

Note - Impact of amendment of section 9 by the Finance Act, 2012, on DTAA's.

Vide the Finance Act, 2012, section 9(1)(i) of the Income-Tax Act, 1961 (the Act), has been amended by insertion of new *Explanations 4* and *5*, thereto. Similarly, section 9(1)(vi) of the Act, has been amended by the Finance Act, 2012, by insertion of *Explanations 4, 5* and *6*, thereto.

It may also be stated here that section 9 of the Act, relates to '*Income deemed to accrue or arise in India*'.

In view of the aforesaid amendments of sections 9(1)(i) and 9(1)(vi) of the Act, queries were raised by some of my clients, regarding the impact of the aforesaid amendments on the TDS liability in respect of payments relating to transactions with non-resident entities. One of the queries was whether the aforesaid amendments will have any impact on the provisions of the Double Taxation Avoidance Agreement (DTAA), entered into by a foreign country with India.

In order to answer the aforesaid queries, I had to deal with the provisions of section 90 of the Act. For this purpose, a Circular of the CBDT was also examined and in addition, some relevant legal precedents were also referred to.

As a result of the aforesaid examination, the following conclusion was reached :

- (i) In case of conflict, the provisions of the DTAA override the provisions of the Income-Tax Act, 1961.
- (ii) In the absence of any change in the relevant DTAA, the aforesaid amendments brought about by the Finance Act, 2012, will have no impact thereon.

In support of the aforesaid conclusion, the relevant Circular of the CBDT and legal precedents are discussed as follows :

1. Circular No.333, dated 2.4.1982.

In the present context, Circular No.333, dated 2.4.1982, issued by the CBDT is relevant [*137 ITR (St) 1*]. The aforesaid Circular relates to '*Conflict between the provisions of the I.T.Act, 1961 and the provisions of the Double Taxation Avoidance Agreement – Clarification*'.

As per para 2 of the aforesaid Circular, the correct legal position is that where a specific provision is made in the DTAA, that provision will prevail over the general provisions contained in the I.T.Act, 1961. For the sake of ready reference, the relevant part of the aforesaid Circular is reproduced as follows :

CIRCULAR NO. 333

Conflict between the provisions of the IT Act, 1961, and the provisions of the Double Taxation Avoidance Agreement—Clarification

02/04/1982

DOUBLE TAXATION RELIEF

SECTIONS 90,

It has come to the notice of the Board that sometimes effect to the provisions of double taxation avoidance agreement is not given by the Assessing Officers when they find that the provisions of the agreement are not in conformity with the provisions of the IT Act, 1961.

- 2. The correct legal position is that where a specific provision is made in the double taxation avoidance agreement, that provision will prevail over the general provisions contained in the IT Act, 1961. In fact the double taxation avoidance agreements which have been entered into by the Central Government under s. 90 of the IT Act, 1961, also provide that the laws in force in either country will continue to govern the assessment and taxation of income in the respective country except where provisions to the contrary have been made in the Agreement.*
- 3. Thus, where a double taxation avoidance agreement provides for a particular mode of computation of income, the same should be followed, irrespective of the provisions in the IT Act. Where there is no specific provision in the agreement, it is the basic law, i.e., the IT Act, that will govern the taxation of income.”*

2. Union of India Vs Azadi Bachao Andolan [2003] 263 ITR 706 (SC)

The aforesaid judgement relates to the validity of Circular No.789, dated 13.4.2000 [243 ITR (St) 57] issued by the CBDT, with regard to assessment of cases in which the Indoor-Mauritius Double Taxation Avoidance Convention, 1983, applied.

The aforesaid judgement is a landmark judgement delivered by the Apex Court on various issues relating to the transactions with foreign entities.

It was also, *inter alia*, held in the aforesaid judgement that no provision of DTAA can fasten a tax liability where the liability is not imposed by the Act. If a tax liability is imposed by the Act, the DTAA may be resorted to for negating or reducing it; and in case of difference between the provisions of the Act and the DTAA, the provisions of the DTAA would prevail over the provisions of the Act and can be enforced by the appellate authorities and the Court.

Thus, the Apex Court has made the legal position very clear that in case of a conflict between the provisions of the Income-Tax Act, 1961 and the provisions of the DTAA, the provisions of the DTAA would prevail.

3. B4U International Holdings Ltd Vs Dy.CIT (Int.Tax) [2012] 18 ITR (Trib) 62 (Mum)

In this judgement, the provisions of the DTAA between India and USA had to be examined by the Tribunal.

It was, *inter alia*, held in this case that there was no change in the DTAA between India and USA and therefore, the amendments made by the Finance Act, 2012, were inconsequential in that regard.

The relevant observations of the Hon. Tribunal are to be found in para 18 on page 71 of the aforesaid judgement in 18 ITR (Trib) 62 (Mum).

For the sake of ready reference, the same are reproduced as follows :

“Coming to the argument of the learned Departmental representative that the amendment to the Finance Act, 2012, changes the position, we find that there is no change in the Double Taxation Avoidance Agreement between India and the U.S.A. Thus, the amendments have no effect on our decision”

From the aforesaid observations of the Hon. Tribunal, it is clearly established that where there is no change under the relevant DTAA, the amendment brought about by the Finance Act, 2012, will have no impact thereon.

Conclusion :

In the light of the aforesaid discussion, it is quite clear that the amendments brought about by the Finance Act, 2012, under sections 9(1)(i) and 9(1)(vi) of the Act, will not have any impact or effect on the provisions of the DTAA entered into by India on a foreign country.

Place : Pune

(S.K.Tyagi)

Date : 29.9.2012

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