



# SATURDAY INTERNATIONAL TAX GYAN !!!

## #taxmadeeasy

### SITG No. 225

General Motors company , USA

vs

ACIT, Circle International Taxation

Fiscal Transparent Entity can be considered as liable to tax and a tax resident of the country where its owners are paying the tax in the same country on the income of such fiscal transparent entity.

28.09.2024



# Facts of the Case

- ❖ The assessee is a Limited Liability Company (LLC) incorporated in Delaware, USA, and claims to be a resident of the U.S. for tax purposes.
- ❖ During the AY 2014-15 and 2015-16 assessee company offered income to tax in India on account of receipts of fees for technical services received from two Indian entity at the rate of 15% by applying India US DTAA.
- ❖ Assessing officer observed that LLC is not entitled to claim the benefit of India-US DTAA. Accordingly, the Assessing officer proceeded to levy tax at 25% as per section 115A of the IT Act.
- ❖ The Assessee company had filed an appeal before the Dispute Resolution Panel (DRP) which upheld the order of the tax officer. Hence, the assessee company filed an appeal before the Delhi Tax Tribunal.

# Assessee's Contention

- ❖ The assessee has obtained a tax residency certificate (“TRC”) from the U.S. Internal Revenue Service, and also filed Form 10F indicating it qualifies as a U.S. tax resident.
- ❖ The company's structure is treated as fiscal transparent entity under U.S. law, i.e. their income is not subject to tax in their own hands in USA.
- ❖ Assessee contends that it is eligible to avail the benefits of DTAA since it qualifies the condition as a resident under Article 4 of India-USA DTAA.
- ❖ **The assessee argues that it qualifies the condition as a resident and ‘liable to tax’ in the resident state i.e. USA and accordingly should be allowed benefit of India USA DTAA.**

# Revenue's Contention

- ❖ The revenue contended that the assessee, being a LLC, is treated as a fiscally transparent entity under U.S. tax law i.e. **their income is not subject to tax in their own hands in USA**. So, LLC do not qualify as residents of USA in terms of Article 4 of India-USA DTAA.
- ❖ Further, revenue concluded that only persons or entities that are liable to tax in their country by reason of domicile, residence, citizenship, place of effective management or any other similar criteria are considered resident for the purpose of DTAA.
- ❖ **The revenue contented that LLC do not come under the special clause for partnership and trust as laid in para 1(b) of Article 4.**
- ❖ The AO proposed to assess the income at a rate of 25% as per income tax act, denying the lower rate provided under the DTAA.

# Legal provisions

## **Section 9 (1)(vii) of the Act:**

income by way of fees for technical services payable by—

- (a) the Government ; or
- (b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or
- (c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India :

## **Section 195 of the Act:**

Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries" ) shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:

# Legal provisions

## Article 4 of India- USA DTAA:

For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, provided, however, that

(a)	this term does not include any person who is liable to tax in that State in respect only of income from sources in that State; and
(b)	in the case of income derived or paid by a partnership, estate, or trust, this term applies only to the extent that <b>the income derived by such partnership, estate, or trust is subject to tax in that State as the income of a resident</b> , either in its hands or in the hands of its partners or beneficiaries.

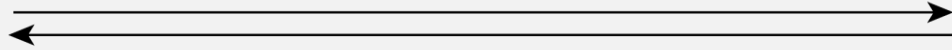
# Ruling

- ❖ The Hon'ble ITAT held that Tax Residency Certificate as received from the United States Internal Revenue Service in accordance with the requirement of the law as applicable to the assessee, being an LLC.
- ❖ The LLC is resident under Article 4 of the Indo-US Tax Treaty is recognized as a separate entity under U.S. law, qualifying as a "person" under the treaty.
- ❖ Further, the Hon'ble ITAT held that LLC with one member is treated as an 'entity' i.e. disregarded as separate from its owner for income tax purpose, that means it's income is reported under the income tax return of the owner.
- ❖ Reliance is placed on the judgement of Hon'ble Mumbai tribunal in case of Linklaters LLP v. ITO where in it is held that India-USA DTAA has to be given precedence wherein concept of fiscally transparent entity is the recognized way of recognizing the phrase 'liable to tax'. Thus, held that even when a partnership firm is taxable in respect of its profits not in its own right but in the hands of the partners, as long as the entire income of the partnership firm is taxed in the residence country, treaty benefits cannot be declined.

## US LLC



Fees received as FTS from two Indian Entities



Offered income to tax @ 15% as FTS & avail benefit of DTAA

## Indian Entities



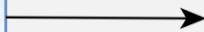
It is a Fiscal transparent entity and its partners pays tax on their share of profit in US

Assessing Officer



Contended that LLC is not entitled to claim the benefit of India- US DTAA ,as a result, tax @ 25% as per section 115A of IT Act has been imposed.

Judgement



ITAT held that LLC, although being a fiscally transparent, are "liable to tax" under US law & therefore, entitled to DTAA benefits. Hence allowing 15% tax rate.



## Our Comments

- ❖ The ruling highlights the importance of understanding the implications of international tax treaties, particularly regarding residency and tax liability.
- ❖ It also acknowledges that entities like LLCs can qualify for treaty benefits even if treated as fiscally transparent under local laws.
- ❖ Emphasizes the need for careful interpretation of terms like "liable to tax," which can impact eligibility for treaty benefits.

<b>Section/Article</b>	Section 9, read with section 90 and 115A, of the Income-tax Act, 1961 read with article 4 and 12 of Indo-USA DTAA
<b>DTAA/Country</b>	India USA
<b>Court</b>	Delhi ITAT
<b>Date of decision</b>	05.09.2024

**Note:** Case law name in **Red**- in favor of the revenue, **Green**-In favor of the Assessee, **Orange** = Partial



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