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Ahmedabad Tribunal* holds that an eligible assessee cannot be declined tax treaty benefit on grounds that assessee has not been able to furnish tax residency certificate

** ITA Nos. 478 & 479/Ahd/2018*

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Facts of the case

- Skaps Industries India Pvt. Ltd. [Assessee], an Indian company, had availed the services of Teems Electric Inc. [TEI], a USA based company in relation to installation and commissioning of certain equipment purchased by the Assessee. The Assessee made certain payments to TEI for these services.
- The Assessing Officer [AO] was of the view that the payments for electrical and mechanical labour are for the services of the engineers in India and therefore covered by the definition of fees for technical services [FTS] as per section 9(1)(vii) of the Income-tax Act, 1961 [Act]. The AO thus held that the Assessee was liable to withhold tax on such payments.
- The Assessee contended that the recipient was eligible for the benefits of the India-USA tax treaty [tax treaty] and the said payments are not taxable under the tax treaty.
- The AO however held that the payment should be taxable both under section 9(1)(vii) of the Act and also under Article 12 of the tax treaty.
- Against the order of the AO, the Assessee filed an appeal before the Commissioner of Income-Tax (Appeals) [CIT(A)].
- However, certain other issues were taken up by the CIT(A) for the first time at this stage, which *inter alia* included requirement of tax residency certificate [TRC] as per section 90(4) of the Act.
- Based on independent analysis, the CIT(A) amongst other aspects held that as the Assessee did not furnish the TRC, it was not eligible for the benefit of the tax treaty, in view of the provisions of section 90(4).
- Aggrieved by the order of the CIT(A), the Assessee filed an appeal before the Tribunal.

Issues under consideration

Whether the Assessee is eligible for the tax treaty benefits in the absence of TRC?
Whether the payments made by the Assessee to TEI are liable to withholding of taxes in India?

Ruling of the Tribunal

- The Tribunal has given certain directions to the CIT(A) and restored the matter back to the CIT(A) for fresh consideration.

Whether tax treaty benefits can be availed in the absence of TRC?

- The Tribunal has identified that eligibility of TEI to avail the beneficial provisions of the tax treaty, is a primary issue in this appeal.

- The Tribunal noted that there are two aspects of this issue viz. i) whether treaty benefit could be declined on the ground that TEI did not or could not furnish the TRC under section 90(4) of the Act? ii) whether TEI did not satisfy the requirements of the tax treaty on merits?
- Based on the provisions of section 90, the Tribunal has observed that the only limitation to section 90(2) is General Anti Avoidance Rules placed under section 90(2A) which starts with non-obstante clause and hence, it overrides tax treaty benefits provided under section 90(2). The provisions of section 90(4) which deals with requirement of TRC, do not start with a non-obstante clause vis-à-vis section 90(2). Therefore, the provisions of section 90(4) cannot be construed as a limitation to, or override the provisions of section 90(2).
- The ITAT therefore observed that in relation to section 90(4), the fundamental approach has to be that it will be applicable only when the same are more beneficial to the Assessee vis-à-vis the provisions of the applicable tax treaty.
- It is further observed that section 90(4) can only be pressed into service as a provision that is beneficial to the Assessee; once this provision is complied with, the AO is denuded of the powers to requisition further details in support of the claim of the Assessee for tax treaty benefits.
- Based on the above, the ITAT held that an eligible Assessee cannot be declined tax treaty protection under section 90(2) on the grounds that the Assessee has not been able to furnish a TRC.
- However, the Tribunal has agreed to the plea of the Revenue that even in case section 90(4) is not applicable, there has to be some reasonable evidence about entitlement of TEI to claim the benefits of the tax treaty.
- In order to be entitled to the benefits of the tax treaty, the Tribunal observed that a foreign enterprise has to establish that it is a resident of the other contracting state and the onus for satisfying the same by any other mode other than TRC, may be far more onerous than furnishing a TRC.
- The Tribunal has thus held that even when provisions of section 90(4) are kept aside, the eligibility of TEI for the tax treaty benefits are not established. In view of the same, the ITAT has held that arguments in relation to scope of various provisions of the tax treaty become academic in nature.
- As the Assessee was not granted reasonable and fair opportunity to submit evidences in support of its residential status, the Tribunal has sent the matter back to the CIT(A) for fresh consideration on this ground as well as on all the other issues raised in the appeal.

Conclusion

The Tribunal held that an eligible Assessee cannot be declined treaty protection under section 90(2) of the Act on the ground that the said assessee has not been able to furnish a TRC in the prescribed form. However, in that case, the Assessee will still have to furnish a reasonable evidence of satisfying the requirement to qualify as a resident under the tax treaty.

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