KPMG

TAX FLASH NEWS

27 June 2018

KPMG in India 25 YEARS of making a difference

Even though the taxpayer has not furnished TRC, the benefit of a tax treaty cannot be denied

Background

Recently, the Ahmedabad Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Skaps Industries India Pvt Ltd[1] (the taxpayer) held that the taxpayer cannot be denied the benefit under the India-U.S. tax treaty (tax treaty) on the ground that it has not furnished a Tax Residency Certificate (TRC). However, the taxpayer has to satisfy the eligibility for the tax treaty benefit. The onus is on the taxpayer to give sufficient and reasonable evidence in support of his residential status so as to satisfy the conditions laid down under Article 4(1) of the tax treaty.

Facts of the case

- During the years[2] under consideration, the taxpayer made payments to the U.S. company for the installation and commissioning services of certain equipment. These payments were made without deduction of tax at source.

- The taxpayer contended that the payments made were not taxable in India since the installation and commissioning activities were inextricably linked to the purchase of the equipment and there was neither a transfer of technology nor was the technology being made available under the tax treaty.

- The Assessing Officer (AO) held that the U.S. company had a high degree of technical expertise and it had the desired level of expertise in installing and commissioning of a machine owned by the taxpayer and therefore, the services were taxable as Fees for Included Services (FIS) under the tax treaty.

- The Commissioner of Income-tax (Appeals) [CIT(A)] held that in the absence of a TRC and in view of the specific provisions of Section 90(4) of the Act, the U.S. company cannot be granted tax treaty benefits. The installation and commissioning services cannot be said to be for the purchase of equipment and thus covered by exclusion clause provided under Article 12(5)(a) of the tax treaty.

Tribunal's decision

- The tax department contended that non-furnishing of TRC under Section 90(4)[3] of the Act itself, on a standalone basis, can be reason enough for declining the treaty protection. It is contended that furnishing of TRC is a condition precedent for invoking the tax treaty protection under Section 90(2)[4] of the Act. However, upon a plain look at the provisions of Section 90 of the Act, it indicates that Section 90(2) of the Act is somewhat unique in providing an unqualified 'treaty override'. In other words, no matter what be the provisions of the Act in respect of a person to whom the tax treaty applies, the provisions of the Act shall apply (only) to the extent they are more beneficial to the taxpayer.

[1] Skaps Industries India Pvt Ltd v. ITO (ITA Nos. 478 and 479/Ahd/2018) – Taxsutra.com

[2] Assessment Years 2013-14 and 2014-15

[3] The taxpayer, not being a resident, to whom tax treaty referred to in Section 90(1) of the Act applies, shall not be entitled to claim any relief unless a certificate of his being a resident in any country outside India or specified territory outside India, as the case may be, is obtained by him from the government of that country or specified territory.

[4] Where the central government has entered into a tax treaty with the government of any country outside India or specified territory outside India, as the case may be, under Section 90(1) of the Act for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the taxpayer to whom such tax treaty applies, the provisions of the Act shall apply to the extent they are more beneficial to the taxpayer.

- The provisions of the Act, in a situation covered by the tax treaty, cannot put any burden on the taxpayer. Only General Anti Avoidance Rule (GAAR)[5] provisions put a limitation on this provision. The GAAR provision is the only statutory provision in the Act which starts with a non-obstante clause vis-à-vis the provisions of Section 90(2) of the Act, and it is the only rider to the tax treaty override provision set out in Section 90(2) of the Act.

- In reference to Section 90(4) of the Act, it has been observed that these provisions do not start with a non-obstante clause vis-à-vis Section 90(2) of the Act and, therefore, these provisions cannot be construed as a limitation to or a rider to somewhat unqualified tax treaty override stipulated in Section 90(2) of the Act.

- The provisions of the Act shall be applicable only when the same are more beneficial to the taxpayer vis-à-vis the provisions of the tax treaty. The principle of the tax treaty override, as set out in Section 90(2) of the Act, remains unaffected by these provisions.

- The provision of Section 90(4) of the Act cannot be construed as a limitation to the superiority of the tax treaty over the domestic law. It can only be pressed into service as a provision beneficial to the taxpayer. The manner in which it can be construed as a beneficial provision to the taxpayer is that once the taxpayer furnishes the TRC in the prescribed format, the AO has powers to ask for further details in support of the claim of the taxpayer for the related tax treaty benefits. The Punjab & Haryana High Court approved this ratio in the case of Serco BPO Pvt Ltd[6].

- Accordingly, it has been held that in the absence of a non-obstante clause, Section 90(4) of the Act, cannot be read as a limitation to the tax treaty superiority under Section 90(2) of the Act. An eligible taxpayer cannot be declined the tax treaty protection under Section 90(2) of the Act on the ground that the said taxpayer had not been able to furnish a TRC in the prescribed form. To this extent, the approach of CIT(A) is erroneous.

- Having held that an eligible taxpayer cannot be declined tax treaty protection under Section 90(2) of the Act on the ground that he had not complied with the provisions of Section 90(4) of the Act, the taxpayer has to satisfy his eligibility for tax treaty protection.

- Article 4(1) of the tax treaty provides that in order to be treated as 'resident of a contracting state', a taxpayer has to demonstrate that he is liable to tax in that jurisdiction by reason of domicile, residence, citizenship, place of management, place of incorporation or any other criterion of similar nature. The residuary clause i.e. 'any other criterion of similar nature', as has been judicially interpreted in the case of General Electric Co plc & Ors[8] should be understood to 'mean any locality-related attachment that attracts residence-type taxation'.

- The onus is on the taxpayer to give sufficient and reasonable evidence of satisfying the requirements of Article 4(1) of the tax treaty.

- In the present case, the taxpayer did not furnish any evidence in support of the tax treaty entitlements. Further, the AO did not doubt the tax treaty entitlements either. Therefore, once it has been held that Section 90(4) of the Act does not act as a bar for tax treaty entitlement, it cannot be seen as a limitation to the superiority of tax treaty provisions vis-à-vis the domestic law provisions. Mere non-furnishing of TRC cannot per se be treated as a trigger to disentitlement to the tax treaty benefits.

- The CIT(A) did specifically ask for the TRC and the taxpayer had furnished a Form W9 which was used in the context of domestic tax withholding requirements in the U.S. The Form W9 does not disclose the residential status of the U.S. entity in the relevant period. It is merely a declaration so as to provide inputs to the tax-deductor for fulfilling reporting obligations to the US IRS. Form W9 is wholly irrelevant in respect of tax withholdings outside the U.S.

[5] Section 90(2A) of the Act - The provisions of Chapter X-A (GAAR) of the Act shall apply to the taxpayer even if such provisions are not beneficial to him.
[6] Serco BPO Pvt Ltd v. Authority for Advance Ruling [2015] 379 ITR 256 (P&H)

[7] DCIT v. General Electric Co plc & Ors [2001] 71 TTJ 973 (Cal)

- In the present case, the eligibility of U.S. company for tax treaty entitlement was not established, and therefore, all the arguments of the taxpayer on the scope of various provisions of the tax treaty were irrelevant. Therefore, the taxpayer was asked to submit evidence in support of his residential status so as to satisfy the conditions laid down under Article 4(1) of the tax treaty. The AO did not deal with this aspect of the matter at all and simply proceeded to apply the law on the assumption that the U.S. entity was entitled to the benefits of the tax treaty. However, the CIT(A) had taken note of this legal requirement and asked the taxpayer to produce a TRC under Section 90(4) of the Act which does not dilute the superiority of the tax treaty law over the domestic law.

- Accordingly, the matter is being remitted to the CIT(A) for fresh adjudication, *inter alia*, on the fundamental aspect of tax treaty entitlement.

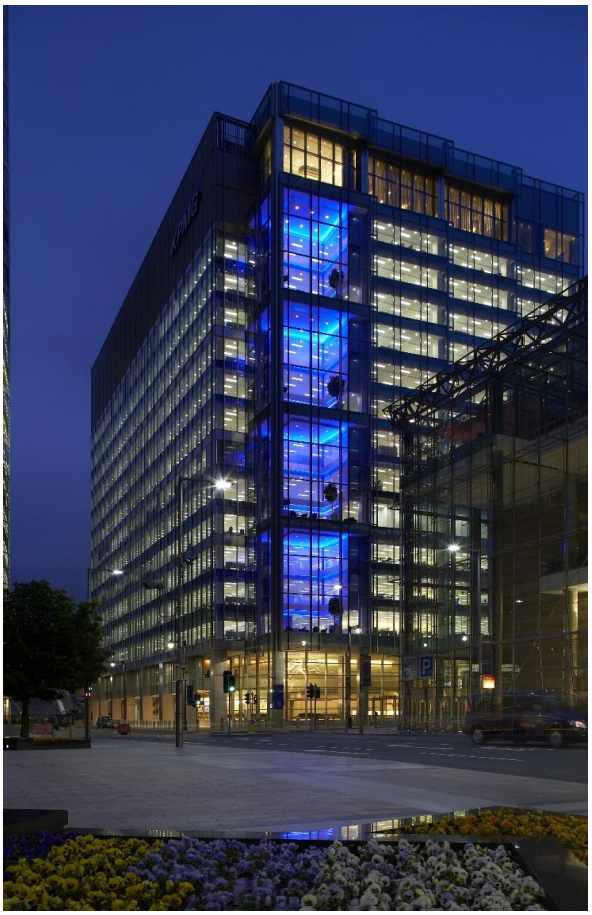
Our comments

The eligibly of tax treaty benefit vis-a-vis TRC requirement has been a subject matter of debate before the Courts/Tribunal.

The Supreme Court in the case of Azadi Bachao Andolan[8] held that TRC issued by Mauritian tax authority constitutes sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the tax treaty.
The Bombay High Court in the case of Universal International Music B.V.[9] held on similar lines under the India-Netherlands tax treaty.

The Finance Act, 2012 provided that in order to claim relief under the tax treaty, a taxpayer is required to produce a TRC issued by the government of the respective country or the specified territory in which such taxpayer is resident, containing certain prescribed particulars. Subsequently, the Central Board of Direct Taxes (CBDT)[10] prescribed the details to be included in the TRC. The Finance Act, 2013 has done away with the requirement of obtaining prescribed particulars in the TRC. In other words, the taxpayer can continue to obtain the TRC as issued by the foreign authorities. The Finance Act, 2013 also introduced a provision to clarify that the taxpayer shall be required to furnish prescribed information or documents.

In the present case, the Tribunal held that the benefit of a tax treaty cannot be denied because the taxpayer has not furnished TRC. However, the onus is on the taxpayer to give sufficient and reasonable evidence in support of his residential status to avail the tax treaty benefit.



[8] UOI v. Azadi Bachao Andolan [2003] 132 Taxman 373 (SC)
[9] DDIT v. Universal International Music B.V. (ITA No.1464 of 2011, dated 8 February 2013)
[10] Notification No. S.O. 2188(E), dated 17 September 2012

www.kpmg.com/in

Ahmedabad
Commerce House V, 9th Floor,
902, Near Vodafone House,
Corporate Road,
Prahlad Nagar,
Ahmedabad – 380 051.
Tel: +91 79 4040 2200

Bengaluru
Maruthi Info-Tech Centre,
11-12/1, Inner Ring Road,
Koramangala,
Bengaluru – 560 071.
Tel: +91 80 3980 6000

Chandigarh
SCO 22-23 (1st Floor),
Sector 8C, Madhya Marg,
Chandigarh – 160 009.
Tel: +91 172 664 4000

Chennai
KRM Towers,
Ground Floor, 1, 2 & 3 Floor,
Harrington Road,
Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

Gurugram
Building No.10, 8th Floor,
DLF Cyber City, Phase II,
Gurugram, Haryana – 122 002.
Tel: +91 124 307 4000

Hyderabad
Salarpuria Knowledge City,
6th Floor, Unit 3, Phase III,
Sy No. 83/1, Plot No 2,
Serilingampally Mandal,
Ranga Reddy District,
Hyderabad – 500 081.
Tel: +91 40 6111 6000

Jaipur
Regus Radiant Centre Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road
Jaipur – 302 018.
Tel: +91 141 – 7103224

Kochi
Syama Business Centre,
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682 019.
Tel: +91 484 302 5600

Kolkata
Unit No. 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091.
Tel: +91 33 4403 4000

Mumbai
1st Floor, Lodha Excelus,
Apollo Mills,
N. M. Joshi Marg,
Mahalaxmi, Mumbai – 400 011.
Tel: +91 22 3989 6000

Noida
Unit No. 501, 5th Floor,
Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305.
Tel: +91 0120 386 8000

Pune
9th floor, Business Plaza,
Westin Hotel Campus,
36/3-B, Koregaon Park Annex,
Mundhwa Road, Ghorpadi,
Pune – 411 001.
Tel: +91 20 6747 7000

Vadodara
Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023.
Tel: +91 265 619 4200