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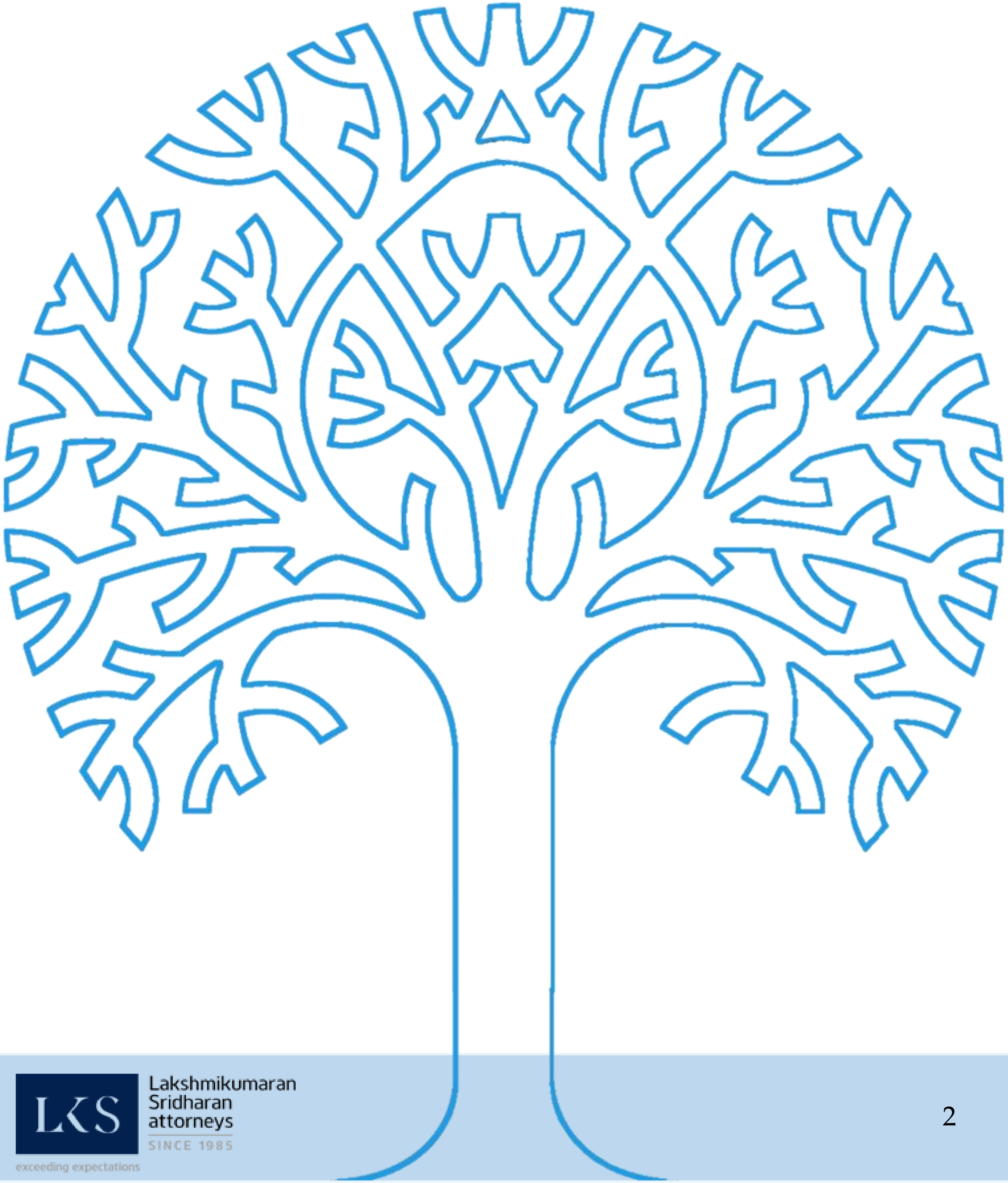

Article

Are there still broken links in taxation of 'Broken Period Interest'?

By **Karanjot Singh Khurana, Prachi Bharadwaj and Loveena Manaktala**

In cases where the debt instruments are acquired in secondary markets, the acquisition of the security may entail payment of principal, unpaid interest and premiums. The deductibility of unpaid interest (colloquially referred to as '**broken period interest**') has been a litigious issue in India. The article in this issue of Direct Tax Amicus notes that the recent judgment of Supreme Court in *Bank of Rajasthan* has put to rest the controversy in context of investments made by banks in government securities, however, the taxability of such interest for other taxpayers is far from settled. The authors for this purpose dive deep into the practical intricacies involving payment of broken period interest and elaborately discuss the existing jurisprudence on the issue. According to them, it would be interesting to see how the matter pans out before the higher judicial forums for characterisation of income for securities held as investments

Are there still broken links in taxation of 'Broken Period Interest'?

By Karanjot Singh Khurana, Prachi Bharadwaj and Loveena Manaktala

Background

It is common for corporates and financial institutions to invest in debt instruments in order to earn risk free/low risk returns. In cases where the debt instruments are acquired in secondary markets, the acquisition of the security may entail payment of principal, unpaid interest and premiums. The deductibility of unpaid interest (colloquially referred to as '**broken period interest**') has been a litigious issue in India.

The recent judgment of Supreme Court of India in *Bank of Rajasthan*[1] has put to rest the controversy with respect to taxation of broken period interest in the context of investments made by banks in government securities to maintain the statutory liquidity ratio. However, the taxability of broken period interest for other taxpayers is far from settled.

Before delving into the intricacies of broken period interest taxation, let us understand the practical intricacies involving payment of broken period interest. Let us consider non-convertible debentures ('**NCD**') as underlying security carrying a fixed coupon rate which is redeemable post the expiry of a predefined period as per below details:

Face value of NCD = INR 100

Annual interest on NCD payable every year on 31 March = INR 12 annually

Date of purchase of NCD= 30 September

Accrued interest on NCD (1 April to 30 September) = INR 6

Purchase price of NCD = INR 107 (**inclusive of INR 6 as accrued interest and INR 1 as premium paid for purchase of NCD**)

Redemption Price of NCD at year end = INR 110

In the aforesaid example, the taxpayer purchased NCD on 30 September. Thus, it must pay the seller the accrued interest (INR 6 in above example) along with the face value of NCD. This accrued interest, which is broken period interest.

[1] *Bank of Rajasthan* v. *CIT*, [2024] 301 Taxman 463 (SC)

The moot issue here arises is whether broken period interest paid will be allowed as an expense to offset the interest income earned by the investor.

Existing jurisprudence on broken period interest

Up to 1 April 1989, interest on any security issued by the Central or State Government was required to be offered to tax as 'interest on securities' under erstwhile Section 18 of the Income-tax Act, 1961 ('**Act**') against which corresponding expense incurred to realize interest income were allowed as deduction[2]. In reference to the erstwhile sections, the SC in case of *Vijaya Bank*[3] held that the price paid for the securities (including the broken period interest) was in the nature of a capital outlay and no part of it can be set off as expenditure against income accruing on those securities.

Section 18 of the Act was subsequently omitted by the Finance Act, 1988 with effect from 1 April 1989. Pursuant to the omission of Section 18, the income from securities can either be taxed under the head capital gains, income from other sources or business income depending on the intent with which the security has been acquired.

When the securities are held as stock-in-trade, Bombay HC in the case of *American Express International Banking Corporation*[4] has held that broken period interest is allowable as deduction while computing business profits. The Court also distinguished *Vijaya Bank's* ruling *(supra)* on the basis that its ratio is not applicable when interest income is assessed as business income. The said Bombay HC judgement was also upheld by the SC in the case of *CitiBank NA*[5].

Relying on the abovementioned judgements, the SC in the case of *Bank of Rajasthan* (*supra)* elucidated the fact that it is the intention of the security holder which shall determine the taxability of broken period interest, i.e., if the securities are held as stock-in-trade, deduction on broken period interest shall be allowed as business expense. Whereas, if the securities are held as investment, the SC held on one hand that the benefit of broken period interest will not be available. On the other hand, the SC judgment seems to suggest that such broken period interest will be added to cost of acquisition of security where it is not held as a trading asset which has led to further controversies in taxation treatment of broken period interest where securities are held as investments.

[2] Erstwhile Section 19 of the Act

[3] *Vijaya Bank* v. *Commissioner of Income-Tax (Additional)*, [1991] 187 ITR 541 (SC)

[4] *American Express International Banking Corporation* v. *CIT*, [(258 ITR 601) (Bom.)]

[5] *CIT* v. *Citi Bank NA*, Civil Appeal No. 1549 of 2006

Though, the SC has not dealt into the aspect of when can a security be classified as a trading asset, in order to undertake the said classification, one may refer to principles enunciated in Circular No. 4 dated 15 June 2007 issued by the Central Board of Direct Taxes.

Seemingly, the deduction for broken period interest paid on acquisition of securities held as stock in trade has been settled. However, one may ponder if the interpretation of the Supreme Court for taxability of government securities held as investment will also be applicable for NCDs when the characterisation of the income on its sale as well as redemption is in itself debatable.

The 'unsettled' issue around the potential overlap of income arising from redemption of debentures under two heads of income, *viz.* capital gains or income from other sources was recently expounded by the Bombay bench of ITAT[6]. In the said case, the ITAT held that the income from redemption of NCDs should be taxed as interest from securities. However, if the NCDs are sold in an open market, the difference in value of market price and face value would amount to capital gains.

In a case where even the redemption of debt instrument is taxed as interest income, one may ponder whether deduction of broken period interest can be offset against the said income even if the debit instrument was held as a capital asset. However, reconciling the said proposition to the judgment of SC in case of Bank of Rajasthan (*supra*) could be challenging.

Also, the conclusion that a mere difference in the mode of monetising from NCD will lead to a change in characterisation of income is also questionable.

Conclusion

While the Supreme Court has further clarified that the intention of the security holder will be the determining factor for allowability of broken period interest, the question of deductibility still remains open for securities held as investments. This is because the very character of income from sale/ redemption of certain securities is a matter of debate.

Further, irrespective of characterisation in books of the taxpayer, the borrower may deduct tax at source on the premium on redemption, ignoring the broken period interest, which may lead to certain mismatch in the income offered to tax by the taxpayer *vis-à-vis* the income on which tax is

[6] *Kushaal C. Thackersey* v. *ACIT*, TS-293-ITAT-2024(Mum)

deducted. It would be interesting to see how the matter pans out before higher judicial forums for characterisation of income for securities held as investments.

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Notifications & Circulars

- Direct Tax Vivad se Vishwas Scheme, 2024 – Clarifications
- Direct Tax Vivad Se Vishwas Scheme, 2024 – Due date for determining amount payable extended

Direct Tax Vivad se Vishwas Scheme, 2024 – Clarifications

There existed certain ambiguities with reference to applicability of the Scheme that was adopted by the Finance (No.2) Act, 2024. CBDT *vide* Circular No. 19 of 2024 dated 16 December 2024 has provided several clarifications in this regard.

1. ***Eligibility for the Scheme***

   Issues have arisen with respect to eligibility of availing the Scheme. Ambiguity existed in cases where on the cut-off date of the scheme the taxpayer was eligible for availing the scheme, however, before the taxpayer could file declaration for availing the scheme, the Appeal got disposed of. Further, ambiguity existed in cases where the appeal was filed with condonation of delay before or after the cut-off date.

   In this regard, CBDT clarified that the taxpayer shall be deemed to be eligible to avail the scheme if:

   - any appeal is pending as on the cut-off date, *viz.* 22 July 2024, irrespective of the fact that before or after filing of declaration form, the appeal has been disposed of or not (either decided on merits or withdrawn).
   - any appeal is filed with condonation of delay prior to 22 July 2024 but condonation request was admitted after the 22 July 2024 but before filing of declaration. In case the appeal is filed post 22 July 2024, the same shall not be eligible.

2. ***Orders or appeals under specific sections of the Act are excluded from the Scheme***

   CBDT has clarified that the following shall be excluded from the purview of the scheme:

   - *Assessment Proceedings:* CBDT has clarified that orders or appeals pursuant to search action under Section 143(3), 153A or 153C of the Act are outside the purview of the scheme.
   - *Review Petitions:* Cases wherein review petitions are pending before Supreme Court and High Court have been excluded.
   - *Income Tax Settlement Commission (‘**ITSC**’):* Cases pending for adjudication before the ITSC or cases wherein writs are filed against order of ITSC have also been excluded.

3. ***Appeals set aside to ITAT/CIT(A)/DRP are included under the Scheme***

In Guidance Note 1/ 2024 dated 15 October 2024, the CBDT had clarified that any appeal set aside to AO, whether fully or partially, shall not be eligible for the Scheme. There existed ambiguity with respect to cases where matters have been set-aside to ITAT/ CIT(A)/ DRP. In this respect, the CBDT has now clarified as follows:

- *Fully set-aside appeals to ITAT/CIT(A)/DRP:* Appeals that are fully set aside to ITAT/CIT(A)/DRP are eligible under the Scheme.
- *Partially set aside appeals to ITAT/CIT(A)/DRP:* All the issues which have been set aside will form a separate appeal and shall be eligible for settlement. Disputed tax will be computed as if pending at the level to which it is set aside.

4. ***Inclusion of cases where demand has been paid***

CBDT has clarified that in cases where appeal is pending as on 22 July 2024, but disputed tax demands have been already paid fully before filing of declaration are also eligible under the Scheme.

5. ***Treatment of additional ground while determining disputed tax***

CBDT has clarified that any additional grounds filed in relation to an appeal on or before 22 July 2024 are to be included in the calculation of disputed tax.

6. ***Cases wherein prosecution has been instituted are excluded from the Scheme***

CBDT has clarified that the Scheme shall not apply in respect of tax arrears relating to an assessment year where prosecution has been instituted on or before the date of filing of declaration. Resultantly, cases wherein prosecution proceedings have not been filed at the time of filing the declaration are eligible under the Scheme.

It has further been clarified that prosecution for one assessment year does not affect the eligibility of appeals related to other assessment years.

7. ***Computation of amount payable***

Cases wherein declarations are filed on or before 31 December 2024 are eligible for lower tax rates under the Scheme. Ambiguity existed around the time limit by which payment of disputed tax is to be made to claim the benefit of the lower rates. In this regard, CBDT has clarified that such payments must be made within 15 days of receiving Form No. 2 to retain eligibility for these rates. Further, credit for earlier taxes paid against disputed tax will be available against the payment to be made under the Scheme.

8. ***Settlement in case of disputed penalty***

Issue arose in cases where penalty is levied before/after taxpayer has filed declaration for the settlement of associated quantum appeal. The question which required clarification was whether penalty in relation to such tax arrears would be waived off or not. In this regard, CBDT clarified that:

- Where penalties are levied after the declaration is filed, the same would be waived off.
- Where no quantum appeal is pending but the penalty appeal is pending as on 22 July 2024 in relation to additions made in the assessment order, such penalty appeal can be settled independent of quantum appeal.
- Where appeal against penalty is not related to quantum assessment, for instance, penalty under Section 271B, 271BA or 271DA of the Act, the same shall be required to be settled separately.

9. ***Applicability in cases where Advance Pricing Agreement (APA)/ Mutual Agreement Procedure (MAP) has been filed***

CBDT has clarified that any dispute pertaining to Non-APA/MAP adjustments can be settled, however, the settlement will not be limited to just non-APA/MAP disputes. That means, whatever issues are pending in appeal are to be settled in full whether they pertain to APA/ MAP adjustments or otherwise.

It has further been clarified that if taxpayer avails the Scheme for transfer pricing adjustments, then provisions of secondary adjustments as per Section 92CE of the Act will be applicable.

10. ***TDS related clarifications***

- *Appeal against intimation under Section 200A of the Act:* CBDT has clarified that Appeals filed before the Appellate Authority against intimation passed under Section 200A of the Act *(regarding intimation on processing of TDS returns)* can be settled under the Scheme.
- *Liability of TDS deductor if deductee has settled his liability:* CBDT has also clarified that if a deductee has settled his tax liability, the deductor is relieved from his liability other than interest payable. Consequential relief for

expense deduction under Section 40(a) of the Act shall also be available to such deductor.

11. ***Other clarifications***

- Appeal pending against intimations under Section 143(1) as on 22 July 2024 is eligible for settlement under the Scheme.
- Foreign entities without a business presence in India can settle disputes through an authorized representative.
- Legal representatives of deceased taxpayers are allowed to file declarations under the Scheme.

Direct Tax Vivad Se Vishwas Scheme, 2024 – Due date for determining amount payable extended

Section 90 of the Scheme provides for determination of amount payable by the declarant as per the date of filing of declaration.

- *Cases wherein declaration is filed on or before 31 December 2024 under column 3 of table:* Tax liability will be 100% of the disputed tax and penalty amount shall be 25% of the disputed penalty
- *Cases wherein declaration is filed after 1 January 2025 but before the last date provided in the Scheme under column 4 of table:* Tax liability will be 110% of the disputed tax and penalty amount shall be 30% of the disputed penalty

Vide Circular No. 20 of 2024 dated 30 December 2024, CBDT has extended the deadline for determining such amount payable under column 3 of the table specified in Section 90 of the Scheme from 31 December 2024 to 31 January 2025. Accordingly, when the declaration is filed on or after 1 February 2025, the amount payable shall be determined as per column 4.

Ratio Decidendi

- Form 10-IC is not required to be filed every year for claiming reduced rate of tax under Section 115BAA – *ITAT New Delhi*
- Crypto currency was covered within the meaning of capital asset prior to 1 April 2022 – *ITAT Jodhpur*
- Interest from funds earmarked for obtaining 'qualifying asset' can be reduced from the cost of such asset – *Delhi High Court*
- Transaction between a foreign enterprise and its Indian PE is an international transaction – *ITAT Ahmedabad*
- Existence of tax residency certificate ('TRC') and corresponding compliance to limitation of benefits ('LOB') under Article 29 of the respective DTAA/MLI is sufficient for availing treaty benefits – *ITAT New Delhi*

Form 10-IC is not required to be filed every year for claiming reduced rate of tax under Section 115BAA

In the instant case, the benefit of concessional tax rate of 22% under Section 115BAA of the Income Tax Act was denied to the Assessee in second year of availing such benefit. The reason for such denial was non-filling of Form 10-IC for the year under consideration. Assessee argued that as per the frequently asked questions issued by the income tax department for Form 10-IC, the said form once filed will not be required to be filed in every assessment year. It is pertinent to note that such a form was duly filed by the Assessee in preceding assessment year wherein such benefit under Section 115BAA of the Act was claimed for the first time. On appeal before the ITAT, the Tribunal observed that Section 115BAA creates a substantive right for the assessee. Thus, the option once exercised in any previous year cannot be withdrawn in any later year. The ITAT further noted that the requirement of filing Form 10-IC in the subsequent year becomes irrelevant for consideration as the statue itself provides for inability of the assessee to withdraw the exercise of option. It was further observed that if the assessee is allowed to take an exit from Section 115BAA opted earlier by not filing prescribed Form 10-IC, it will mean that the assessee has a gateway to not exercise the option in the subsequent AYs. The same is contrary to the express language of the provision and defeats the plain intent and purpose of fastening the obligation on the assessee for availing the benefit of Section 115BAA of the Act.

[*Indo British Garments Pvt. Ltd.* v. *DCIT, ITA* – TS 878 ITAT 2024 (DEL)]

Crypto currency was covered within the meaning of capital asset prior to 1 April 2022

The assessee was a salaried employee who purchased bitcoins (crypto currency) during AY 2016-17 and sold the same after 4 years, i.e., during AY 2021-22. The assessee offered such income from sale of crypto currency to tax as Long-Term Capital Gains (‘**LTCG**’) after claiming benefit of Section 54F of the Act. Said claim of the assessee was rejected by the lower authorities. The authorities taxed the same under the head ‘income from other sources’ on the ground that crypto currency does not fall within the meaning of capital asset under Section 2(14) of the Act. The ITAT observed that specific provisions with respect to taxability of virtual digital assets were first time introduced *vide* Finance Act, 2022. Prior to such amendment, as is applicable in case of assessee, plain vanilla meaning shall be ascribed to crypto currency. In this regard, the ITAT noted that ‘property’ as defined in explanation 1 to Section 2(14) of the Act includes ‘right of every kind'. Thereby, the right of the assessee in crypto currency, though a virtual asset, qualifies as a capital asset. The ITAT further observed that even after amendment, crypto currency was specifically incorporated in the statute as an asset. Therefore, even before 1 April 2022, it was an asset and gain on sale of such an asset held for investment purposes must be taxed under the head capital gain.

[*Raunaq Prakash Jain* v. *ITO* – Income Tax Appeal No. 01/Jodh/2024, ITAT Jodhpur]

Interest from funds earmarked for obtaining 'qualifying asset' can be reduced from the cost of such asset

Assessee, a joint venture company, was set up for the purpose of acquiring and operating a coal mine overseas. For the purpose of acquisition of coal mine, the assessee called for funds from shareholders and promoters. While the negotiations were going on, the part of the said funds were kept in the short-term fixed deposit yielding interest. However, the proposal for acquisition of coal mine did not fructify and thus the amounts borrowed were repaid to the promoters along with interest. The AO alleged that the difference between the interest earned, and interest paid was chargeable to tax as income from other sources. On the other hand, the assessee contended that the interest received on borrowed funds, which were temporarily held in interest bearing deposit, is a part of the capital cost and is required to be credited to capital work-in-progress.

The question for consideration before the Court was whether the interest income entirely earned on surplus fund deposited in the bank during pre-commencement of the business is liable to be taxed as income from other sources.

The Court observed that if the interest is earned on the amounts which were temporarily kept in fixed deposits in the course of acquisition of the coal mine to set up its business, the interest earned would require to be accounted for as part of the capital value of the business/asset. The Court emphasized that this accounting treatment is or will be applicable only if the nature of the asset is such that it requires time for construction or for putting it in use, also known as a Qualifying Asset. The Court further differentiated between the settled principles as were held in case of *Tuticorin Alkali Chemicals* [1997] 227 ITR 172 (SC) and *Bokaro Steel Ltd.* [1999] 236 ITR 315 (SC). The Court noted that in the former case, interest was earned on surplus funds available with the assessee which was not linked to cost of the asset and therefore held to be revenue in nature. Whereas, in the latter case, the interest was earned from funds that were inextricably linked to the setting up of a plant and therefore, were reduced from the capital cost of factory. The Court also relied on the decision of Delhi High Court in the case of *Indian Oil Panipat Power Consortium Ltd.* v. *ITO* [2009] 315 ITR 255 (Delhi), wherein the Court observed that interest earned on funds primarily brought for infusion in the business could not have been classified as income from other sources.

Therefore, in the light of above, the Court held that interest from the funds specifically earmarked by the assessee for acquiring coal mine will be reduced from the capital cost.

[*PCIT* v. *International Coal Ventures Pvt. Ltd.* – TS 934 HC 2024 (DEL)]

Transaction between a foreign enterprise and its Indian PE is an international transaction

The assessee was a Project Office ('**PO**'/permanent establishment ('**PE**')) of a Chinese company ('**TBEA**') in India. TBEA was awarded a contract by Power Grid Corporation of India Ltd. ('**PGCIL**') for building sub-stations in India. PO was established by TBEA to fulfil its contractual obligations pertaining to on-shore services. Some part of the work related to onshore supply was also subcontracted by PO to third party contractors in India. Accordingly, TBEA rendered onshore supply services through its PO in India as well as through such subcontractors. As the PO did not have a bank account in India, the head office ('**HO**') in China made/received payments on its behalf. The AO alleged that since the original contract was executed between HO and PGCIL, the act of carrying out execution of contract by the PO in India on behalf of HO and consequent incurring of expenses by it is required to be considered as international transaction between the two.

Therefore, the key question for consideration before the ITAT Special Bench ('**SB**') was whether or not the transactions between foreign enterprise outside India and its Indian PE can be considered as international transaction under Section 92B of the Act and therefore be governed by transfer pricing ('**TP**') provisions.

The SB first discussed the need for the application of TP in this case. A clear differentiation was made between foreign branch of Indian enterprise and Indian branch of foreign enterprise. This differentiation was made on the fact that in case of foreign branch of Indian enterprise, the global income is taxable by virtue of Section 5(1) of the Act in the hands of Indian enterprise. This includes the income of the foreign branch. However, in case of Indian branch of foreign enterprise, only income of Indian branch is taxable in India by virtue of Section 5(2) of the Act. In such cases, there is a potential to manipulate the profits of Indian branch *qua* transactions between head office and branch.

The SB further discussed whether the PO and HO can be called separate 'enterprises' for the applicability of TP provisions. Reference was made to Section 92F of the Act wherein enterprise has been given a wider import to include a PE within its ambit. Therefore, the principle that one cannot transact with itself gets nullified when a separate identity is given to PE by virtue of meaning provided under Section 92F. Moreover, Article 7(2) of the India- China Double Taxation Avoidance Agreement ('**DTAA**') treats profits attributable to a PE in India as if the PE were a distinct entity, thus making TP provisions applicable to transactions between the PE and its HO. Therefore, even under the DTAA, the PE is considered a separate enterprise for profit attribution purposes. It was thus held by the SB that HO and PO are two distinct enterprises for the purposes of TP.

It was further noted by SB that there is no conflict between domestic TP provisions and Article 9 of DTAA as was asserted by the assessee. The SB explained that the purpose of Article 9 of the DTAA is limited to only confirming that broadly similar rules exist in domestic law. Further, Article 9(1) does not, in itself fulfil any necessary function, as it only formulates rules that may already exist in domestic laws. The SB noted that even it is assumed that Article 9 of DTAA overrides the Act, then one needs to attribute profits to the PE as per provisions of Article 7 of the DTAA, treating the PE as a distinct entity operating independently, which is nothing but adherence with arm's length principles.

[*TBEA Shenyang Transformer Group Company Ltd. v. Deputy Commissioner of Income-tax, International Taxation* – [2024] 169 taxmann.com 145 (Ahmedabad - Trib.) (SB)]

Existence of tax residency certificate ('TRC') and corresponding compliance to limitation of benefits ('LOB') under Article 29 of the respective DTAA/MLI is sufficient for availing treaty benefits

The assessee was a company incorporated under the laws of Luxembourg and engaged in the business activity of investment in securities. It was a 100% subsidiary of a company registered in Cayman Island. Treaty benefits claimed by the assessee were denied by AO observing that assessee is just a conduit, and the real owner is holding company based in Cayman Island with which India has no DTAA. Further, AO observed that tax residency certificate ('**TRC**') is not sufficient to establish tax residency. Therefore, following were the questions for consideration before ITAT:

- whether the existence of TRC and limitation of benefits ('**LOB**') provisions under Article 29 of DTAA adequately address the concerns of treaty abuse. That is, can revenue go beyond to raise several other conditions to grant DTAA benefits?
- whether, in light of the applicable facts and without anything brought on record by the revenue, the conditions for applicability of Article 29 were satisfied?

ITAT observed that Article 29 of DTAA under consideration, as amended by multilateral instrument signed between the two countries, refers to limitation of benefits where the principal purpose of incorporation of entity in Luxembourg is to obtain benefit of DTAA. ITAT relied on the decision of jurisdictional High Court in the case of *Tiger Global International III Holdings* [W.P.(C) 6764/2020] wherein the Court observed that satisfaction of TRC and LOB conditions together should constitute sufficient evidence for residency as well as beneficial ownership and eligibility to treaty benefits. Relying on above, the ITAT further noted that in order to deny treaty benefit, the onus is on the revenue to establish that such transaction is sham or a colorable device. Further, it was noted based on the facts of the present case that AO has not brought any cogent material on record to indicate that the assessee was in substance a conduit except expressing his views and presumptions. Thus, in absence of any cogent material to deny treaty benefit, appeal of the assessee was allowed.

[*SC Lowy P.I. (LUX) S.A.R.L., Luxembourg* v. *Assistant Commissioner of Income Tax, International Taxation* – ITA No.3568/DEL/2023 (Delhi - Trib.)]

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