IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA

[Coram: Pramod Kumar AM and Shri George Mathan JM]

I.T.A. No.: 1412/Kol/2011
Assessment year: 2008-09

Deputy Commissioner of Income Tax
Circle 11, Kolkata ***……Appellant***

Vs.

Andaman Sea Food Pvt Ltd ***……Respondent***
8/1H, Diamond Harbour Road
Kolkata 700 069 [PAN: AADCA1503C]

Appearances by:
D J Mehta and Sanjay Kumar *for the appellant*
D S Damle *for the respondent*

Date of concluding the hearing : June 19, 2012
Date of pronouncing the order : June 19, 2012

O R D E R

Per Pramod Kumar:

1. By way of this appeal, the Assessing Officer has challenged the correctness of CIT(A)'s order dated 11th July 2011, in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2008-09, on the following ground:

> **Whether on the facts and in the circumstances of the case, the learned CIT(A) was correct in holding that consultancy fees paid to Singapore based foreign company were not chargeable to tax in India, as well as the applicability of section 40(a)(ia) for failure of deduction under section 195.**

2. As learned representatives fairly agree, the issues that we are required to adjudicate are (a) whether or not the CIT(A) was justified in holding that the income of the Singapore company, to which assessee had

made payments for consultancy fees, was not taxable in India in respect of such fees; and (b) whether or not the CIT(A) was further justified in holding that non deduction of tax at source under section 195, from such payments, will result in disallowance under section 40(a)(i) of the Act.

3. The material facts are not in dispute. The assessee is engaged in the business of trading and export of sea foods. During the course of assessment proceedings, the Assessing Officer noticed that the assessee had claimed a deduction of Rs 3,00,22,646 in respect of consultancy charges paid to a Singapore based company by the name of Global Maharaja Pte Ltd (**GMPL**, in short). In response to Assessing Officer's requisition for further details, it was submitted by the assessee that during the relevant financial period, the assessee had carried out huge volume for currency derivative transactions, and that, in terms of agreement with the GMPL, the assessee was required to pay consultancy charges @ 1% of the total transacted volume of forex derivatives, futures and options – subject to a profit realization of at least Indian Rs 3.50 per U S Dollar. It was further submitted that, out of the total amount of Rs 3,00,22,646, the assessee had remitted a sum of Rs 37,97,246 on 27th March 2008, and the balance amount of Rs 2,62,25,400 was shown, as outstanding dues to payable to GMPL, in the balance sheet as on 31st March 2008. It was in the backdrop of these facts that the Assessing Officer required the assessee to show cause as to why the amount not be disallowed under section 40(a)(i) because the assessee has not deducted any tax at source from these payments, as required under section 195 of the Act. It was submitted by the assessee that the services were rendered outside India, and, for that reason, the amount paid for consultancy services to GMPL cannot be said to be ' fees for technical services' so as to attract the provisions of Section 9(1)(vii). This argument did not impress the Assessing Officer. He was of the view that, in the light of retrospective amendment w.e.f. 1st June 1976 introduced by the Finance Act 2010, it is no longer relevant whether the non resident has rendered

services in India or outside India and whether the non resident has place of business or business connection in India or not. As long as the services are used in India, according to the Assessing Officer, the fees for such technical services will be taxable in India. Accordingly, the Assessing Officer proceeded to hold that amounts paid or payable by the assessee to GMPL were taxable in India, and that the assessee having failed to discharge his tax deduction obligation under section 195, the entire amount paid and payable to the said company, aggregating to Rs 3,00,22,646 is liable to be disallowed under section 40(a)(i) of the Act.

4. Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A), in a very erudite and detailed order, held **(i)** that the provisions of the India Singapore Double Taxation Avoidance Agreement (209 ITR Statute 1), being beneficial to the assessee vis-à-vis the provisions of the Indian Income Tax Act, will override the provisions of the Income Tax Act; **(ii)** that the consultancy fees paid by the assessee to GMPL is not covered by the scope of the expression 'fees for technical services' under Article 12 of the India Singapore tax treaty; **(iii)** that since GMPL did not have any permanent establishment in India, the income of the assessee is not taxable as 'business profits' in India; **(iv)** that since income embedded in the payments made to GMPL was not taxable in India, and in the light of Hon'ble Supreme Court in the case of GE Technology Centre Pvt Ltd Vs CIT (327 ITR 456), the assessee did not have any obligation to deduct tax at source in India; and **(v)** that since there was no lapse of non deduction at source by the assessee, the impugned disallowance of Rs 3,00,22,646 was to be deleted. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

6. There is no, and cannot be any, dispute with the basic legal position, as inherent in the scheme of the Indian Income Tax Act under section 90, that the provisions of a duly notified double taxation avoidance agreement will override the provisions of the Income Tax Act, unless, and to the extent, the latter are beneficial to the assessee. As Late *Prof. Klaus Vogel,* in his oft referred book *'Klaus Vogel on Double Taxation Conventions',* had observed that, "the treaty acts like a stencil that is placed over the pattern of domestic law and covers over certain parts". Dr. Vogel's perception on this issue quite appropriately sums up the legal position in India as well. A tax treaty essentially restricts the rights of the source state on taxation of an income arising therein, inasmuch as residence country generally has unqualified right to tax global income of its tax subjects anyway, and, therefore, it is useful to begin by examining, from a source country's perspective, whether the income in question can at all be taxed in the source state under the applicable tax treaty. Let us, therefore, begin by examining the taxability of consultancy fee paid to GMPL in the light of applicable tax treaty provisions.

7. We find that there is no dispute with the factual position that the GMPL did not have any permanent establishment in India, and with the legal principle laid down in the applicable tax treaty that, in the absence of the PE of GMPL, its business profits could not be taxed in India. The taxability under the source state under Article 7 of the applicable tax treaty, therefore, clearly fails. We further find that so far as taxability under Article 12, i.e. with respect to 'Royalties and fees for technical services' is concerned, we find that Article 12(4) provides that, "The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services : (a) are ancillary and subsidiary to the application or enjoyment of the right, property or

information for which a payment described in paragraph 3 is received ; or (*b*) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein ; or (*c*) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein." A plain reading of this provisions makes it clear that the case of the GMPL could at best fall in 12(4)(b) but, even for this, it is a condition precedent that the services should enable the person acquiring the services to apply technology contained therein, but then it is nobody's case that services rendered by the GMPL were such that the assessee was enabled to apply technology contained therein. The services were simply consultancy services which did not involve any transfer of technology. The amounts received by the GMPL could not be taxed as 'fees for technical services either. As a matter of fact, learned Departmental Representative submits that the CIT(A) was quite justified in holding that the income in the hands of the GMPL is neither taxable as a business income under article 7 of as fees for technical service under article 12, even though learned Director of Income Tax (International Taxation) Shri Sanjay Kumar, who was present in the court room in connection with some other case, immediately got up to disown this argument and submit that the views so expressed by the learned Departmental Representative are quite at variance with the stand being taken by the directorate of international taxation in all other cases. That does not make any difference to our decision on this issue, because even without this benevolence of the learned Departmental Representative, we will still come to the same conclusion. The reason is this. There are at least two non-jurisdictional High Court decisions, namely Hon'ble Delhi High Court in the case of DIT Vs Guy Carpenter & Co Ltd (2012 TII 14 HC DEL INTL) and Hon'ble Karnataka High Court in the case of CIT Vs De Beers India Pvt Ltd (TS-312-HC-2012), in favour of the assessee, and there is no contrary decision by Hon'ble jurisdictional High Court or by

Hon'ble Supreme Court. We bow before higher wisdom of Hon'ble Courts above and hold that unless there is a transfer of technology involved in technical services extended by Singapore company, the 'make available' clause is not satisfied and, accordingly, the consideration for such services cannot be taxed under Article 12(4) of India Singapore tax treaty. Learned Departmental Representative, however, proceeds to give a new twist to the case of the revenue. Learned Departmental Representative has now come up with the argument that even if the income embedded in payments to GMPL were not taxable in India under Article 7 (i.e. business profits) or under Article 12, these amounts were taxable under article 23 of the applicable tax treaty. He invites our attention to Article 23 which provides that "(i)tems of income which are not expressly mentioned in the foregoing Articles of this Agreement may be taxed in accordance with the taxation laws of the respective Contracting States." His interpretation of the scope of this provision is that when taxability fails under all articles of the applicable tax treaty, the taxability automatically arises under this provision. In other words, for example, when a business profit is not taxable under Article 7, this non taxability is not the end of the road so far as taxability in the source state is concerned, because, according to the learned Departmental Representative, the taxability of business profit in such a situation, though not taxable under article 7, automatically shifts to the taxability under article 23, effectively under the domestic laws of the source state. He has also filed a note, though more little carefully worded than his arguments in the court room, which also lays lot of emphasis on the scope of article 23, as also the fact that the foreign company should "have approached the authority for advance ruling as per the provisions of sections 245N to 245V of the Income Tax Act, 1961 to be on the right side of the law, instead of failing to fulfil their tax obligations and presuming and assuming non applicability of certain provisions of the Income Tax Act vis-à-vis the DTAA between India and Singapore". Learned Departmental Representative goes on to state that "the assessee

has preferred the tortuous *(path)* over the straight". Learned Departmental Representative has also laid lot of emphasis about, what he perceives as, learned CIT(A)'s categorical finding that the payments made to GMPL were in the nature of 'other income' and, therefore, should be taxed under article 23 of the Indo Singapore tax treaty.

8. As for learned Departmental Representative's reference to the alleged finding of the CIT(A) regarding the amount having been paid to GMPL falling within category of the "other sum", it is important to note that the CIT(A) had stated that "Section 40(a)(i) of the Income Tax Act provides that in computing income of an assessee under the head 'profits and gains of business', deduction will not be allowed for any expenditure being royalty, fees for technical services and other sum chargeable under the Act, if it is payable outside India, or in India to a non resident, and on which tax is deductible at source under Chapter XVII B and such tax has not been deducted", and it was in this context that the CIT(A) noted that though the fee paid to GMPL was not covered by fees for technical services, it could fall under the head 'other sum' but since the said other sum was not chargeable to tax in India, the assessee did not have any tax withholding obligation. This classification of income was not in the context of treaty classification but in the context of, what he believed to be, two categories of income referred to under section 40(a)(i), i.e. 'royalties and fees for technical services' and 'other sums chargeable to tax'. As the CIT(A) did so, he missed out the expression 'interest' appearing in Section 40(a)(i) but that is hardly material in the present context. What is material is that the expression 'other income' was used in the context of mandate of Section 40(a)(i) and not in the context of treaty classification of income. Learned Departmental Representative has clearly missed out this vital fact. Let us now turn to the provisions of Article 23 of the applicable tax treaty. As we have noted earlier, this treaty provision provides that "items of income which are not expressly mentioned in the foregoing Articles of this Agreement may be taxed in

accordance with the taxation laws of the respective Contracting States". Learned Departmental Representative's argument is that "consultancy charges, brokerage, commission, and incomes of like nature which are payments which are covered by the expression "other sums" as stated in Section 40(a)(i) and chargeable to tax in India as per the Income Tax Act, and also liable to tax as per taxation laws of Singapore" are squarely covered by Article 23 of the India Singapore tax treaty. This argument proceeds on the fallacious assumption that 'other sums' under section 40(a)(i) constitutes an income which is not chargeable under the specific provisions of different articles of India Singapore tax treaty, whereas not only this expression 'other income' is to be read in conjunction with the words immediately following the expression 'chargeable under the provisions of this (*i.e. the Income Tax Act 1961)* Act', it is important to bear in mind that this expression, i.e. 'other sums, also covers all types of incomes other than (a) interest, and (ii) royalties and fees for technical services. Even business profits are covered by the expression 'other sums chargeable under the provisions of the Act' so far as the provisions of Section 40(a)(i) and Section 195 are concerned and, therefore, going by this logic, even a business income, when not taxable under article 7, can always be taxed under article 23. That is clearly an absurd result. A tax treaty assigns taxing rights of various types of income to the source state upon fulfilment of conditions laid down in respective clauses of the treaty. When these conditions are satisfied, the source state gets the right to tax the same, but when those conditions are not satisfied, the source state does not have the taxing right in respect of the said income. When a tax treaty does not assign taxability rights of a particular kind of income to the source state under the treaty provision dealing with that particular kind of income, such taxability cannot also be invoked under the residuary provisions of Article 23 either. The interpretation canvassed by the learned Departmental Representative, if accepted, will render allocation of taxing rights under a treaty redundant. In any case, to suggest that consultancy charges, brokerage and commission can be taxed

under article 23, as has been suggested by the learned Departmental Representative, overlooks the fact that these incomes can indeed be taxed under article 7, article 12 or article 14 when conditions laid down in the respective articles are satisfied.

9. It is also important to bear in mind the fact that article 23 begins with the words 'items of income not expressly covered' by provisions of Article 6-22. Therefore, it is not the fact of taxability under article 6-22 which leads to taxability under article 23, but the fact of income of that nature being covered by article 6-22 which can lead to taxability under article 23. There could be many such items of income which are not covered by these specific treaty provisions, such as alimony, lottery income, gambling income, rent paid by resident of a contracting state for the use of an immoveable property in a third state, and damages (other than for loss of income covered by articles 6-22) etc. In our humble understanding, therefore, article 23 does not apply to items of income which can be classified under sections 6-22 whether or not taxable under these articles, and the income from consultancy charges on is covered by Article 7, Article 12 or Article 14 when conditions laid down therein are satisfied. Learned Departmental Representative's argument, emphatic and enthusiastic as it was, lacks legally sustainable merits and is contrary to the scheme of the tax treaty. While dealing with the scope of residuary article of income under the tax treaties, and in support of the above conclusions, we may also refer to certain observation, with which we are in most respectful agreement, made by the Hon'ble Justice P V Reddi, articulating the views of the Authority for Advance Ruling in the case of Gearbulk AG (318 ITR 66), and in his felicitous words as follows

> *…….The question is whether the profits from the shipping operations in international traffic can be said to be "an item of income" "not dealt with" in the previous articles of DTAA ? We do not think so. Among the various items of income in the foregoing articles, business profits into which the shipping income falls has been dealt with under article 7. Profits from the international operation of ships*

are only a species of business profits just as the profits from international air transport. The latter is dealt with separately in article 8 for the reason that it does not fall in line with the scheme of taxation of business profits under article 7. Exclusive right is given to the State in which the enterprise resides. Permanent Establishment test is irrelevant under article 8. Hence, a separate article. As far as the profits from international operation of ships are concerned, it is an integral part of business profits; at the same time, they are excluded from the business profits - article for the obvious reason that it is not intended to be covered by the Treaty. That income has been left to the care of domestic law under which the burden of taxation on such income has been minimized (vide section 172 of Income-tax Act). We are of the considered view that a particular species of income which is specifically referred to in article 7 and deliberately left out of its genus, namely business profits, cannot be said to be an item of income not dealt with under article 7. The expression 'deal with' is a comprehensive expression having different shades of meaning. In the New Chambers Thesaurus, the meanings of 'deal with' are given thus :

> *"1. deal with a situation, attend to, concern, see to, manage, handle, tackle, cope with, get to grips with, take care of, look after, sort out, process."*

In Collins Cobuild English Language Dictionary, it is stated thus :

> *"If a book, speech, film etc. deals with a particular thing, it has that thing as its subject or is concerned with it."*

In Shorter Oxford Dictionary (Thumb Index Edn.) one of the meanings given is :

> *"be concerned with (a thing) in any way; busy or occupied oneself with, esp. with a view to discuss or refutation."*

The following meaning given in the New Oxford American Dictionary may also be noted :

> *"take measures concerning (someone or something) ..... take or have as a subject; discuss."*

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9.1 The applicant's counsel submitted that an item of income can be said to have been dealt with in an article of the Treaty only if it defines its scope as well as allocates the right to tax such income between the two Contracting States. Mere exclusion of shipping business profits from article 7 does not amount to dealing with that item of income. We find it difficult to accept this contention. Allocation of taxing right to the source State can well be done by such a process of exclusion. There is no particular manner or methodology of achieving that result. The expression 'dealt with' does not necessarily mean that there should be a detailed or elaborate treatment of the subject

10. Clearly, therefore, the income from consultancy services, which cannot be taxed under article 7, 12 or 14 because conditions laid down therein are not satisfied, cannot be taxed under article 23 either. It is

also only elementary that when recipient of an income does not have the primary tax liability in respect of an income, the payer cannot have vicarious tax withholding liability either. This position is independent of the payer having moved an application under section 195 or not, or on the payer or the payee having obtained an advance ruling in their favour or not. The law is now very well settled in this regard by Hon'ble Supreme Court's judgment in the case of GE India Technology Centre Pvt Ltd Vs CIT (*supra)* wherein Their Lordships have categorically held that, "where a person responsible for deduction is fairly certain, then he can make his own determination as to whether the tax was deductible at source and, if so, what should be the amount thereof". In view of these discussions, and bearing in mind entirety of the case, we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.

11. In the result, the appeal is dismissed. It was so pronounced in the open court immediately upon conclusion of hearing.

Sd/xx ***Sd/xx***
George Mathan **Pramod Kumar**
(Judicial Member) (Accountant Member)
Kolkata, the 19th day of June , 2012

Copies to : *(1) The appellant*
(2) The respondent
(3) CIT
(4) CIT(A)
(5) The Departmental Representative
(6) Guard File

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Kolkata benches, Kolkata

Laha Sr PS