

Prevalence of Double Tax Convention over Indian local tax law

- A Tribunal decision creating confusion on established principles

Recently, the Chennai Tribunal in the case of **DCIT v. TVS Electronics Limited** reported in **52 SOT 287** added confusion to the ongoing chaos between assesseees and Indian Tax Department on international tax front.

The issue in that case was pretty simple. The Indian Assessee made some payment to a Mauritian company relating to some survey and information services which allegedly fell within the ambit of 'Fees for Technical Services' ('FTS') within the provision of Indian tax law.

However, the Double Tax Convention ('DTC') between India and Mauritius does not have a separate provision (Article) for FTS and therefore it would fall within the next best provision covering it i.e. the Article of 'Business Income' in this case.

Therefore, the payment made by Indian Assessee to the Mauritian company would be taxable in India per the provisions of local tax law but not so taxable per the provisions of DTC.

Moreover, the local tax law also specifically provides that where the DTC provisions are beneficial vis-à-vis its own provisions, the DTC would prevail.

This itself makes it clear that the taxability of an item in India needs to be seen independently under local tax law as well as the concerned DTC and then the beneficial of the two to the assessee should apply.

The Tribunal, in the above decision, however opined that because there is no separate provision for FTS under the Indo-Mauritian DTC, one has to fall back on the provisions of the local tax law! Now, if that were to be done, then there would be a complete overlap between DTC and local law and the beneficial of the two can never be decided, thus making the corresponding local law provisions of extending superiority to DTC redundant.

In that view of the matter, in our humble opinion, the opinion of the Honorable Tribunal is not in line with proper interpretation of Indian tax law and the concerned DTC, and needs reconsideration and suitable modifications.

However, until then, if anyone gets stuck with the above finding and needs a support of a case law, then the decision of **Mumbai Tribunal** in the case of **Kotak Mahindra Old Mutual Life Insurance Ltd. v. JDIT, International Tax** reported in **52 SOT (URO) 187** is helpful; wherein it has been held that once where the taxability of an item in India is not attracted under the local law, then any contrary conclusion based on provision of DTC will not affect such non-taxability.

In conclusion therefore, the above stated decision of the Honourable Chennai Tribunal should be taken with a contesting view.