

## SATURDAY INTERNATIONAL TAX GYAN !!!

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### Credit Suisse AG Vs. ACIT (IT)-2(1)(1)<sup>1</sup>

#### MAT provisions under Income Tax Act are not applicable to all Foreign Companies

#### Facts:

- Assessee is a foreign company incorporated in Switzerland and has Singapore Branch (CSSB) and also branch in Mumbai (CSMB).
- CSMB undertakes banking operation in India and constitute a fixed place PE of assessee.
- Income earned by CSSB is not offered to tax in India as it is a branch office situated outside India.

#### Assessee's contention:

- The assessee stated that the income is earned by CSSB not by CSMB and contended that same should not be included in Books of Accounts of CSMB.
- The assessee contended that the income earned is not attributable to PE in India as per domestic Laws.
- Assessee also contended that provision of sec 115JB were never intended to apply to all foreign companies but a foreign company which has PE in India.

#### Revenue's contention:

- The Revenue stated that certain income earned by CSSB not included in books of account of CSMB and income should be offered for tax.
- The Assessing officer contended that the assessee is liable for MAT since it has a PE in India.
- He also contended that Sec 115JB would be applicable to Foreign company considering the Explanation-4 of Section 115JB.

#### Ruling:

- Let's first understand the Article 7 of India-Switzerland DTAA and Sec 115JB- Explanation-4

#### Article 7:

*"The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the*

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<sup>1</sup> [TS-630-ITAT-2022(Mum)]

enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State **but only so much of them as is attributable to that permanent establishment.**”

- **As stated above, Business income will be taxable in the other state (i.e, India in our case) only when there is Permanent establishment in India and income is attributable to such PE.**

**Now let's analyze explanation 4 to section 115JB**

**Section-115JB Explanation-4**

*it is hereby clarified that the provisions of this section shall not be applicable and shall be deemed never to have been applicable to an assessee, being a foreign company, if—*

- (i) *the assessee is a resident of a country or a specified territory with which India has an agreement referred to in sub-section (1) of section 90 or the Central Government has adopted any agreement under sub-section (1) of section 90A and the assessee does not have a permanent establishment in India in accordance with the provisions of such agreement; or*
  - (ii) *the assessee is a resident of a country with which India does not have an agreement of the nature referred to in clause (i) and the assessee is not required to seek registration under any law for the time being in force relating to companies.*
- **It was held that there is tax treaty which existed between India-Switzerland and also income earned by foreign branch of assessee is not attributable to PE in India and hence MAT provision is not applicable to assessee on such income.**

**Our comments:**

1. Further if we consider the provision of business connection u/s 9 of the Income Tax Act also, it can be said that only such income is taxable in India which is attributable to the operations carried out in India. Relevant extract of Section 9(1)(i) is as under:

*“in the case of a business, other than the business having business connection in India on account of significant economic presence,] of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;*

*(b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export;*

*(c) in the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India;*

*(d) in the case of a non-resident, being—*

*(1) an individual who is not a citizen of India; or*

*(2) a firm which does not have any partner who is a citizen of India or who is resident in India;*  
*or*

*(3) a company which does not have any shareholder who is a citizen of India or who is resident in India,*

*no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations which are confined to the shooting of any cinematograph film in India;”*

2. MAT provisions are applicable to foreign company only in below mentioned situation:
  - a. PE of Foreign company should be present in India and the MAT provisions applicable to only income which is attributable to PE.
  - b. MAT provision is applicable to the foreign company of a country with whom India does not have treaty and such company is registered in India because of other laws.
3. **Thus, it can be said that having a PE is not the only criteria to charge tax or MAT on a foreign company we also need to check whether the income earned is related to that PE or not. If the income earned is not connect with the PE in India then such income cannot be charged to tax in India.**
4. Further to apply MAT provision company needs to maintain books of accounts as per Schedule III of the Companies Act, 2013.

<b>Section</b>	<b>Article 7 of DTAA&amp; Sec 115JB of Income Tax act 1961</b>
<b>DTAA/Country</b>	<b>India- Switzerland</b>
<b>Court</b>	<b>Mumbai Tribunal</b>
<b>Date of Decision</b>	<b>03.08.2022</b>

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

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**Thank you**