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Delhi Bench of Tribunal (in the case of Daler Singh Mehndi) rules on taxability in India of income earned abroad by Indian resident artist in light of relevant tax treaties and provisions of Section 90(3) of Income Tax Act, 1961

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Facts of the case

- The taxpayer, an individual is a public entertainer, an artist engaged in the profession of singing, music and performing stage shows in India as well as abroad. During assessment years (AYs) 2000-01, 2001-02, 2003-04 and 2004-05, the taxpayer had performed stage shows in USA, Canada, Netherlands etc. and has derived income therefrom.
- The claim of the taxpayer is that taxpayer's income is covered under Article 17/ 18 of double taxation avoidance agreement (DTAA) with respective countries and hence according to those agreements such income 'may be taxed' in that other state only. Accordingly, the taxpayer claimed exemption in India with respect to all these income in the tax returns filed for the relevant AYs.
- The assessing officer (AO) denied the taxpayer's claim as it could not produce any proof of taxes paid in those countries.
- On appeal, Commissioner of Income Tax (Appeals) (CIT(A)) allowed the taxpayer's claim of exclusion of income earned from Canada, from taxation in India, as per the DTAA, as the taxpayer filed evidences of tax paid in that country. With respect to income earned in other countries (i.e. USA, Netherlands etc.), as the taxpayer could not furnish the details of taxes paid in those countries, the CIT(A) also rejected the taxpayer's claim.

Issues before the Tribunal

- The revenue filed appeal before the ITAT on the ground that CIT(A) wrongly applied the DTAA to allow income earned from Canada to be excluded from taxation in India. The revenue's argument in these cases was that the income earned in foreign country is to be included in the total income of the taxpayer in India and it would be granted credit for taxes paid on that income in the foreign country.
- The taxpayer also preferred cross appeals, to claim that income derived by the taxpayer from other foreign countries (USA, Netherlands etc.) shall be taxed only in those countries as per the respective DTAA. The taxpayer contended that the term 'may be taxed' used in Article 17/ 18 of the DTAAs gives exclusive power to the source country to tax the income of artist / athlete.
- The taxpayer relied on the Supreme Court (SC) ruling in DCIT v. Turquoise Investment & Finance Ltd. [2008] 300 ITR 1, wherein it was held that the use of the term 'may be taxed' in the provisions of the DTAA shall mean that the relevant income shall be taxed in that particular state. Therefore, according to the ruling, in such a case, the income elimination method for elimination of double tax must be given preference over the tax credit method.

Ruling of the Tribunal

- ITAT observed that decision of SC in Turquoise Investment and Finance Ltd. was rendered for the years prior to introduction of section 90(3) of the Act. Subsequently, the Act was amended to introduce section 90(3) with effect from April 1, 2004 and a notification no. 91/2008 was issued under the said section.
- ITAT noted that Section 90(3) states that any term used but not defined in Act / in the DTAA, shall have the meaning assigned to it in a notification issued by the government. Notification no. 91/2008 issued by CBDT states that when the term 'may be taxed' is used in a DTAA, such income shall be included in total income chargeable to tax in India and relief shall be granted in accordance with the method for avoidance of double taxation.
- ITAT relied on co-ordinate bench ruling in the case of Essar Oil Ltd v. ACIT [2014] 42 taxmann.com 21 Mumbai, wherein it was held that ratio of the earlier judgments on the interpretation of the expression 'may be taxed' (that once income is taxable in the country of source, then country of residence is denied of the right to levy tax on such income), would no longer apply after insertion of section 90(3) of the Act with effect from April 1, 2004.
- Thus, ITAT held that SC's decision in the case of Turquoise Investment and Finance Ltd. was applicable prior to AY 2004-05 i.e. before insertion of section 90(3) in the Act. Therefore, income earned by a tax resident of India prior to AY 2004-05 in foreign countries (USA, Netherlands etc.) is to be excluded from taxability in India as per the relevant language of the DTAAs.
- The ITAT further held that income earned by taxpayer for AY 2004-05 in foreign countries shall be included in the total income chargeable to tax in India and relief shall be granted to taxpayer in accordance with method of elimination or avoidance of double taxation as per the relevant DTAA.

Conclusion

The Delhi Bench of ITAT has held that after insertion of section 90(3) and as clarified by Notification no. 91/2008, in case the term 'may be taxed' is used in a DTAA, the subject income would be included in the income chargeable to tax in India and tax credit to be allowed for the taxes paid in foreign country. The taxpayer would not be able to exclude that income from his taxable income and the decision of SC would no longer apply from AY 2004-05 and onwards on account of insertion of section 90(3), read with Notification no. 91/2008.

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