



Since the taxpayer is incorporated and liable to tax in the UAE, it is eligible for the India-UAE tax treaty benefit

Background

Recently, the Rajkot Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Martrade Gulf Logistics FZO-UAE¹ (the taxpayer) held that since the taxpayer is liable to tax in the UAE by virtue of its incorporation in UAE, it is eligible for the India-UAE tax treaty (the tax treaty) benefit. The tie breaker rule with respect to residential status of the taxpayer comes into play when the taxpayer is resident of both the states, i.e. India and UAE which is not the case in the instant decision. The Tribunal observed that whether the taxpayer company was formed in UAE or in Germany, it would not have made any material difference so far as non-taxability of said income in India is concerned. Accordingly, the Limitation of Benefit (LOB) Article will not apply.

Facts of the case

- During the course of scrutiny of return filed under Section 172(4) of the Act, the Assessing Officer (AO) observed that the directors of the taxpayer being different nationalities other than UAE i.e. Indian, German and Portuguese nationalities and therefore, the tax treaty protection should be declined to the taxpayer
- Article 29 of the tax treaty dealing with LOB provisions provides that an entity which is a resident of a State shall not be entitled to the benefits of the tax treaty if the main purpose or one of the main purposes of the creation of such entity was to obtain the benefits of the tax treaty which would not have been otherwise available.

- The AO observed that when a resident of the Contracting State can be said to be resident of both the Contracting States under the tax treaty under Article 4(4), then it shall be deemed to be a resident of the State in which its Place of Effective Management (POEM) is situated.
- On the basis of this provision, the AO sought to deny the status of the taxpayer being treated as a resident of UAE on the ground that the POEM is not situated in UAE.
- The taxpayer contended that it is managed and controlled wholly from UAE, even though the shareholders and directors of the UAE company are non-UAE residents. Further since the business is carried on from the UAE, the provisions of Article 29 of the tax treaty did not come into play on the facts of the present case.
- The Commissioner of Income-tax (Appeal) [CIT(A)] reverses the action of the AO on the basis of findings that the POEM of the taxpayer was UAE and, that, in view of the residency certificate, incorporation certificate, trading license and other documents, it is clear in principle that the taxpayer was a resident of UAE and accordingly eligible for the tax treaty benefit.

Tribunal's decision

- Relying on the decision in the case of Green Emirates², the Tribunal observed that it is necessary for the purpose of being treated as a resident of a State under the tax treaty is that the

¹ ITO v. Martrade Gulf Logistics FZCO-UAE (ITA Nos. 7 to 9/Rjt/2011) – Taxsutra.com

² ADIT v. Green Emirate Shipping and Travels [2006] 100 ITD 203 (Mum)

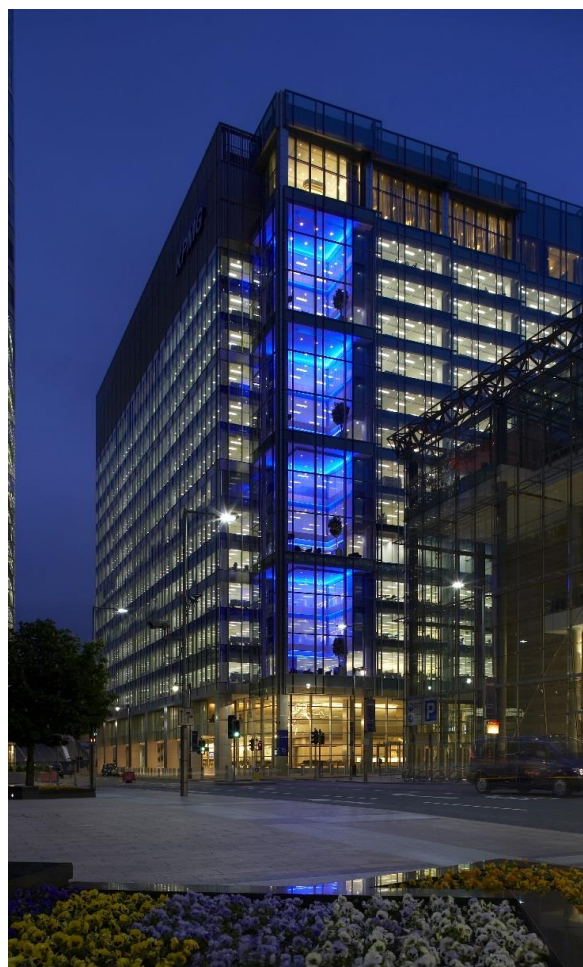
person should be liable to tax in that State by the reason of domicile, residence, place of management, place of incorporation etc. The taxpayer was incorporated in UAE and, therefore had this locality related attachment which led to residence type taxation.

- It is not at all necessary to be treated as 'liable to be taxed in UAE', for the purposes of this treaty, that the taxpayer should actually pay tax in UAE.
- Tie breaker rule with respect to residential status of the taxpayer comes into play when the taxpayer is resident of both the States, i.e. India and UAE.
- Therefore, the tie breaker rule set out in Rule 4(4), to which so much of emphasis is placed by the AO, is wholly irrelevant in the present context.
- The CIT(A) has given very reasoned and elaborate findings that the POEM of the taxpayer was from UAE. There is no reason to disturb these findings of the CIT(A) nor has any specific defect therein been pointed out by the revenue authorities.
- In order to invoke Article 29, what is to be established is that if the taxpayer was not to be formed in the UAE, the taxpayer would not have been entitled for such benefits.
- Entire share capital of the taxpayer is held by German entities by the name of Martrade Shipping + Transport GMBH and C.R. Consulting & Holding GMBH, but then, in the India-Germany tax treaty also similar tax treaty benefit with regard to taxability of shipping profits only in the state of residents are available.
- Therefore, whether the taxpayer company was formed in UAE or in Germany, it would not have made any material difference so far as non-taxability of said income in India is concerned.
- As corollary to this legal position, merely because the company is set up in UAE and not in the country to which the capital belongs, the taxpayer does not get any benefits of the India-UAE agreement which would have been otherwise available. The requirement necessary for invoking Article 29 is thus not fulfilled in the present case.
- As regards the wordings of the tax residency certificate, based on which the AO has concluded that the company was formed only for the purpose of availing the tax treaty benefits, it was observed that neither the inference of the AO is based on any legally sustainable material or even common sense, nor this TRC is relevant in any way. There is no dispute that the taxpayer was liable to tax in UAE by the virtue of incorporation in UAE and therefore, the taxpayer was covered by definition of 'resident of Contracting State' under Article 4(1) of the tax treaty.

Our comments

The issue with respect to benefit of India-UAE tax treaty and applicability LOB Article has been a matter of debate. The Rajkot Tribunal in the case of MUR Shipping DMC Co, UAE³ held that the benefit of the India-UAE tax treaty cannot be denied to the foreign shipping company by applying LOB provisions, since such a company has bonafide business activities in the UAE. The Tribunal held that LOB provisions under the tax treaty would be applicable only when the main purpose or one of the main purposes of the creation of an entity was to obtain benefits of the tax treaty which would otherwise not be available.

In the instant case, the Tribunal on the basis of incorporation certificate, TRC, etc. held that the taxpayer is a resident of UAE. Further the LOB Article under the tax treaty is not applicable to the taxpayer because whether the company was formed in UAE or in Germany, it would not have made any material difference so far as the non-taxability of the said income in India is concerned. Accordingly, the Tribunal held that the taxpayer is eligible for India-UAE tax treaty benefit.



³ ITO v. MUR Shipping DMC Co, UAE [2015] 155 ITD 1079 (Rjt)

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