of the Revenue

- The revenue contented that beneficial owner of the fees (arising from the payment made by the applicant) were other group companies to whom the said fees were passed on by the UK Company. Since the tax treaty benefits are available only if the beneficial owners of the relevant income are resident of the jurisdiction, the concessional tax treatment available for the resident of UK with regard to the payment giving rise to 'fees for technical services' should not be made available to the UK Company under question.

Rulings and Analysis

- The authority considered the broad term of the agreement as well as various services covered under the said agreement. The Authority also referred to the provision of the tax treaty. With regard to the concept of "make available" relevant for the definition of 'fees for technical services', the authority referred to various judicial precedents as well as MOU appended to the tax treaty signed between India and USA explaining the scope of phrase 'make available'. Various judicial precedents were also referred to derive the meaning of the term 'technical services', 'consultancy services' and 'managerial services'. The ruling brings out an exhaustive and academic discussion on the various terms defining the income "fees for technical services". However, the authority did not answer the question raised by the applicant. The authority held that the question argued by the applicant defies a precise answer, either in the affirmative or negative. The authority also agreed that many of the services covered in the agreement would not 'make available' technology, knowledge, etc. and therefore would fall outside the definition of "fees for technical services". At the same time, the authority was of the view that some of the services would satisfy the test of 'making available' technical knowledge and therefore would be covered under the definition of fees for technical services. The authority however did not specify such services.

6. ESSAR OIL LIMITED (BOMBAY HIGH COURT)

Background and Facts

- Assessee is an Indian Company which executes various turn key projects. For the relevant assessment year the assessee executed certain projects in Oman. The assessee has established a Permanent Establishment at Oman to execute the said projects. Having regard to the provisions of article 7 of the tax treaty signed between Indian and Oman, the assessee was liable to pay tax in Oman in respect of income earned from the said Permanent Establishment. The assessee contended that profit made by the assessee at Oman from the activities of the said Permanent Establishment should be excluded for the purposes of determining taxable income of the assessee in India. The Tribunal allowed the contention of the assessee and had accordingly excluded profits earned at Oman from the purview of taxability in India.

Issues and Conclusions

- The revenue challenged the said decision of the Tribunal and contested the said exclusion of the profit from taxability from India. The Hon'ble Bombay High Court considered the factual pattern of the case as well as examined the legal provisions in this regard. The Hon'ble Bombay High Court referred to the decision of Hon'ble Supreme Court in the case of CIT vs. P.V.A.L.Kulandagan Chettiar, 267 ITR 654 and held that profit earned from Permanent Establishment at Oman should not be brought to tax in India.

Comments

- The decision of Hon'ble Supreme Court relied upon by the Hon'ble Bombay High Court in this case was with regard to the tax treaty signed by India with Malaysia. The scheme of the said tax treaty and method of elimination of Double Taxation provided therein differs from the provisions of tax treaty signed between India and Oman. The recent notification no. 91 2008 of 28th August, 2008 suggest that tax should be levied in India even if the taxing rules under the relevant tax treaty entitles the source country to tax relevant income in its jurisdiction.

7. INDIA SPACE RESEARCH ORGANISATION (ADVANCE AUTHORITY RULINGS)

Background and Facts

- Indian Space Research Organisation (ISRO) for its satellite centre entered into a contract with UK Company for securing under lease navigation transponder capacity owned by the UK Company carries various transponders. The satellite of the UK Company carries various transponders. The satellite owned by the UK Company orbits the earth at an altitude of 36 kms. In pursuance to the said agreement ISRO was allowed to use the transponder capacity available on the satellite for the purposes of sending data across the ground stations. The transponders enable ISRO to enhance the navigation capabilities and improve the corrected signals transmitted by the ground stations. The UK Company also has its own ground station at UK. As per the terms of the agreement, ISRO was required to pay a fix annual charge to the UK Company irrespective of the actual use of the transponders.
- The applicant approached the Authority to determine the character of the payment required to be made by ISRO to UK Company in terms of the said agreement. The applicant raised a question before the Authority to

determine whether the payment made to the UK Company was in the nature of "Royalty" under the provisions of the Act and / or under the provisions of the treaty signed between India and UK.

Contentions of the Applicant and Revenue

- The Applicant contended before the Authority that the payment under consideration was not in the nature of "Royalty". Having regard to the provisions of the Act as well as the treaty, it was contended by treaty before Authority that the agreement did not grant any right to use in favour of the applicant in as much as the control and operational arrangement of the satellite remains with the UK Company. The applicant submitted that the payment under consideration should not be liable to tax in India at all.
- The revenue contented before the Authority that the payment under consideration would be liable to tax in India since the said payment would be in the nature of "Royalty". The department also suggested that the applicant had controlled over the transponders in as much as the transponders were a keen to the remote control of the Television Set.

Ruling by the Advance Authority Rulings

- After considering the submissions and contentions of the applicant as well as revenue, the department did not agree to the contentions of the revenue. The Authority arrived at a conclusion that no control or operational independence of the satellite was made available to the applicant by the agreement. The Authority noted that transponder automatically responds to the data received from the ground station. The Authority also distinguished the features of the remote control of the Television Set vis-à-vis the transponder of the satellite. The Authority then referred to its own earlier ruling in the case of Del International Services India Private Limited (218 CTR 209). The Authority concluded that payment to be made by ISRO to the UK Company would not be in the nature of "Royalty".

8. FUGRO ENGGINEERS BV (DELHI TRIBUNAL)

Background and Facts

- The assessee is a Non-Resident Company. The assessee is incorporated under the laws of Netherlands. The assessee executed various projects in India. The scope of work under the projects involved variety of activities. During the course of assessment proceedings, the assessing

officer examined the scope of work of each contract and the services rendered by the assessee. The scope of work involved following activities / services

Name of Entity	Scope of Work	**Duration of the Project**
ONGC	• soil investigation for exploration drilling locations • drilling and sampling of bore holes • on-board laboratory testing and specialized analysis through risk assessment technique	**13 days**
Cairn Energy	• geo-physical and geo-technical investigation (at eight different locations across India) – the assessee mobilized its own rig and vessel from Singapore for this work	**41 days**
Ganesh Benzoplast	• execution of work on "Samudra Sarveshak" belonging to ONGC and involved geo-technical investigations and geo-technical services on-board the vessel	**37 days**
	TOTAL	**91 days**

The assessee contended that having regard to the total number of days spent by it in India for execution of the projects, no Permanent Establishment was established in India by it. The assessee relied on article 5 & 7 of the tax treaty. The assessee concluded that assessee had established a Permanent Establishment in India and brought to tax the revenue earned by the assessee from the projects accordingly.

Contention of the Assessee

- Having regard to the scope of work entrusted to the assessee and the method and manner of the execution of the said projects by the assessee, it should be held that business operations of the assessee were not giving rise to a Permanent Establishment in India. The place of business covers premises, facility or exploration use exclusively by the assessee for the purpose of its business. Having regard to paragraph 2 (i) of article 5 of the tax treaty, a Permanent Establishment can come into existence provided the specified activities continues for more than 183 days. The assessee had spent only 91 days in India and consequently would not get covered under the Permanent Establishment definition covered under

paragraph 2 (i). The assessee relied on the decision of Hon'ble Andhra Pradesh High Court in the case of CIT vs Vishakapatnam Port Trust 144 ITR 146. The assessee contended that there should be a projection of the foreign enterprise into the soil of another country which is enduring or permanent nature and only then it could fall within the ambit of definition Permanent Establishment. The assessee also referred to other judicial preceeding and contended that there was no Permanent Establishment of the assessee in India. The assessee also contended that all paragraphs of article 5have to be read together. If the case of the assessee was covered under paragraph 2 (i) of article 5, could not recourse or be taken by the revenue to test the factual pattern of the conditions / definition of Permanent Establishment provided under paragraph 1 of article 5

Contentions of the Department

- The revenue referred to the provisions of paragraph 1 of article 5 of the tax treaty. Paragraph 1 defines the term Permanent Establishment to mean a fix place of business to which the business of the enterprise is wholly or partly carried on. The revenue contended that existence of a fix place of business in India of a Non-Resident and undertaking of business either wholly or partly by such Non-Resident from such place of business would trigger / establish a Permanent Establishment of such Non-Resident in India. The revenue contended that once the case of the assessee falls within the ambit of paragraph 1, it is irrelevant to test the threshold limit for the number of days provided for establishment of a Permanent Establishment under specified circumstances. The revenue also contended that the activities carried on by the assessee in India and also the availability to fix the place of business (in the form of vessel of the Indian entities) would give rise to Permanent Establishment in India. The revenue also distinguished the judicial preceeding cited by the assessee the revenues contention was that the assessee did not erect any installation and therefore would not be covered under the activities prescribed vide paragraph 2 (i) of article 5. The revenue also referred to the commentary in this regard of OECD model tax convention.

Conclusions

- The Tribunal considered the facts of the case as well as submissions and arguments of assessee as well as the revenue. The Tribunal noted that each contract executed by the assessee in India was of less than 183 days duration. The Tribunal also noted that the assessee had been conducted such activities in past in India and such activities are carried on by the assessee in India on an ongoing basis. The Tribunal distinguished the legal precedence cited by the assessee. The Tribunal held that paragraph

3 or paragraph 2 (i) cannot over right article 1 of paragraph 5. The Tribunal was of the view that in order to attract paragraph 1 of article 5, there should be a link between the place of business and the geographical point the duration for which the Non-Resident operates in India is of no relevance at the same time an equipment did not be actually fix to the soil of India. The Tribunal was of the view that the term "through which" article in paragraph 1 should be given vide meaning.

The Tribunal held that no length of time is prescribed in respect of paragraph 1 of article 5 and it was rightfully held by CIT (A) that the assessee have a place of business available to it which would constitute its Permanent Establishment in India.

9. SUMITOMO CORPN v. DEPUTY CIT (DELHI TRIBUNAL)

Background and Facts of the Case

- The assessee is a company incorporated at and resident of Japan. After complying with the provision of Foreign Exchange Management Act, the assessee established a liaison office (LO) in India. The assessee obtained necessary approval of Reserve Bank of India (RBI) for establishing LO. The role of LO was to facilitate imports from Japan and exports from India. Three project offices were established by the assessee for different projects of an Indian Company. The Indian Company, after issuing global tender inviting bids for purchase of different methology and equipments, awarded the supervision of the same by the assessee. Head Office of the assessee secured various contracts for supply of equipments in response to the global tenders invited by the Indian Company. The assessee was entitled to receive supervision fees from Indian Company for supervising installation of equipments. The assessee took a stand that it had no PE in India and consequently, the supervision fees would not be subject to tax in India.

Questions

- The assessee preferred an appeal before the Tribunal to determine the taxability of the supervision fees received by its Head Office from the Indian Company and also to determine existence of a PE in India in the form of the LO.

Analysis and Decision

The Revenue contended that project offices established by the assessee were PE of the assessee and it was not necessary that each project should have a separate PE. The Revenue also contended that LO was in fact acting as a PE of assessee in India. The Revenue also contended that supervision fees should be taxed @ 30% and not @ 20%. The assessee contended that the activities by LO were as per the terms and conditions in this regard prescribed by RBI and no commercial activities were undertaken by LO. The assessee therefore contended that having regard to the provisions of article 5 of the tax treaty, LO cannot be regarded as a PE. Further, it was contended by the assessee that contract supply of equipments was directly entered into by the Indian Company with the Head Office and not with LO or project office. As regard to rendering of the supervising service to the supervisors physically visiting India and Indian Company had borne the airfare and other charges of such supervisors. The Tribunal examined the facts of the case and also referred to various judicial precedents. The Tribunal held that the assessee had established PE in India for rendering supervisory services to the Indian Companies. The Tribunal further held that LO could not be regarded as PE of assessee in India. The Tribunal contended that supervision fees should be brought to tax in the hands of the assessee @ 20% provided in article 12 (2).

REGULATIONS GOVERNING INVESTMENTS

SEBI eases norms for FII investment in exchanges

The Securities and Exchange Board of India (SEBI) amended its earlier circular to allow Foreign Institutional Investors (FIIs) to buy shares of stock exchanges and other security market infrastructure companies even before they are listed.

In its earlier circular, SEBI had allowed FIIs to pick up shares of stock exchanges and security market infrastructure companies only from the secondary market. However, no exchange was listed.

SEBI, vide this new circular now also allowed FIIs to purchase shares of such exchange which are not listed through the transactions outside the exchange, provided it is not an initial allotment. However, if the exchange is listed, transactions by FIIs should be done through the exchange only.

SEBI has put a limit on foreign direct investments in such companies at 26 per cent and FIIs can invest a further 23 per cent.

RBI allows 49% single-entity FDI in credit info companies

The Reserve Bank of India (RBI) has allowed up to 49 per cent foreign investment in credit information companies (CICs) by a single entity.

This forms part of the revised notification on foreign direct investment (FDI) in CICs. In its earlier circular, while the RBI allowed FDI in CICs up to 49 per cent, it had directed that investments directly or indirectly made by a single entity, whether resident or otherwise, should not exceed 10 per cent of the equity capital of the company.

However, the current notification has clarified that the foreign entity investing in India should not have any single investor with more than 10 per cent voting rights. Voting right is usually limited to share holding in a company. However, in this case, the voting right is limited to 10 per cent of the total share capital of the company even if the shareholding of the entity is above 10 per cent. Official sources close to the development clarified that this distinction has been made to avoid conflict of interest between the foreign investing company and its other businesses.

However, it is explained that such problems could arise if the foreign investor was a holding company and it had other businesses such as banking, which, in turn, could use information of the CIC for its own business. Restriction in voting right could limit such decisions.

The RBI has clarified that the investor should have an established track record of running a credit information bureau in a well-regulated environment and it should be listed on a recognised stock exchange. In case the investor is a wholly-owned subsidiary of an investment holding company, these conditions would apply. The revision follows discrepancies in FDI norms under press note 1, 2008 and the subsequent RBI notification, which had different views on single entity foreign holding in such companies.

Limited Liability Partnership Bill, 2008 passed by Rajya Sabha

Recently the Rajya Sabha has passed the Limited Liability Partnership Bill, 2008. Limited Liability Partnership (LLP) as proposed in the Bill, 2008, is a new corporate form that enables professional expertise and entrepreneurial initiative to combine, organize and operate in an innovative and efficient manner. In India, this need has long been recognized for businesses which may require a framework that provides flexibility suited to requirements of service, knowledge and technology based enterprises. The advantage of the LLP form would be that it will not impose detailed legal and procedural requirements intended for large widely held companies on such enterprises. In this way it will also be useful for small enterprises.

The salient features of the LLP Bill, 2008 are as follows:

1) The LLP will be an alternative corporate business vehicle that would give the benefits of limited liability but would allow its members the flexibility of organizing their internal structure as a partnership based on an agreement.

2) The Bill does not restrict the benefit of LLP structure to certain classes of professionals only and would be available for use by any enterprise which fulfills the requirements of the Act.

3) While the LLP will be a separate legal entity, liable to the full extent of its assets, the liability of the partners would be limited to their agreed contribution in the LLP. Further, no partner would be liable on account of the independent or un-authorized actions of other partners, thus allowing individual partners to be shielded from joint liability created by another partner's wrongful business decisions or misconduct.

4) LLP shall be a body corporate and a legal entity separate from its partners. It will have perpetual succession. Indian Partnership Act, 1932 shall not be

applicable to LLPs. Since LLP shall be in the form of a body corporate, it is also proposed that the relevant provisions of the Companies Act, 1956 may be made applicable to LLPs at any time in the future by Notification by Central Government, with such changes or modifications as appropriate.

5) An LLP shall be under obligation to maintain annual accounts reflecting true and fair view of its state of affairs. Since tax matters of all entities in India are addressed in the Income Tax Act, 1961, the taxation of LLPs shall be addressed in that Act.

6) Provisions have been made in the Bill for corporate actions like mergers, amalgamations etc.

7) While enabling provisions in respect of winding up and dissolutions of LLPs have been made in the Bill, detailed provisions in this regard would be provided by way of rules under the Act.

ACCOUNTS & AUDIT

IFRS – ADVISABLE FOR INDIAN COMPANIES LISTED ON THE US STOCK EXCHANGE

It will be now advisable for Indian companies listed on the US stock exchanges to comply with International Financial reporting Standards (IFRS) as spending money on the new US GAAP, which is financial accounting standard, FAS—161 is not going to have long-term benefits.

At present, the companies listed on the US stock exchange have to prepare two set of statements which is by the Indian GAAP as well as by the US GAAP. Once the Indian accounting standards are fully converged with IFRS, then an Indian company listed on the US stock exchange preparing financial statements under Indian GAAP would not be required to prepare a separate financial statement under US GAAP. This would save the compliance cost for the Indian companies listed on the US to a great extent.

According to the decision taken in November 2007 by the Securities and Exchange Commission (US), for the companies listed in the US, financial statements will be accepted without reconciliation to US Generally Accepted Accounting Principles **only if** they are prepared using IFRS as issued by the International Accounting Standard Board. Reconciliation statements are prepared to identify the difference between the financial statements prepared under one set of GAAP and another set of GAAP.

US Financial Accounting Standards Board (FASB) has come out with even more detailed statement of financial accounting standard which is FAS-161. This is effective for financial statements issued for fiscal years and interim periods beginning after November 15, 2008. Although, FAS-161 has its own set of advantages in the form of better disclosures relating to financial instruments like derivatives but still for the Indian companies, to go by IFRS would be a better option. This is because FAS-161 is not going to have long-term benefits.

The companies who are listed on the US stock exchange have an option to choose either between the US GAAP or IFRS. These companies will not be required to give reconciliation statement if they follow IFRS and not the US GAAP.

ACCOUNTING STANDARDS FOR LOCAL BODIES – ICAI

Recently the Institute of Chartered Accountants of India (ICAI) has come out with first two accounting standards for local bodies, accounting standard for

local bodies (ASLB) 3— Revenue from Exchange Transactions, and Accounting Standard for Local Bodies (ASLB) 4—Borrowing Costs.

The (ASLB) 3— Revenue from Exchange Transactions lays down the accounting treatment for revenue arising from exchange transactions and events, in addition to specifying revenue recognition norms. It deals with how the revenues of a local body would be accounted when there is some value received in exchange. The new standard would help to recognize the revenue, measurement criteria and how it should be presented in the financial statements. The local bodies like municipalities and panchayats will be able to use this standard for revenue arising from the rendering of services, sale of goods, and other income like royalty, dividend and interest.

The (ASLB) 4—Borrowing Costs prescribes capitalization of borrowing costs that are incurred for acquisition, construction or production of a qualifying asset. As per this standard, any borrowing cost, such as interest or commitment charges related to raising of funds, will be added to the cost of asset.

Currently, there are no accounting standards for local bodies in India.

INTERNAL AUDIT FOR STOCK BROKERS/TRADING MEMBERS/CLEARING MEMBERS.

The Securities and Exchange Board of India (SEBI) has issued recently a circular regarding internal audit for stock brokers, trading members and clearing members to protect the interest of investors in securities and to promote the development of, and to regulate, the securities market. According to this circular, every stock broker, trading member or clearing member will have to carry out complete internal audit on a half yearly basis by Chartered Accountants, Company Secretaries or Cost and Management accounts who are in practice and who do not have any conflict of interest. The first such audit period will be from October 1, 2008 to March 31, 2009.

The scope of such audit shall cover, interalia, the existence, scope and efficiency of the internal control system, compliance with the provisions of SEBI Act, 1992, Securities Contract s (Regulation) Act, 1956, SEBI (Stock Brokers and Sub-Brokers) Regulations, 1992, circulars issued by SEBI, agreements, KYC requirements, Bye Laws of the Exchanges, data security and insurance in respect of the operations of stock brokers/clearing members.

PCAOB PROPOSES NEW STANDARDS FOR AUDIT RISK

The Public Company Accounting Oversight Board has voted to propose seven new auditing standards related to risk assessment.

The proposed standards would supersede the board's interim auditing standards related to audit risk and materiality, audit planning and supervision, consideration of internal control in an audit of financial statements, audit evidence, and performing tests of accounts and disclosures before year end.

The proposed standards would establish requirements and provide direction on audit procedures, from the initial planning stages through the evaluation of the audit results.

The proposed standards cover the auditor's responsibilities for reducing audit risk to an appropriately low level, audit planning and supervision, identifying and assessing the risks of a material misstatement, responding to the risks of a material misstatement, evaluating audit results, considering materiality in planning and performing an audit, and determining the sufficiency of audit evidence. The PCAOB is providing a 120-day comment period, ending February 18, 2009.

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