SATURDAY INTERNATIONAL TAX GYAN !!!
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SITG No. 235

Amarchand Mangaldas & Suresh A Shroff & Co.

vs

ACIT

Filing tax return is not mandatory for FTC eligibility as taxes withheld abroad qualifies as taxes paid and allowed full FTC to prevent double taxation, in line with DTAA provisions and established precedents

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07.12.2024

ITA No.852/M/2024 [30-09-2024]

Jain Shrimal & Co.

Facts of the Case

- **Amarchand Mangaldas & Suresh A. Shroff & Co.** (“Appellant”) is a partnership firm providing legal services and received professional fees from clients in various countries, including Japan, Brazil, China, and Nepal, where taxes were withheld at source.
- The firm claimed **Foreign Tax Credit (FTC)** in India for taxes withheld under the relevant **Double Taxation Avoidance Agreements (DTAAs)** without filing tax return abroad.
- The **Assessing Officer (AO)** denied FTC, arguing that services rendered were non-taxable in Japan.
- The **CIT(A)** upheld the denial of FTC and issued an enhancement disallowing deductions for taxes withheld in countries such as Brazil, China and Nepal.

Assessee's Contention

- The Assessee contented that taxes withheld abroad qualify for FTC, under the DTAAs and Section 90 of the Income Tax Act, as the income was taxed in the source country.
- The Assessee further contented that it cannot be denied based on interpretation of Article 14, since Article 14 of the India-Japan DTAA was applicable only to individuals and thus not applicable to the appellant, which is a partnership firm. The services were taxable as "Fees for Technical Services" under Article 12 of the DTAA, not under Article 14.
- Assessee contended that Article 23 of DTAA does not mandate filing a tax return in the foreign jurisdiction for FTC eligibility.

Assessee's Contention

- In all cases in which interpretation of residence country about applicability of a treaty provision is not the same as that of source jurisdiction about the provision and yet the source country levied taxes whether directly or by way of tax withholding, tax credit cannot be declined.

Revenue's Contention

- As per the ld. AO, the provisions of Article 14 of the India-Japan DTAA dealing with Independent Personal Services would be applicable to the case of the Appellant; and since the Appellant did not have a fixed base in Japan for more than 183 days (which is a prerequisite for taxability under Article 14), no tax was liable to be deducted in Japan and consequently, FTC cannot be granted to the Appellant in India for the taxes wrongly withheld in Japan.

- The Revenue maintained that FTC was not allowable without filing a tax return in the foreign jurisdiction, **arguing that taxes withheld do not qualify as taxes "paid."**.

Legal provisions

Article 14 of India-Japan DTAA:

1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that Contracting State **unless he has a fixed base regularly available to him** in the Contracting State for the purpose of performing his activities or **he is present in that other Contracting State for a period or periods exceeding in the aggregate 183 days** during any taxable year or 'previous year' as the case may be. If he has such a fixed base or remains in that other Contracting State for the aforesaid period or periods, the income may be taxed in that Contracting State but only so much of it as is attributable to that fixed base or is derived in that other Contracting State during the aforesaid period or periods.

2. The term 'professional services' includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants

Legal provisions

Article 12 of India-Japan DTAA:

The term **'fees for technical services'** as used in this article means payments of any amount to any person other than payments to an employee of a person making payments and to any individual for independent personal services referred to in article 14, in consideration for the services of a managerial, technical or consultancy nature, including the provisions of services of technical or other personnel.

Legal provisions

Article 23 of India-Japan DTAA:

Double taxation shall be avoided in the case of India as follows :

(a) Where a resident of India derives income which, in accordance with the provisions of this Convention, may be taxed in Japan, India shall allow as a deduction from the tax on the income of that resident an amount equal to the Japanese tax paid in Japan, whether directly or by deduction. Such deduction in either case shall not, however, exceed that part of the income-tax (as computed before the deduction is given) which is attributable, as the case may be, to the income which may be taxed in Japan. Further, where such resident is a company by which surtax is payable in India, the deduction in respect of income-tax paid in Japan shall be allowed in the first instance from income-tax payable by the company in India and as to the balance, if any, from surtax payable by it in India.

Legal provisions

Article 23 of India-Japan DTAA:

(b)Where a resident of India derives income which, in accordance with the provisions of this Convention, shall be taxable only in Japan, India may include this income in the tax base but shall allow as a deduction from the income-tax that part of the income-tax which is attributable, as the case may be, to the income derived from Japan.

Ruling

- Article 14 of the India-Japan DTAA was applicable only to individuals and thus not applicable to the Appellant, which is a partnership firm.
- The fees earned by the Appellant firm in Japan was taxable as fees for technical services under Article 12 and that the FTC ought to have been granted to the Appellant firm for the taxes withheld in Japan.
- It held that when the source jurisdiction has taken a reasonable and bona fide view, which is not manifestly erroneous, that taxes should be withheld at source, FTC should be provided by the resident jurisdiction even though the legal position in the residence jurisdiction may not be the same. Article 23 does not require filing of return in source to claim FTC.

Our Comments

- Filing of income is not mandatory if we do not want to claim any refund from foreign jurisdiction and taxes withheld are enough to claim FTC in residence jurisdiction.
- Wherever in Article 14, there are words such as “he” or “individual”, it will only applies to Individual and not Company or Firm which has been claimed in the above judgment.
- Further, if a service which is of legal/ professional nature and not covered under Article 14 could be covered under Article 12.
- If in the case where tax is withheld even if the same is not as per DTAA, can assessee still claim the credit of same within the same residence?
- If TDS is not withheld as per DTAA, can credit of TDS be claimed u/s 91?

Section/Article	Section 90(1) of the Income-tax Act, 1961 and article 12 & 14 of DTAA
DTAA/Country	India Japan DTAA
Court	ITAT of Mumbai
Date of decision	30-09-2024

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

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