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SITG No. 240

Right to Choose Between DTAA and IT Act

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Introduction

In the realm of international taxation, the interplay between the provisions of the Income-tax Act, 1961, and the Double Taxation Avoidance Agreement (DTAA) holds significant importance. As per the **established principle under Section 90(2) of the Income-tax Act**, in cases where a DTAA is in force, the provisions of the Act or the DTAA, whichever are more beneficial to the assessee, shall prevail. This principle ensures that taxpayers are not disadvantaged by conflicting or overlapping provisions, thereby fostering a fair and equitable tax framework in cross-border scenarios. Assessee will have the liberty to choose the provision which is more beneficial to him.

This principle shall only be applicable in relation to the provisions which are overlapping under the Income tax act and DTAA. Where, there is no overlapping provision then the Income tax act or DTAA whichever is applicable shall prevail.

TRC is not mandatory for subscribing to DTAA

- **Skaps Industries India Pvt Ltd V. Income Tax Officer International Taxation, Ahmedabad ITA Nos. 478 and 479/Ahd/2018**

As per Income tax act section 90 sub section 4, Tax residency certificate (TRC) is mandatory to claim benefit of DTAA. However, the DTAA does not provide for any requirement of having TRC to subscribe to a DTAA. If a person can establish that he is a resident of one of the countries who have entered into the agreement they can claim benefit of that DTAA.

Reliance in this regard is placed on Skaps Industries India Pvt Ltd V. Income Tax Officer International Taxation, Ahmedabad ITA Nos. 478 and 479/Ahd/2018

PE provision could over rule business income

❖ **Commissioner of Income-tax v. P.V.A.L. Kulandagan Chettiar (2004) 267 ITR 654/137**

- The respondent firm, an Indian resident, earned income from rubber estates and capital gains from property sales in Malaysia.
- The treaty provisions prevailed, **exempting the business income from taxation in India** since the firm had closer economic ties to Malaysia and no permanent establishment in India in regard to carrying on business of rubber plantations in Malaysia.
- Furthermore, capital gains from immovable property in Malaysia were also covered by the treaty, ensuring they were taxed only in Malaysia.

Definition of term liable to tax as per Local law and DTAA

❖ **Saket Kanoi Vs DCIT (2024) 168 taxmann.com 418 (Delhi - Trib.)**

- UAE resident earning capital gain income from mutual fund in India will only be taxable in UAE and not in India
- **The DTAA prevents both actual and potential double taxation**, and its provisions apply even if the other contracting state (UAE) chooses not to exercise its taxing rights.
- Hence, DTAA is not only applicable when an income is taxed in two countries but is also applicable to check in which country an income could be taxed i.e. resident country, source country or both country.

Our Comments

There could be some scenario's where even if the provision of DTAA is more beneficial but assessee may choose to not take the more beneficial provision.

For eg: Tax withholding rate for FTS as per Income tax act is 20%+4% cess i.e. 20.8% and per India-Bulgeria DTAA the tax rate is 20%. Now, although the tax rate in India-Bulgeria DTAA is more beneficial to assessee, however if assessee get's his TDS deducted as per Income tax act then as per section 115A of the Income tax act he will not be required to file Income tax return in India whereas if tax is deducted as per the DTAA he might have to file Income tax return.

Our Comments

Now, in such case although DTAA is more beneficial as far as tax is concerned. However, if relief from filing Income tax return in India is more important to assessee he may choose to get TDS deducted at higher rate. Hence, choosing more beneficial provision is the choice of assessee and not a compulsion for him.

Also, in the above scenario the non-resident could be denied credit in his country if tax is not deducted as per DTAA.

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