IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Pavan Kumar Gadale (Judicial Member)]

ITA No. 2613/Mum/19
Assessment year: 2014-15

Amarchand & Mangaldas
& Suresh A Shroff & Co **…….……Appellant**
3rd floor, Lentin Chambers, Dalal Street,
Fort, Mumbai 400023 [PAN: AAAFA6542P]

Vs.

Assistant Commissioner of Income Tax
Circle 16(2), Mumbai **……Respondent**

Appearances by

Dr. S M Lala, Dishesh Shrivastava, and Harsh Bafna *for the appellant*
S S Iyengar *for the respondent*

Date of concluding the hearing: : December 16, 2020
Date of pronouncement : December 18, 2020

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged the correctness of the order dated 7th March 2019 passed by the learned Commissioner (Appeals) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2014-15.

2. The short issue that we are required to adjudicate in this appeal is whether or not the authorities below were justified in declining tax credit under article 23(2) of India Japan Double Taxation Avoidance Agreement ['**Indo Japanese tax treaty**', *in short*; **(1990) 182 ITR (Stat) 380**- as amended from time to time], in respect of taxes of Rs 80,55,856 withheld by its clients fiscally domiciled in Japan, on the facts and in the circumstances of this case. As an alternate plea, assessee pleads that, in the event of the assessee being declined the tax credit in respect of the taxes so withheld in Japan, the assessee should at least be allowed a deduction, for the said amount, in computation of its professional income.

3. The issue in appeal lies in a rather narrow compass of material facts. The assessee before us is one of India's well-known law firms and is assessed to tax in the status of a partnership firm. The return filed by the assessee was subjected to scrutiny assessment proceedings. In the course of these scrutiny assessment proceedings, it was, *inter alia*,

noticed that the assessee had claimed a foreign tax credit of Rs 80,55,856 in respect of taxes withheld by its clients in Japan. The taxes so withheld were at the rate of 10% on gross billing amounts, by treating the professional fees earned by the assessee in Japan as taxable in Japan, i.e. the source country, under article 12 of Indo-Japanese tax treaty. The Assessing Officer, however, was of the view that credit for such taxes withheld in Japan was not admissible to the assessee, for the reason that the income so earned by the assessee could only have been taxable under article 14 for the 'independent personnel services' but then since assessee admittedly did not have any fixed in Japan, the condition precedent for taxability even under article 14 was not at all satisfied. The Assessing Officer was thus of the view that the taxes have been wrongly withheld in Japan, and, therefore, the assessee was not entitled to a foreign tax credit in respect of the same. In support of the stand so taken, the learned Assessing Officer placed his reliance on the decisions of the coordinate benches in the cases of **Maharashtra State Electricity Board Vs DCIT [(2004) 90 ITD 793 (Mum)]**, **Dy. CIT v. Chadbourne & Parke LLP [(2005) 2 SOT 434 (Mum)]**, and **Ershisanye Construction Group India (P.) Ltd. Vs DCIT [(2017) 84 taxmann.com 108 (Kol)]**. The foreign tax credit of Rs 80,55,856 was thus declined. Aggrieved, the assessee carried the matter in appeal before the learned Commissioner (Appeals), but without any success. Learned Commissioner (Appeals) referred to certain emails exchanged between the assessee and his Japanese clients, which show that the assessee had consistently taken a stand that the assessee could only be taxed under article 14 in Japan, and since the assessee admittedly did not have a fixed base in Japan for more than 183 days, which is *sine qua non* for taxation under that article, no taxes could legitimately be withheld from the payments in question. Learned Commissioner (Appeals) noted that the taxes withheld by the Japanese clients were contrary to the scheme of the Indo Japanese tax treaty, and, therefore, the assessee was not entitled to any foreign tax credit for the same. The action of the Assessing Officer was thus confirmed, and infact further fortified, by the learned Commissioner (Appeals). The assessee is not satisfied and is in further appeal before us.

4. We have heard Dr. Lala, learned counsel for the assessee, and Shri Iyengar, learned Departmental Representative, at length. We have also perused the material on record and duly considered the facts of the case in the light of the applicable legal position.

5. There is no dispute about the fundamental legal position that, in terms of Article 23(2)(a) of Indo Japanese tax treaty, "**where a resident of India derives income which, in accordance with the provisions of this Convention, may be taxed in Japan, India shall allow as a deduction from the tax on the income of that resident an amount equal to the Japanese tax paid in Japan, whether directly or by deduction**" *[Emphasis, by underlining, supplied by us]*. What essentially follows is that when in accordance with the provisions of Indo Japanese tax treaty, any income of Indian resident is taxed in Japan, the Indian resident will get the deduction, in the computation of his tax liability, taxes paid by the assessee in Japan- whether paid directly by the assessee or whether taxes were withheld in Japan. There are many other conditions attached to this basic provision, but, for our present purposes, those conditions are not really relevant. That brings us to the question as to what are the connotations of "in accordance with the provisions" of the tax treaty. In the case of **Nav Bharat Vanijya Vs CIT [(1980) 123 ITR 865 (Cal)]**, Hon'ble Calcutta High Court has observed that "**(t)he words 'in accordance with', mean being in agreement or harmony with; in conformity to: vide the Compact Edition of the Oxford English Dictionary, Vol.**

I, page 62". In paragraph 32.5 of the OECD Model Convention Commentary, 2017, as indeed in its earlier versions, it is, *inter alia*, stated that "Article 23 A and Article 23 B, however, **do not require that the State of residence eliminate double taxation in "all" cases where the State of source has imposed its tax by applying to an item of income a provision of the Convention that is different from that which the State of residence considers to be applicable**". Essentially, therefore, it is open to the Assessing Officer to take a call on whether the taxes withheld in the treaty partner jurisdiction could be reasonably said to be in harmony with or in conformity with the provisions of the related tax treaty, and in a case in which he comes to the conclusion that the taxes so withheld in the treaty partner jurisdiction could indeed be reasonably said to be not in harmony with the scheme of taxation in that tax treaty, he can decline the foreign tax credit under article 23(2)(a). The question, therefore, that we really need to adjudicate upon is whether the assessee could reasonably be said to be taxable in Japan under article 12, in respect of the professional income earned in Japan, of the Indo Japanese tax treaty. It is when the answer to this question is in the affirmative that the granting of the tax credit in respect of taxes so paid abroad could be considered, of course on merits, in the hands of the assessee

6. Let us begin by taking a look at article 12 and article 14 of the Indo Japanese tax treaty, as they are relevant for the purposes of our adjudication on this core question. These provisions are reproduced below:

ARTICLE 12- ROYALTIES & FEES FOR TECHNICAL SERVICES

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that Contracting State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services.

3. The term 'royalties' as used in this article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films and films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience.

4. The term 'fees for technical services' as used in this article means payments of any amount to any person other than payments to an employee of a person making payments and to any individual for independent personal services referred to in article 14, in consideration for the services of a managerial, technical or consultancy nature, including the provisions of services of technical or other personnel.

5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other Contracting State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of article 7 or article 14, as the case may be, shall apply.

6. Royalties and fees for technical services shall be deemed to arise in a Contracting State when the payer is that Contracting State itself, a political sub-division, a local authority thereof or a resident of that Contracting State. Where, however, the person paying the royalties or fees for technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for technical services was incurred, and such royalties or fees for technical services are borne by such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the Contracting State in which the permanent establishment or fixed base is situated.

7. Where, by reason of special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for technical services, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

[Emphasis, by underlining, supplied by us]

ARTICLE 14- INDEPENDENT PERSONAL SERVICES

1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that Contracting State unless he has a fixed base regularly available to him in the Contracting State for the purpose of performing his activities or he is present in that other Contracting State for a period or periods exceeding in the aggregate 183 days during any taxable year or 'previous year' as the case may be. If he has such a fixed base or remains in that other Contracting State for the aforesaid period or periods, the income may be taxed in that Contracting State but only so much of it as is attributable to that fixed base or is derived in that other Contracting State during the aforesaid period or periods.

> **2. The term 'professional services' includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, surgeons, lawyers, engineers, architects, dentists and accountants**.

7. Undoubtedly, there are overlapping areas in the definition of fees for technical services under article 12(4), which covers' technical, management and consultancy services' vis-à-vis the definition of professional services income from which can be taxed under article 14 as 'income from independent personnel services'. This overlapping is recognized in article 12(4) itself, as it provides that where fees from technical services sought to be taxed under article 12 include any item of income which is dealt with in article 14, article 12 will yield to those specific provisions in respect of that fee for technical service which can be taxed as income from independent services under article 14. That treaty approach is in consonance with the well-settled principle of law contained in the Latin maxim ***generalia specialibus non derogant***, i.e., general provisions do not override the specific provisions. Quite clearly, therefore, when a particular type of income is specifically covered by a treaty provision, the taxability of that type of income is governed by the specific provisions so contained in the treaty. However, it is equally well settled a legal position that a treaty is to be read as whole and, therefore, different articles cannot be read on a standalone basis *dehors* the scheme of the tax treaty. A coordinate bench of this Tribunal and speaking through one of us (i.e. the Vice President) has, in the case of **Hindalco Industries Ltd Vs ACIT [(2005) 94 ITD 242 (Mum)]**, observed that "**A tax treaty is to required to be interpreted as a whole, which essentially implies that the provisions of the treaty are required to be construed in harmony with each other**," and this principle was reiterated in another coordinate bench decision in the case of **DCIT Vs Boston Consulting Group Pte Ltd [(2005) 94 ITD 31 (Mum)]. Hon**'ble Supreme Court, in the case of **K.P. Varghese v. ITO [(1981) 131 ITR 597 (S.C.)]** and even in the context of the interpretation of taxing statutes, have held that the task of interpretation is not a mechanical task and, quoted with approval; Justice Hand's observation that **"it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning".** When such are the views of the Hon'ble Supreme Court on the interpretation of taxing statutes, essentially the tax treaties, which are to be subject to less rigid rules of interpretation, cannot be subjected to literal interpretation isolation with the context in which the provisions of the treaty are set out. When we are interpreting a treaty provision, we cannot be guided by any one rule of interpretation alone even when the results achieved on that basis come in conflict with the results reached at by way of applying the other applicable principles. If we are to apply, for example, the principle of general provisions making way to the specific provisions in this case, and thus hold that only article 14 will come into play for the taxation of professional services, the results arrived at will be in conflict with the well-established principle that the treaty is to be read as a whole and the provisions of the treaty are to be construed in harmony with each other, inasmuch as while article 12(4) exclusion clause proceeds on the basis that article 14 applies to individuals alone, the article 14 will then be applicable to all the entities- including the partnership firms and corporate entities. That will be clearly incongruous. In any case, we have not been able to find even any conceptual justification for excluding one class of eligible taxpayers, i.e.

individuals, from the application of provisions of article 12. Whatever holds good for the exclusion of individuals earning income taxable under article 14 must hold good for the other taxpayers earning income taxable under article 14 as well- unless, of course, article 14 is treated as applicable to the individuals alone. Therefore, unless the provisions of article 14 are held to be applicable only for individuals, the exclusion clause under article 12(4) being confined to the individuals earning income taxable under article 14 does not make sense. The principles of interpretation of treaties, as indeed any statutory provision or legal document, are to be applied in a holistic manner, and no one principle of interpretation, howsoever well established, can have priority over another principle of interpretation which is legally binding. The principle of ***generalia specialibus non derogant***, i.e., general provisions do not override the specific provisions, is, therefore, required to be read for the purposes of individuals alone, so far as the provisions of article 14 are concerned, as is implicit in the scheme of the Indo-Japanese tax treaty as discussed above. Let us, in this background, take a look at the provision of article 12(4) once again. This article makes it clear that so far as the exclusion clause of an income from professional activities is concerned, i.e. income taxable under article 14 as independent personal services, only when the income is so earned by an individual. The exclusion clause, under article 12(4), covers only payments to "**to any individual for independent personal services referred to in article 14**". It is also important to bear in mind the fact that the normally an exclusion clause for independent personal services, as embedded in the article dealing with the fees for technical services, would cover only what is taxable under the head' independent personal services'. It does indicate that under the scheme of this treaty, what is taxable under article 14 is only the professional income of an individual and not of entities other than individuals. While on this aspect of the matter, it is important to take note of the fact that there is a school of thought to the effect that article 14 comes into play only for individuals while article 7 is for entities other than individuals, and it is for this reason that article 14 was finally removed from the OECD Model Convention. Taking note of this position, a coordinate bench of this Tribunal, in the case **of Linklaters LLP Vs ITO [(2011) 9 ITR (T) 217 (Mum)],** has observed as follows:

> **105. Learned counsel has also contended that the professional services can only be taxed under the head article 15 and in case chargeability under article 15 fails, that is end of the road. It cannot be open to revenue authorities to tax income from professional services under article 7. It is contended that article 15 applies only to individuals. As to the situations in which article 5 will apply in respect of the professional services and the situations in which article 15 of the India-UK tax treaty, which is in *pari materia* article 14 of the U.N. Model Convention, will apply, we find guidance from the following observations made in the U.N. Model Convention Commentary: —**
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> > **"The Group discussed the relationship between article 14 and sub-paragraph 3(b) of article 5. It was generally agreed that remuneration paid directly to an individual for his performance of activity in an independent capacity was subject to the provisions of article 14. Payments to an enterprise in respect of the furnishing by that enterprise of the activities of employees or other personnel are subject to articles 5 and 7. The remuneration paid by the enterprise to the individual who performed the activities is subject either to article 14 (if he is an independent contractor engaged by the enterprise to perform the activities) or article**

15 (if he is an employee of the enterprise). If the parties believe that further clarification of the relationship between article 14 and articles 5 and 7 is needed, they may make such clarification in the course of negotiations."

106. We are in considered agreement with this analysis in the U.N. Model Convention Commentary. We are thus of the considered view that, in a situation like the one that we are *in seisin* of, i.e., in which specific provisions for professional services or independent personal services or included services exist under article 15, when services are rendered by the enterprise, article 5(2)(k) will come into play, and when services are rendered by an individual, article 15 will find application. Therefore, while we agree with the learned counsel that article 15 will not be applicable on the facts of the present case, this finding does not really come to the rescue of the assessee since, as we have already held, the assessee did have a P.E. in India under article 5(2)(k) of the India-UK tax treaty, and, accordingly, profits attributable to the P.E. are taxable under article 7 of the India-UK tax treaty

9. In view of these discussions, there is a valid school of thought that in the scheme of the Indo Japanese tax treaty, article 14 for independent personal services holds the field for the individuals only- particularly in the light of the exclusion clause under article 12(4) being restricted to payment of fees for professional services to individuals alone. There is no dispute that the provisions of article 14 and article 12 are overlapping inasmuch as what is termed as professional service could also be covered by the fees for technical service- particularly as the definition of the fees for technical services is on 'classical model' of much wider scope and not on the 'make available model' now in vogue in many tax treaties. The only reason for which exclusion from article 12 was canvassed by the Assessing Officer was that rather specific provisions of article 14 have to make way for rather general provisions of article 12, but then when we hold that, in the context of Indo Japan tax treaty, article 14 comes into play only for individuals, this proposition ceases to hold good in the present context. As a corollary to this legal position, and the exclusion clause under article 12(4) not being triggered on the facts of this case as such, it is indeed reasonably possible to hold that the payments in question were rightly subjected to tax withholding in Japan. The judicial precedents cited by the authorities below are in the context of the tax treaties other than Indo Japan tax treaty, and the provisions of the Indo Japan tax treaty are not in *pari materia* with the provisions of those tax treaties. These judicial precedents deal with the tax treaties that India has entered into with China, U.K. and the USA, but then all the three treaties are, in the material respects, differently worded vis-à-vis the Indo-Japanese tax treaty that we are presently dealing with. It is, therefore, not even necessary, even if we have our reservations on correctness of these decisions, to refer the matter to the larger bench for reconsideration of the principle laid down therein. Suffice to say, on the facts of this case, the conclusions arrived at by the Japanese tax authorities, directing tax withholdings from the payments made to the assessee by its Japanese clients, cannot be said to unreasonable or incorrect. In the light of these discussions, as also bearing in mind entirety of the case, we hold that the assessee was wrongly declined tax credit of Rs 80,55,856 on the facts of this case. We, therefore, direct the Assessing Officer to grant the said tax credit to the assessee. As we have upheld the plea of the assessee with respect to the admissibility of the foreign tax credit, we see no need

to deal with the alternate plea of the assessee seeking deduction of the taxes so withheld abroad in the computation of its income.

10. As we part with the matter, we may add that, in our humble understanding, so far as determination of question as to whether or not the taxation has been done in the source country "**in accordance with the provisions of this Convention, may be taxed in …** *(the source jurisdiction)*", one has to take a judicious call as to whether the view so adopted by the source jurisdiction is a reasonable and *bonafide* view, which may or may not be the same as the legal position in the residence jurisdiction. While it is indeed desirable that there should be uniformity in tax treaty interpretation in the treaty partner jurisdictions, it may not always be possible to do so in view of a large variety of variations, such as the sovereignty of judicial systems, domestic law overrides on the treaty provisions, the legal framework in which the treaties are to be interpreted, and the judge-made law in the respective jurisdictions etc. In a situation in which a transaction by resident of one of the contracting states is to be examined in both the treaty partner jurisdictions, from the point of view of taxability of income arising therefrom, different treatments being given by the treaty partner jurisdictions will result in incongruity and undue hardship to the assessee. On the subject uniformity of interpretation in the treaty partner jurisdictions, Lord Denning, in the case of Corocraft, said: "**If such be the view of the American Courts, we surely should take the same view. This convention should be given the same meaning throughout all the countries who were parties to it**" (1 Q.B. 616). The importance of uniformity of interpretation of expressions which are used in global treaty networks can thus hardly be overemphasized. As was said in the Federal Court in **Canadian Pacific Ltd. v. Queen 76 DTC 6120 at p. 6135)** in interpreting the 1942 Canada-US Treaty, "While it is true that this Court has the right to interpret the Canada-US Tax Convention and Protocol itself **and is no way bound by the interpretation given to it by the United States** Treasury, **the result would be unfortunate if it were interpreted differently in the two countries when this would lead to double taxation. Unless, therefore, it can be concluded that the interpretation given in the United States is manifestly erroneous it is not desirable to reach a different conclusion, and I find no compelling reason for doing so**." That situation is to be best avoided, and it can only be so avoided when unless the view of the treaty partner jurisdiction is wholly unreasonable or, to borrow the words of Canadian Federal Court, "manifestly erroneous," it should be adopted, at least in respect of that transaction, by the other treaty partner as well. Here is a case in which not only the source country jurisdiction has taken the view that the legal fees received by the assessee are taxable under article 12 of the Indo Japan tax treaty, but, as discernable from the facts as recorded by the authorities below, the Japanese tax authorities have consciously taken a call rejecting the plea of the assessee for non-taxation, and even proceeded against the assessee's Japanese clients for interest and penalties for non-deduction of tax at source from the payments in question. This view, in the light of the detailed reasons set out above, is a reasonable view in the context of Indo Japan tax treaty and, at the minimum, not a 'manifestly erroneous.' It is noteworthy that in the OECD Model Conventions Commentaries, which are judicially held to be in the nature of *contemporanea expositio* in India and which our Hon'ble Courts above have referred to, with a great degree to respect and approval, from to time in taking calls on the provisions relating to the tax treaties, also it is stated, as we have noted earlier as well, that "Article 23 A and Article 23 B, however, **do not require that the State of residence eliminate double taxation in "all cases " where the State of source has imposed its tax by applying to an item of income a provision of the Convention that is different from that which the State of residence considers to be applicable**" *[Emphasis, by underlining, supplied by us]*. Therefore, it was a

position well visualized by the multilateral bodies, developing the treaty provision in question, that in all the cases in which the interpretation of the residence country about the applicability of a treaty provision is not the same as that of the source jurisdiction about that provision, and yet the source country has levied taxes- whether directly or by way of tax withholding, the tax credit cannot be declined. To put a question to ourselves, what could possibly be the situations in which views of the source and residence jurisdictions may differ about the applicability of a treaty taxation provision, and yet the residence country could still provide the related tax credits. In our humble understanding, for the detailed reasons set out above, these are the cases in which the treaty partner source jurisdiction has taken a reasonable *bonafide* view which is not manifestly erroneous- even though it is not the same as is the view taken by the residence jurisdiction. That aspect alone, however, is not the sole determinative factor in the present context since we have already held that, on the peculiarities of Indo Japanese tax treaty provisions, the legal fees paid to a partnership firm of lawyers can indeed be subjected to levy of tax under article 12 as the exclusion clause under article 12(4) does not get triggered for payments to persons other than individuals, and the provisions of article 14 are required to be read in harmony with the provisions of article 12(4).

11.. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 18th day of December, 2020.

Sd/xx ***Sd/xx***
Pavan Kumar Gadale **Pramod Kumar**
(Judicial Member) (Vice President)
Mumbai, dated the 18th day of December, 2020

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

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai