

**TITLE OF ARTICLE: AN INSIGHT INTO LAW RELATING TO DOUBLE TAXATION
IN INDIA**

AUTHOR: AKSHAY MAHESHWARI & ANJALI BHATT

**NAME OF THE INSTITUTION AND YEAR OF STUDY: UNIVERSITY OF
PETROLEUM AND ENERTGY STUDIUES, DEHRADUN 5TH YEAR**

EMAIL ID : AKSHAYMAHESHWARI05@GMAIL.COM

An Insight into Law relating to Double Taxation in India

Abstract

The Preamble to the Constitution of India acknowledges India as a sovereign republic and in the constitution this sovereignty is zealously guarded by keeping sovereign power with regard to entering into agreements with foreign countries under absolute constitutional control. Under entry 14 of the Union list, the matter included is '*Entering into treaties and agreements with foreign countries and implementation of treaties, agreement, and convention with foreign countries*'. Thus the exclusive power of the Parliament to make laws with regard to entering into treaties, agreement is all encompassing and consequently includes the power to legislate in this regard in the field of taxation of income. This specific power has been exercised by Parliament by enacting Sec 90 of the Income Tax Act 1961. Under sec 90 of this act, the Parliament has delegated power to enter into 'agreement' with the Government of any other country and by notification in the Official Gazette makes such provision as may be necessary for implementing the Agreement. When such agreement does not exist relief is provided in Sec 91. In present India has agreements with more 82 countries and limited tax treaties with 20 others. The paper analyses the powers of the government to enter into tax agreement with other countries and the law that has developed till date.

Keywords: Taxation, Government, Notification

Introduction

It is a fundamental rule of law of taxation that unless otherwise expressly provided, income cannot be taxed twice. Double Taxation in the strict legal sense, means taxing the same property or subjecting matter twice for the same purpose for the same period and in the same territory. To constitute double taxation, two or more taxes must have been (i) levied on the same property or subject matter, (ii) by the same Government or authority, (iii) during the same period, (iv) for the same purpose.

There is no double taxation strictly speaking where (a) the taxes are imposed by different States (b) one of the imposition is not tax (c) one tax is against property and the other is not a property tax or (d) the double taxation is indirect rather than direct. To let there be free flow of services between different countries, it has been deemed desirable in the interest of any country if double taxation is avoided. Chapter IX of Income Tax Act 1961 contains provision relating to double taxation relief. Sec 90 empowers Central government to enter into agreement with the Government of another country outside India for the specified objects. When such agreement does not exist relief is provided in Sec 92.

International double taxation arises when various sovereign countries exercise their sovereign power to subject the same person to taxes of substantially similar character on the same income. There are three distinct classes of cases in which international double taxation may arise:

1. The first and most important class includes those cases where double taxation is 'due to co-existence of personal and impersonal tax liability'. Personal tax liability is based on the personal status of tax payer i.e. his nationality, domicile and residence whereas impersonal tax liability arises when a state claims tax on income earned or received within its territory without having regard to personal status of the recipient. A person may be subjected to tax on the same income in one country on account of his personal status and in another because the source of his income is situated within the territory. Property may be taxed in the country where it is situated and also by the country where its owner resides.
2. The second class includes cases of simultaneous personal liability of a person in various countries. This may arise when different countries apply different criteria to, personal liability to tax or where the conditions of the same criteria are differently defined in

different countries. One country may claim personal tax on account of nationality, and the other because of domicile or residence of the person concerned within its borders. A person who has his domicile in one and a residence in another may be liable to tax in the country of his domicile and that of his residence as well. He may reside in various countries and be liable to personal tax in each of them. Also the same person may be claimed as domiciled or residents by different countries in each of which he fulfils the legal conditions of such personal status.

3. The third class of double taxation arises when various countries apply different tests of impersonal liability. Double taxation of this kind may occur, for instance when the assets or activities, that produce a given income are situate elsewhere then in the country where the income is earned or from which it is due. "Business transactions may be subjected to tax both in the country of their origin and of their completion. Tax on salaries and other remuneration for professional activities or employment may be demanded by the country where the act is performed , or where it is paid for, or where the employee or professional man resides or belong by nationality"

This state of affairs subject business ventures, into other territories risky and sometimes unprofitable too. A business would find itself not infrequently, having to pay on the whole, as between the two territories a sum of tax more than the sum of its profits, involving an eating into capital or if left with anything in its hands, had it not ventured abroad. Hence, it becomes a matter of concern to the state to see that such an inhibition on earning wealth does not occur by reason of fiscal policies. The solution is to devise affairs such that the individual's whole faculty is taxed, but is taxed only once, and the liability is divided amongst the taxing territories according to relative interests of the tax payer in each territory. This is brought about by treaties between the governments of two territories which is called bilateral relief. In the other, relief is provided to its own national irrespective of reciprocity by the Government of the other authority. This is called unilateral relief.

The Preamble to the Constitution of India acknowledges India as a sovereign republic and in the constitution this sovereignty is zealously guarded by keeping sovereign power with regard to entering into agreements with foreign countries under absolute constitutional control. Under entry 14 of the Union list, the matter included is '*Entering into treaties and agreements with*

foreign countries and implementation of treaties, agreement, and convention with foreign countries'. Thus the exclusive power of the Parliament to make laws with regard to entering into treaties, agreement is all encompassing and consequently includes the power to legislate in this regard in the field of taxation of income. This specific power has been exercised by Parliament by enacting Sec 90 of the Income Tax Act 1961. Under sec 90 of this act, the Parliament has delegated power to enter into 'agreement' with the Government of any other country and by notification in the Official Gazette makes such provision as may be necessary for implementing the Agreement.

According to Klaus Vogel "Double Taxation Convention" establishes an independent mechanism to avoid double taxation through restriction of tax claims in areas where overlapping tax claims are expected or at least theoretically possible. In other words, the Contracting States mutually bind themselves not to levy taxes or tax only to a limited extent in cases when the treaty reserves taxation for other contracting states either entirely or in part. Contracting States are said to 'waive' tax claims or more illustratively to divide 'tax sources' the 'taxable objects' among themselves.

Double Taxation avoidance treaties were in vogue even from the time of League of Nations. The experts appointed in the early 1920s by the League of Nation describe this method of classification of items and their assignment to the contracting states. While the English lawyers called it 'classification and assignment rules' the German jurists called it 'distributive rule-Verteilungsnorm'. To the extent that an exemption is agreed to, its effect is in principle independent of both whether the other contracting state imposes a tax in the situation to which exemption applies and of whether the State actually levies tax.

Section 90 of the Income Tax Act 1961 was substituted by the Finance Act 1972 and came into force on 01.04.0972. The scope and effect of the substituted section and all other allied provisions is elaborated in the following portion of department circular¹:

'Provision for enabling Central Government to enter into tax treaties with foreign countries for exchange of information for preventing evasion or avoidance of taxes and recovery thereof: Under Sec 90 the Central Government is empowered to enter into an

¹ Circular No 108 Central Board of Direct Taxes dated 20th Mar 1973

agreement with the Government of any foreign country for the avoidance of double taxation of income and to make provision for implementing the agreement by the issue of a notification in the official Gazette. Some of the taxpayers having transactions with outside countries resort to dubious methods for evading their liability under tax laws. Tax evasion is thus closely linked with transactions involving over invoicing and under invoicing in import and export business, operations through foreign secret foreign bank accounts and smuggling of valuable articles into and out of India. Cases of tax payers who thwart the attempt of the administration to collect dues by either retaining their assets abroad or transferring them secretly outside India are also unknown. With a view to enabling the tax administration to tackle problem of tax evasion having international ramifications, the Finance Act 1972 has substituted a new section for the existing sec 90 in order to empower the Central Government to enter into agreements with foreign countries not only for the purpose of avoidance of double taxation of income but also for enabling the tax authorities to exchange information for the prevention of evasion or avoidance of taxes on income ore investigation of cases involving tax evasion or avoidance or for recovery of taxes in foreign countries on a reciprocal basis’.

This section does not empower the government to enter into an agreement with retrospective effect and the same was upheld by Bombay High Court wherein it was held that an agreement for the double taxation cannot apply retrospectively nor can it apply to contracts prior to the date of the agreement.²

The four pillars of Section 90

The power of Central Government to enter in to an agreement with government of another country or specified territory³ for the purpose of double taxation and evasion is restricted to the four clauses mentioned in sub section (1) of Sec 90. Clause (a)empowers the Central

² CIT v Tata Iron 248 ITR 190

³As the scope of ‘any other country outside India’ was restricted, From October 1, 2009 the Government of India has been empowered to enter into an agreement with government of specified territory outside India as a need was felt to expand the scope of this cooperation by entering into DTAA or tax information exchange agreement with non-sovereign jurisdictions as well . By explanation ‘specified territory’ means any area outside India which may be notified by Central Government.

Government to grant relief in respect of such double taxation wherein tax has already been paid on the same income in both the countries. The Finance Act 2003 substituted clause (a)⁴ to provide that an agreement may also be entered for granting relief in respect of income chargeable under this Act and under corresponding law in force in that country, to promote mutual economic relations, trade and investment.

With the amendment, the powers of the Government were significantly widened and it can now enter into an agreement not only for avoidance of double taxation but also for exempting income from taxation. But the power can only be exercised to grant relief in respect of income tax and not to create any fresh charge, obligation or responsibility. If the agreement with foreign country is under clause (a) for the relief against double taxation the assessee must show that identical income has been doubly taxed and that he has paid tax both in India as well as foreign country, on the same income⁵. Wherein the assessee has paid no tax but a percentage of his gross receipt by way of royalty to the country that would not entitle him to double taxation relief⁶. Also if the tax has been overpaid in the foreign country and later the excess is repaid when the rate of currency has altered in computing double taxation relief,⁷

Clause (b) which is wider⁸ than clause (a) provides that an agreement may be made for 'avoidance of double taxation of income under this act and under corresponding law, in force of that country' though a word of caution was voiced that this clause cannot be extended to provisions in agreement in situation not relating to double taxation. However it is not necessary that a situation regarding 'avoidance of double taxation' arises only when tax is actually paid in one of the contracting states.⁹

In the case of clause (a) the tax has to be paid first and then only arises the right to apply for a refund of the excess payment¹⁰. So relief is granted after an income has suffered tax under laws

⁴ With effect from April 1, 2004

⁵ CIT v New Citizen Bank 58 ITR 468

⁶ Ashanti v Merrifield 19 TC 52

⁷ Greig v Ashton 31 ITR 538

⁸ UOI v Azadi Bachao Andolan 263 ITR 706, 773 (SC)

⁹ Ibid at pp 743-755

¹⁰ Cf Shell Co of India Ltd V CIT (1964) 51 ITR 669, 667 (Cal)

of both the countries. But on the other hand in Clause (b) relief is allowed at the time of assessment itself. In other words one important feature distinguishing the two concepts – avoidance of double taxation and relief against double taxation lies in this that in the case of avoidance of double taxation, the assessee does not have to pay tax first to apply for relief in form of refund, as he would be obliged to do under a provision for relief against double taxation. Thus the respective schemes embodying the two concepts differ in some degree from each other.

Clause (c) and (d) essentially deal with agreements made for exchange of information, investigation of cases and recovery of income tax.

As long as the objectives in these clauses are sought to be effectuated by the agreement, the power of Central government cannot be said to have been used in ultra vires manner¹¹ and the following observation of the Supreme Court justify the same:

1. A delegate of the legislature can exercise the power of exemptions in fiscal statute.
2. The validity of an agreement made under this section is to be determined by ascertaining whether it is within the parameters of legislative provision
3. The principles governing the interpretation of treaties are not same as those governing interpretation of statutory language¹².

The same powers as are enshrined in Sec 90 can be exercised under Sec 90A in relation to agreements between specified associations for double taxation relief which have been adopted by central government.

Effect of Agreement

The effects of an agreement pursuant to this section are as follows:

- a. If no tax liability is imposed under this Act, the question of resorting to the agreement would not arise. No provision of this agreement can possibly fasten a tax liability where the liability is not imposed by this act¹³.

¹¹ Ibid at pp 734

¹² CIT v VR SRM Firm 208 ITR 400

¹³ CIT v Muthaiah 202 ITR 508

- b. If tax liability is imposed by this act, the agreement may be resorted to for negating or reducing it¹⁴.
- c. In case of difference between the provisions of the Act and of an agreement u/s 90, the provisions of agreement prevail over the provisions of this act and can be enforced by the appellate authorities and the court. However as provided by sub-sec (2) the provisions of this Act apply to the assessee in the event they are more beneficial to him¹⁵.

Tax treaties generally contain a provision to the effect that the laws of the two contracting States will govern the taxation of income in the respective state except when express provisions to the contrary is made in the treaty. It may so happen that the tax treaty with a foreign country may contain a provision giving concessional treatment to any income as compared to position under Indian law existing at that point of time. However, the Indian law might be subsequently amended reducing the incidence of tax to a level lower than what has been provided in the tax treaty.

Since the tax treaties are intended to grant tax relief and not put residents of a contracting country at disadvantage vis-à-vis taxpayers, Section 90 was amended to clarify that any beneficial provision in the law will not be denied to a resident of a contracting country merely because the corresponding provision of the tax treaty is less beneficial.

In CIT v Vishakhapatnam Port Trust¹⁶ the Andhra Pradesh High Court has held that:

“Though under section 9(1) (ii) all income arising, whether directly or indirectly, through or from any “business connections” in India shall be deemed to accrue or arise from India, the charging section 4 as well as the definition of “total income” in section 5 are expressly made subject to the provision of the Act, which means that they are subject to Sec 90. By necessary implications it is subject to terms of Double Taxation Avoidance Agreement., if any entered into by government. Even assuming that all the profits of a foreign company are to be deemed to accrue or arise in India, under section 9 of the act, the provisions of the articles of the agreement will prevail over under section 9. In effect,

¹⁴ Ibid

¹⁵ CIT v Estienne 242 ITR 422; Arabian Express V UOI 212 ITR 31, CIT v SRM Firm 208 ITR 400

¹⁶ CIT v Vishakhapatnam Port Trust (1983) 144 ITR 146, 160 (AP)

such profits of a foreign company will not be liable to tax under Sec 9 except to the extent allowed by agreement with the foreign country.”

While the assessee can choose to be taxed under the Double Taxation Avoidance Agreement and the Act whichever is more beneficial, in view of the introduction of General Anti Avoidance Rules¹⁷ in Chapter X-A, any assessee entering into impermissible avoidance agreement is denied the above mentioned benefit.

Consequential Changes

1. A change has also been made in the provision of the act relating to recovery of arrears by the inserting a new section 228A. Where the tax treaty provides for the recovery of taxes due to the Government of one treaty country in the other and the Government of the foreign country or authority specified in this behalf in the tax treaty sends to Central board of Direct Taxes a certificate for the recovery of any tax due in foreign country, the board has been empowered to send certificate to the Tax Recovery Officer within whose local jurisdiction the property of the defaulter is situated and thereupon the Tax Recover officer will proceed to recover dues in the manner specified in the Act. Likewise if a taxpayer in India has property in the foreign country, the Assessing officer will be able to send a certificate to the Board certifying the amount of arrears due from the taxpayer and thereupon the Board will take action for the recovery of the dues in the foreign country in accordance with the terms of the tax treaty.
2. The Companies Profit Surtax Act¹⁸, Wealth Tax Act¹⁹ and Gift Tax Act²⁰ also contained similar provision enabling the Central Government to enter into agreement with foreign countries for avoidance double taxation with respect to taxes levied in these acts. The corresponding provision in these acts were also brought in line with the provisions of the Income Tax Act. However the Profit Surtax Act and the Gift Tax Act have now been repealed and are non-existent.

¹⁷ By Finance Act 2012

¹⁸ Sec 24A of the Companies Profit Surtax Act, 1964

¹⁹ Sec 44A of the Wealth Tax Act, 1957

²⁰ Sec 44 of the Gift Tax Act, 1958

3. Under the provisions of Sec 195 of the Act, any person responsible for paying to a non-resident tax payer or to a foreign tax payer any sum, other than interest on securities, salary or dividends, chargeable to income tax in India is required to deduct at income tax thereon at rates in force. Where the person responsible for paying to a non-resident, considers the whole amount would not be chargeable to income tax, he may apply to the Assessing officer to determine the appropriate proportion of such sum chargeable to tax. In such situation the tax is required to be deducted from the portion as determined by the Assessing Officer. This facility for deducting tax only from a portion of the sum payable is not available in cases where the payment is by way of interest, loyalty or fee for technical services to a foreign company. In some of the bilateral agreement for avoidance of double taxation, it has been provided that any or all the income referred to above would be taxed in India on net basis. Further, under certain tax treaties, income by way of royalty or fee for technical service is charged to tax on net basis in cases where such income is attributable to "Permanent Establishment" of the foreign enterprise in India. As a result in large number of cases relating to payment of royalty, fee for technical service etc. to non-resident, tax required to be deducted at source was much larger than financial liability. With a view to avoiding such situation Sec 195 has been amended to empower the Assessing officer to determine, in all cases of payment of interest, dividends, royalties, fees for technical services, paid to a foreign company or to a non-resident taxpayer, the appropriate proportion of the amount from which tax is deducted at source.
4. Under the previous scheme deduction of tax at source, even in cases where lower rate of tax on income was provided by the tax treaty, tax had to be deducted at the rate prescribed in law. As a result in many cases, the amount of tax deducted from the sums remitted to the foreign companies was larger than the final tax liability, thus requiring filing of claims for refund. With a view to correcting this position, Sec 2(37A) of the Act has been amended to secure that the tax deducted at source is for final liability at the rate applicable in a particular case.
5. Section 115A of the Act, provided for special rates of tax in respect of income from dividends, royalty, technical fee etc. in the case of a foreign company. Sec 44D of the Act provides that such income in the hands of foreign companies shall be taxed on

gross basis without allowing for any deduction in respect of expenditure. By the Direct Tax Laws Amendment Act, 1989, an insertion was made in sec 115A to provide for special rate of tax in respect of income of foreign company from units of mutual fund. However no corresponding amendment was made in sec 44D. With a view to bring parity in respect of incomes which are taxed at special rate in respect of foreign companies, Sec 44D of the act was amended to clarify that the income from units of mutual fund in the hands of foreign company would also be taxed on gross basis.

6. Through Finance Act 2001, an explanation has been inserted in section 90 of the Income Tax Act to clarify that the charge of tax in respect of foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favorable charge or levy of tax in respect of such foreign company.
7. The central government has notified²¹ that where an agreement entered into by the Central Government with the Government of any country outside India for granting relief of tax or as the case may be for avoidance of double taxation, which provides that any income of a resident of 'India may be taxed' in the other country, such income shall be included in the total income chargeable to tax in India in accordance with the provisions of the Act and relief shall be granted in accordance with the method for elimination or avoidance of double taxation provided in such agreement. A similar notification²² has been issued for agreements entered into by any specified association in India with any specified association outside India.

Remedy

An assessee can make application for refund under section 237 for relief under sec 90. An order under sec 237 is appealable order [vide sec 246(1) (k)] and an appeal lies to first appellate authority. Against the order of such appellate authority a further appeal lies to Income tax Appellate Tribunal and an appeal is maintainable against the decision of Appellate Tribunal to the High Court on substantial question of law. For resident assessee aggrieved by the tax

²¹ Notification no S.O. 2123 [E] dated August 28, 2014

²² Notification no S.O. 2124 [E] dated August 28, 2014

authorities of any country outside India, the mutual agreement procedure is provided under rule 44G.

Countries with which no agreement exists

As regards to income which accrues to a resident of India, in a country with which there is no such agreement the relief is provided in sec 91. It makes provision for grant of unilateral relief by the Government of India in respect of incomes which had suffered tax both in India and in the country with which there is no agreement for double taxation relief or for avoidance of double taxation. In other words, this section is attracted for relief against double taxation only if the income derived by the assessee is from the foreign country with which there is no reciprocal agreement between that country and India for relief of or avoidance of double taxation. Where there is a reciprocal agreement, the relief has to be granted under that section only²³

The object of the section is that the amount of Indian income tax paid or the amount of tax paid in foreign country whichever is lower, is allowed as a deduction from the tax payable under the Act on such doubly taxed income²⁴. This section does cater to contingencies for such Indian residents to whom such foreign income accrues. It empowers them to claim the deduction on the income which is doubly taxed, whichever rate is lower, will be admissible and in case where both the rates are equal then the rate which is applicable in India will be applicable to him²⁵.

In order to be able to obtain relief, the assessee must show that²⁶

1. He was a resident of India in the previous year for which relief is claimed
2. The income on which relief is claimed accrued or arose outside in a country with which there is no agreement for avoidance of double taxation and such income is not deemed to arise in India
3. He had paid in that country, income tax by deduction or otherwise under the law being in force in that country.

²³ CIT v Carew & Co Ltd (1979) 120 ITR 540, 544 SCC

²⁴ K.V. AL.M. Ramanathan Chettiar V CIT (1973) 88 ITR 169, 183 (SC)

²⁵ CIT v Yawar Rashid (1996) 218 ITR 699,704 (M.P.)

²⁶ Supra Refer Note 24.

Implication of doubly taxed income

The phrase “such doubly taxed income” has reference to²⁷ the foreign income which is again being subjected to tax by its inclusion in the computation of income under the Indian law and not the same income under an identical head of income in both the countries. The consideration that the income has been delivered under a particular head does not have much relevance. It has been held to be a reference to the tax which the foreign income bears, and the income is again burdened by the Act by being included in the total income chargeable under sec 4.

The relief under section 91 is available only to residents and non-resident partner of a registered firm. In the case of residents, relief is allowed at the Indian rate of tax or tax of other country whichever is lower and is subject to the assessee producing proof that the income in question has suffered tax in the other country. A non-resident partner whose share in the firm includes any income which has accrued in country with which there is no agreement, is also entitled to the same relief.

Since the relief is permissible to only a person, the Govt. of India issued a notification to cure the difficulty in cases where the assessee (i) is a firm or (ii) it is a Hindu Undivided Family. The concessions would be shown in respect of the assessment of income of partners in a firm registered in India but unregistered elsewhere or vice-versa.

The language of subsection (1) of section 91 designates the person entitled to relief as the very person who has paid taxes in both the countries. The application of this principle in relation to firms would permit relief only in the following cases:

- i. Where the firm is assessed as unregistered firm both in India and in the foreign country.
- ii. Where the firm is registered in India and the partners are directly assessed on their share income of the registered firm, both in India and in the foreign country

To curb the inequity caused by restriction of relief to these two cases it was instructed by CBDT that the relief²⁸ cannot be refused on the score of failure to secure registration

²⁷ CIT v Arunachalam Chettiar (1963) 49 ITR 574

²⁸ Notification No6, dated 17 Mar 1944

The controversy- Gross or net dividend

Treatment of income from foreign dividend, whether should be of gross or net income has been the subject matter of decisions especially in the context of computation, where there is no agreement with the country, where such dividend income arises. It stands to reason what, where it is covered by DTAA, gross dividend will have to be taken to avail tax credit. The Madras High Court in CIT v United India Insurance Co. Ltd²⁹ assumed that gross dividend alone should be taken for tax purposes, since the law in United Kingdom did not treat the tax on such dividend at source as the income of the shareholder. The court referred to the agreement between India and United Kingdom and the provisions under Sec 91 for the proposition that the gross dividend should be included. It appears that treatment can be different depending whether it is covered by agreement or otherwise. The tribunal held in favor of the assessee following the decision of CIT v Hobbs³⁰. The High Court felt that the tribunal had overlooked the decision of Supreme Court in CIT v Clive Insurance Co. Ltd³¹. It was also pointed out that the Madras High Court had itself taken the same view that gross dividend should be included in view of provisions in UK law and the agreement between India and UK.

Such a view cannot be correct as had been pointed out by the Bombay High Court³² wherein the decision of Supreme Court in Clive Insurance Co. Ltd. and Kerala High Court in Hobbs case were found to be inapplicable again in the context of U.K. dividend drawing support from another precedent in CIT v Shaw Wallace and Co. Ltd³³. It was observed that the tax credit scheme in UK will be irrelevant for computation of income in India, since Indian law cannot take cognizance of foreign law. The provisions under the UK law was also understood as giving credit only for domestic shareholders. It explained the decision of Supreme Court in Clive Insurance Co. Ltd as one in the context of double taxation law and even had expressed a reservation whether Clive case would have application after a change in UK law providing tax credit only for shareholders in UK by UK Finance Act 1972. These aspects were however not discussed in decision of High Court in United India case leaving some scope for future

²⁹CIT v United India Insurance Co. Ltd (2000) 243 ITR 114 (Mad.)

³⁰ CIT v Hobbs (YNS) (1979) 116 ITR 20 (Ker)

³¹ CIT v Clive Insurance Co Ltd (1978) 113 ITR 636 (SC)

³² CIT v Tuslsidas Kilachand (199) 210 ITR 844 (Bom)

³³CIT v Shaw Wallace and Co. Ltd (1981) 132 ITR 446 (Cal)

controversy. The Bombay High Court in respect of Ceylon dividend held that it was taxable on the basis of gross dividend and not net dividend after deduction at source³⁴. The decision of High Court was based on following an earlier case³⁵ in which it was not in issue whether tax should be levied on gross or net dividend, but dividend is taxable at all when it could not be received in India because of restriction on remittances.

The better solution would be that only the net dividend would be assessable in every case of foreign dividend, but for the computation of double tax avoidance agreement, one may have to consider the effects of law in the country from which dividend is received and specific provisions under the double agreement in this regard. Whenever credit for tax paid on dividend is reckoned for purposes of elimination of double taxation, gross dividend will alone be relevant. This would reconcile the possible conflict as to whether gross or net dividend would be assessable in every case.

Problems in the Application of Double Taxation Avoidance Agreement

Even recent agreements unfortunately do not make any attempt to solve outstanding issues as regards the places of accrual in e-commerce or treatment of intangible presence of a non-resident for inference of permanent establishment. There is also a problem with partnership firms with one country treating the firm as a corporate entry while other taxes the partners directly which makes the application of the agreement difficult. Different method of taxing dividend either directly on the shareholder by way of with-holding tax or by way of additional tax is yet to be resolved in many agreements. It is indeed surprising that Government of India has not thought of providing for a solution for Hindu-Undivided families and its approach is merely to follow U.N. or OECD Models, which are outdated and have been more academic than realistic.

³⁴Madhavrao J Scindia V CIT (2000) 243 ITR 683 (Bom)

³⁵Meherbai N Sethna v CIT (1994) 209 ITR 453 (Bom)

Recommendations

- a. Admission of tax residency certificate should not be a mandatory condition for claiming benefits under Sec 90 & 90A.
- b. Suitable provision may be made alternately in the Act for refund of withholding tax on submitting the proof of tax residency the non-resident without requiring him to file return of income. The payer deductor in this regard may be authorized to refund such excess tax as deducted after making adjustment in the subsequent deposit of tax
- c. The rate of tax specified by the tax treaty, if needs to be enhanced by surcharge and education cess under domestic law should depend on respective terms as provided in the tax treaty generally which defines taxes as provided in the tax treaty to include income tax and surcharge thereon and any identical or substantially similar taxes thus providing for no lee way of adding surcharge and education cess over the maximum tax rate prescribed
- d. The overtly declared intent of DTAA being to avoid double taxation, there seems no rational to shut doors for arbitration which is designed to attain avoidance of double taxation in practice where the best efforts of the Contracting States by way of persuasion have failed. Therefore mutual agreement procedure for resolution of grievance, should be amended to provide for mandatorily resolution of dispute by way of arbitration.

Conclusion

Tax treaties are considered to be mini legislations containing within themselves all the relevant aspects or features which are at variance with general taxation laws of the respective countries. Such variance are in some cases in addition to the existing local tax laws and in other cases in lieu thereof. The provisions of Sec 5 and 6 if the Act shall have to be read subject to provisions of agreement and that the agreement, by necessary implication takes away the power of Indian government to levy tax in respect of certain categories as mentioned in the agreement.

Principles of interpretation of statutes are not applicable to tax treaties. It has to be interpreted in good faith in accordance with the ordinary meaning given in the context and in light of the objects and purpose as it is an agreement and not a taxing statute. The laws in force in either country continue to govern the assessment and taxation of the income in the respective countries except where provisions to contrary have been made in the agreement. Tax liability arising in respect of a person residing in both contracting States has to be determined with reference to his close personal and economic relations with one another.