

ORDER SHEET

ITA NO.734 OF 2008
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

DIRECTOR OF INCOME TAX, (INTERNATIONAL TAXATION KOLKATA)
Versus
M/S. ATN INTERNATIONAL LIMITED

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ARINDAM SINHA

Date : 29th July, 2016.

For Appellant/Petitioner : Mr.M.P.Agarwal,Advocate
Mrs.Anwara Quereshi,Advocate

For Respondent : Mr.J.P.Khaitan,Sr.Advocate
Mr.Pranit Bag,Advocate
Mr.M.S.Tiwari,Advocate
Mr.A.K.Sukla,Advocate

The Court : We deem it proper to record that Mr.Khaitan, learned Senior Advocate for the assessee at the commencement of hearing raised a point that the tax effect in this case is below Rs.20 lakhs. Therefore, the revenue should not press the appeal, regard being had to the binding circular issued by the CBDT. Mr.Agarwal, learned advocate for the revenue submitted that the tax effect in this case is above Rs.20 lakhs. There is, as such, no reason

why the appeal should not be pressed. In a case where there is a dispute as regards the tax effect involved in an appeal and the dispute cannot be resolved except through a process of complex reasoning, we think, it would not be proper on our part to decide the question as to whether the tax effect is more or less than the sum of Rs.20 lakhs because the circular does not create any corresponding right in the assessee to have the appeal dismissed. We expressed that view at the beginning and thereafter took up the matter.

The appeal is directed against a judgement and order dated 4th April, 2008 passed by the learned Income Tax Appellate Tribunal, "C" Bench, Kolkata in ITA Nos.820 to 822/Kol/2007 preferred by the revenue pertaining to the assessment years 2001-02, 2002-03 and 2003-04 and Cross-objection No.90-92/Kol/2007 in connection with the aforesaid appeals pertaining to the same assessment years preferred by the assessee.

The learned Tribunal dismissed the appeals preferred by the revenue. Since the appeals themselves were dismissed, there was no occasion for the learned Tribunal to deal with the Cross-objection. They were also dismissed.

The aggrieved revenue has come up in appeal. On 31st October, 2008 when the appeal was admitted, the following questions were formulated :

1. *Whether on the facts and in the circumstances of the case the ld. Income Tax Appellate Tribunal was justified in holding that the payments made by the assessee to the foreign company, Shin Satellite Company of Thailand, are in the nature of the royalty*

within the meaning of Article 12(3) of the DTTA between India and Thailand?

2. *Whether on the facts and in the circumstances of the case the ld. Income Tax Appellate Tribunal was justified in holding that the process involved in the transponder for transmission of a Satellite TV Channel is not a secret process and thus outside the scope of Article 12(3) of the DTTA between India and Thailand, despite the presence of “confidentiality Clause” in the agreement between the assessee and the foreign company ?*
3. *Whether on the facts and in the circumstances of the case the ld. Income Tax Appellate Tribunal failed to consider that the ‘Satellite Transponder’ for the use of which the assessee paid hire charges to the foreign company was also an Industrial, Commercial or scientific equipment and therefore the payments assume the character of royalty under the treaty law?”*

Mr.Agarwal, learned advocate appearing for the revenue submitted that the questions formulated earlier may be substituted by the following question which covers the entire controversy. Mr.Khaitan, learned Senior Advocate appearing for the assessee has no objection. The questions for determination as formulated earlier, are thus given up and the following question of law is reformulated:

“Whether, on the facts and circumstances of the case, the Income-tax Appellate Tribunal is correct in holding that the payments made by the

assessee to a foreign company, Shin Satellite Company of Thailand, did not constitute royalty within the meaning of Article 12(3) of the Double Taxation Agreement between India and Thailand ?”

The facts and circumstances of the case were summarised by the CIT (A) in disposing of the appeal preferred by the assessee, as follows .

“The brief facts of the case are that the appellant a Public Ltd. Company is engaged in the operation of Satellite T. V. Channel namely ATN which is a Free to Air Channel. It has entered into an agreement with Thailand Company called M/s. Shin Satellite Public Ltd. Co. (SSA) for hiring of transponder for transmitting the TV programmes through satellite. M/s. SSA was providing uplinking facilities from their Earth Station based in Bangkok, Thailand. The cable operators downlink the programs from the transponder and exhibit the same to their viewers. As per the agreement the assessee facilitated transmission and broadcasting of various programs in India and earned the income mainly from advertisement as it is a free to Air Channel. The A.O. has held that payment made to non resident company was from the source in India. Therefore, income deemed to have accrued or arisen in India and same is taxed as a Royalty within the meaning of sub clause (b) of section 9(1)(vi) read with clause (iii) of explanation 2 of the said section. The appellant’s main contention is that payment made to the non resident company will not term as a royalty hence same will not be liable for tax in India as per the DTAA agreement between India and Thailand.”

The CIT(A) was of the opinion that “The facts of the appellant’s case and facts of the case of Pan Amsat International Systems Incorporation (Supra) are identical. Hence, it is held that the payment cannot be regarded as Royalty in terms of article 12(3) between India and Thailand, as the treaty provisions between India and Thailand are similar to that treaty with U.S.A. Hence, following the view taken in the case of Pan Amsat International Systems Inc. by the ITAT (Delhi), the assessee entitles for the relief. Further, Hon’ble Supreme Court in the case reported 239 ITR 587 has held that if income of the foreign concern is not taxable in India then no TDS is liable to be made. Under the circumstances the order passed by the ADIT (TT) –I, Kolkata is cancelled. As regard to other ground relating to legality of combined order for three years same is not considered as appellant has been allowed relief on merit.”

In an appeal by the revenue, the learned Tribunal concurred with the views of the CIT(A). An additional point raised on behalf of the revenue that the payment was on account of the use of industrial or commercial or scientific equipments was also rejected by opining as follows :

“13. The last contention raised by the ld.DR is that the service provided by the Thailand company is tantamount to the use of industrial, commercial or scientific equipment. A perusal of the Digital Channel Service Agreement with M/s.SSA shows that, as per Appendix B which defines Digital Broadcast Service to be rendered to the assessee company, all equipments used for the Digital Broadcast Service shall be the equipment already installed at the

telepoint facilities and used at the discretion of SSA only and that the customer shall be responsible to provide only the source signal from a tape-play system. Further, the service description has been provided in Appendix B which is given below :-

“SSA shall provide one digital channel including video and audio signal for broadcasting customer’s television programs.”

13.1. The above averments in the agreement show that the agreement is not for the use of any equipment but for rendering the service (namely Digital Broadcast Service) and the assessee has not control over the equipments used for the purpose.

14. In our considered opinion, the service agreement with M/s.SSA does not fall within the realm of “use of or the right to use industrial, commercial or scientific equipment: as per Article 12(3) as contended by the ld. DR. We are fortified in our view by the decision of the Mumbai Bench in the case of Kotak Mahindra Primus Ltd. vs. Dy.DIT 11 SOT 578. In view of the discussions made hereinabove, we find no merit in the appeal filed by the revenue.”

Mr.Agarwal, learned advocate appearing for the revenue drew our attention to the Clause 3 of Article 12 of the agreement for avoidance of double taxation of income and the prevention of fiscal evasion between Republic of India and the Government of the Kingdom of Thailand which provides as follows :

“3 .The term “royalties” as used in this article means payments of any kind received as a consideration for the alienation or the use of, or the

right to use, any copyright of literary, artistic or scientific work (including cinematograph films, phonographic records and films or tapes for radio or television broadcasting), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.”

Mr. Agarwal laid stress to the words ‘*including cinematograph filmsor television broadcasting*’. He submitted that any payment made with respect to the cinematograph films or with respect to television broadcasting is covered within the definition of royalties provided in Clause 3 of Article 12 of the aforesaid agreement. We have not been impressed by this submission because a cinematograph film or television broadcasting is not important. What is important is the permission to take the benefit of a copyright either in the film or in the television broadcasting. In case, the assessee had paid any amount in consideration of exploitation of any copyright of the foreign party, the payment in that case would have taken the character of royalty. But payment was made because the television programmes produced by the assessee were digitally broadcast through the satellite of the foreign party. The foreign party appears to be in the business of broadcasting television programmes through its satellite. The assessee who is a producer of the tele-programmes provides the contents in the form of tapes. The foreign party broadcasts the contents through its satellite and in lieu of such broadcasting, foreign party was paid various sums from time

to time. We are, as such, unable to agree with Mr. Agarwal that the payment made by the assessee partakes the character of royalty.

In that view of the matter, we are of the opinion that no interference is called for. It may also be recorded that the point was decided by the Delhi Court in the case of *Asia Satellite Telecommunications Co. Ltd. v, DIT (2011) 332 ITR 340* and thereafter, the matter has once again been decided by the Delhi High Court in the case of *Director of Income-Tax vs. New Skies Satellite BV : reported in (2016) 382 UTR 114, Delhi*. We are in agreement with the views expressed by the Delhi High Court.

The question formulated, at the time of hearing of the appeal, is answered in the affirmative and against the revenue. The appeal is, therefore, dismissed.

(GIRISH CHANDRA GUPTA, J.)

(ARINDAM SINHA, J.)