

SATURDAY INTERNATIONAL TAX GYAN !!!

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Steria (India) Ltd. v. Commissioner of Income-tax-VI.¹

Protocols in DTAA, elaborate and complete the text of a treaty, sometimes even altering the text.

Facts:

- The assessee, 'S' was a public limited company registered under the laws of India and was a leading provider of IT driven business services for its client's core business processes.
- 'SF', was a partnership firm, incorporated as per the laws of France having its registered office at France. It centralized technical skills to carry on management functions.
- The assessee entered into a Management Services Agreement with 'SF' whereby 'SF' provided various management services to the assessee with a view to rationalize and standardize the business conducted by the assessee in India in accordance with the international best practices.
- Assessee had also appeared before AAR wherein it was held that such Protocol does not apply automatically.

Assessee's contention:

- Petitioner contended that having regard to Clause 7 of the 'Protocol' the less restrictive definition of the expression 'fees for technical services' appearing in the Indo-UK DTAA, must be read as forming part of the India- France DTAA as well.
- Hence, benefit of MFN clause available in India-UK DTAA will be available to person taking benefit of India-France DTAA due to 'Protocol'.

Revenue's contention:

- Revenue contended that Protocol could not be treated as forming part of the DTAA itself. It further held that restrictions imposed by the Protocol were only to limit the taxation at source for the specific items mentioned therein. The restriction was only on the rates. Further, the 'make available' clause found in the Indo-UK DTAA could not be read into the expression 'fee for technical services' occurring in the India-French DTAA unless there was a notification under Section 90 of the Act issued by the Central Government to incorporate the less restrictive provisions of the Indo-UK DTAA into the India-France DTAA.

¹ [2016] 72 taxmann.com 1 (Delhi)

Ruling:

- Clause 7 thereof which is relevant for the present purposes reads as under:
"At the time of proceeding to the signature of the Convention between France and India for the avoidance of double taxation with respect to taxes on income and on capital, the undersigned have agreed on the following provisions which shall form an integral part of the Convention.
- 7. In respect of articles 11 (Dividends), 12 (Interest) and 13 (Royalties, fees for technical services and payments for the use of equipment), if under any Convention, Agreement or Protocol signed after 1-9-1989 between India and a third State which is a member of the OECD, India limits its taxation at source on dividends, interest, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate of scope provided for in this Convention on the said items of income, the same rate or scope as provided for in that Convention Agreement or Protocol on the said items income shall also apply under this Convention, with effect from the date on which the present Convention or the relevant Indian Convention, Agreement or Protocol enters into force, whichever enters into force later."
- The AAR appears to have failed to notice that the wording of clause 7 of the Protocol makes it self-operational.
- It is also not in dispute the separate Protocol signed between India and France simultaneously forms an integral part of the Convention itself. The preamble in the Protocol, which states 'the undersigned have agreed on the following provisions which shall form an integral part of the Convention', makes this position clear. Once the DTAA has itself been notified, and contains the Protocol including para 7 thereof, there is no need for the Protocol itself to be separately notified or for the beneficial provisions in some other Convention between India and another OECD country to be separately notified to form part of the Indo-France DTAA. Hence assessee can take benefit of MFN clause available in India UK DTAA.

Our comments:

- There are generally two types of Protocols in any DTAA, one in where the protocol become applicable automatically and one where protocol will become effective when government issues notification. Hence, it become effective after receiving consent.
- It is also advisable to always read Protocol as various beneficial provisions and amendments are mentioned in Protocol and protocol is an integral part of any DTAA. It is always available in the end of DTAA. Various DTAA with India which have Protocol are: Malaysia, Australia, Bangladesh, Canada, China, Germany, Italy, Japan, Hong Kong etc.

Section	Article 12 and clause 7 of Protocol
DTAA/Country	India- France
Court	Delhi
Date of Decision	28.07.2016

Note: Case law name in **Red**- in favour of the Revenue, **Green**- In favour of the Assessee, **Orange** = Partial.

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