IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1274 OF 2013

Director of Income Tax (IT) – II,]
Scindia House, 1st Floor, Ballard Estate,]
N.M. Road, Mumbai – 400 038.] ... Appellant

Versus

M/s. B4U International Holdings Limited,]
C/o.B4U International Holdings Network]
(I) (P) Ltd., Plot No.15, Near Versova]
Telephone Exchange, Four Bungalow,]
Mumbai – 400 053.] ... Respondent

WITH
INCOME TAX APPEAL NO. 1557 OF 2013
WITH
INCOME TAX APPEAL NO. 1599 OF 2013
WITH
INCOME TAX APPEAL NO. 1621 OF 2013
WITH

Mr. Tejveer Singh for the Appellants in all appeals.

Mr. J.D. Mistri, senior counsel with Mr. Atul K. Jasani for the Respondents in all appeals.

CORAM : S.C. DHARMADHIKARI &
A.K. MENON, JJ.

WEDNESDAY, 29TH APRIL, 2015

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ORAL JUDGMENT : [Per S.C. Dharmadhikari, J.]

1. These appeals by the Revenue and for several assessment years, project the following questions as substantial questions of law :

> "(1) Whether ITAT was correct in holding the decision of CIT(A) that B4U cannot be treated as dependent agent of assessee despite various clauses of the agreement between the assessee and B4U demonstrating that the case is covered by Article 5(4) and Article 5(5) of Indo Mauritius Treaty ?
>
> (2) Whether ITAT was correct in holding that agent being remunerated at arm's length no further profits is attributable despite agent being dependent ?
>
> (3) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT is correct in holding that assessee need not deduct tax u/s 195 and subsequently there can be no disallowance u/s

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> 40(a)(i) despite the fact that the transponder charges being a consideration for "process" as clarified in terms of Explanation (6) to section 9 of the I.T. Act ?
>
> (4) Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT is correct in holding that the amount in question is not liable to tax in India and consequently the question of deduction of tax at a source u/s 195 does not arise despite the transfer of telecast right being a consideration for Royalty as clarified in Explanation (4) and (5) to section 9 of the I.T. Act ?"

2. The factual background in which these appeals have been brought by the Revenue are that the respondent-assessee is a Mauritius based company. The Revenue proceeded against it on the footing that it is engaged in the business of telecasting of TV channels such as B4U Music, MCM etc. It is the case of the Revenue that the income of the assessee from India consisted of collections from time slots given to advertisers from India through its agents. The assessee

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claimed that it did not have any permanent establishment in India and has no tax liability in India. The Assessing Officer did not accept this contention of the assessee and held that affiliated entities of the assessee are basically an extension in India and constitute a permanent establishment of the assessee within the meaning of Article 5 of the Double Taxation Avoidance Agreement (DTAA).

3. This view of the Assessing Officer was not accepted by the assessee and it preferred a appeal. The First Appellate Authority, namely, the Commissioner of Income Tax (Appeals) Mumbai, partly allowed the appeal in some cases and held that the entity in India cannot be treated as an independent agent of the assessee. Alternatively, and assuming that it could be treated as such if a dependent agent is paid remuneration at arm's length, further proceedings cannot be taxed in India.

4. The Revenue preferred an appeal to the Tribunal and essentially on this aspect. The Tribunal having dismissed the Revenue's appeals, the matter is carried before us. Our jurisdiction under section 260-A

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of the Income Tax Act 1961 (hereinafter referred to as the "IT Act") is invoked to urge that the four questions which have been proposed and reproduced above, are all substantial questions of law.

5. Mr. Tejveer Singh appearing in support of these appeals which are for assessment years 2001-02, 2004-05 and 2005-06 would submit that the Tribunal's orders raise the above questions because the Tribunal misapplied and misinterpreted the decision of the Hon'ble Supreme Court in the case of *Director of Income Tax (International Taxation) vs. Morgan Stanley & Company Inc. (2007) 292 ITR 416*. Mr. Tejveer Singh would submit that the transfer pricing analysis was not submitted and mere reliance on a circular of the Revenue / Board would not suffice. If the transfer pricing analysis did not adequately reflect the functions performed and the risks assumed by the agent in India, then, there would be need to attribute profits of the permanent establishment for those functions/risks. That had not been considered. Mr. Tejveer Singh also submitted that the B4U, MCM etc. were erroneously assumed to be the agents but not dependent on the assessee. Alternatively, they have also been erroneously held to be

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paying the remuneration at arm's length. All this has been assumed by the Tribunal though there was no relevant material. The Assessing Officer had rightly held that the payment made towards purchase of films for which no details were submitted as to what are the costs incurred were treated as royalties. The exhibition and telecast price were intangible and could not be termed as goods and merchandise in respect of export of advertisement films. Such findings of the Assessing Officer could not have been disturbed by the Commissioner (Appeals) and by the Tribunal. Therefore, the Tribunal's orders raise the above questions and which are substantial question of law.

6. It is argued that even with regard to the Question (C), the assessee cannot be said to be relieved of the obligation of deducting tax under section 195 of the Income Tax Act, 1961. This could not be a finding and equally the relief from applicability of section 40(a)(i) when the transponder charges being a consideration for “process” as clarified in terms of explanation 6 to section 9 of the Income Tax Act, 1961. Thus, the finding that this amount is not liable to tax in India and consequently, the question of deduction of tax at source does not

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arise will also raise substantial question of law.

7. However, Mr. Mistri, learned senior counsel appearing on behalf of the assessee raised a preliminary objection and pointed out that though the appeals are for distinct assessment years, the Revenue has filed appeals, raising same questions of law. The Tribunal order may be common but the grounds for each assessment years and in the Memos of Appeal before the Tribunal are not necessarily common. Therefore, the grounds in the Memos of Appeal of the Revenue and the assessee being distinct and it being not indicated as to which part of the Tribunal order and covering which appeal is the Revenue aggrieved by, this Court should not entertain such common questions and projected as substantial questions of law. Apart from the fact that separate appeals have to be filed even though the assessee is common, the order is common but the assessment years being different still what is pointed out by Mr. Mistri is that in all Memos of Appeal of the Revenue, similar questions are proposed and projected as substantial questions of law. They do not arise in all the appeals. On merits it is submitted by him that none of the findings and conclusions rendered

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by the Tribunal can be termed as perverse or vitiated by any error of law apparent on the face of the record. In that regard, he submits that the Tribunal has held that B4U cannot be treated as dependent agent of the assessee. Assuming that it can be so treated, it has been remunerated at arm's length. Therefore, no further profit is attributable. Mr. Mistri then points out that if the Tribunal order and which is fairly detailed for the assessment year 2001-02 is perused, it would indicate as to how the Tribunal has held in favour of the assessee and upheld some of the conclusions of the Commissioner (Appeals). As far as other two questions are concerned, they have also been dealt with, but the essential and core finding is that B4U cannot be termed as dependent agent and that assuming it can be so, it has been held by the Tribunal on the issue of arm's length price there were two facets. One being whether it is arm's length price or not and secondly whether when arm's length price is paid, whether the liability of the principal gets extinguished. It was pointed out that 15% is the norm for advertising agency and as determined by Circular No.742 dated 2nd May, 1996 which has been referred to in paragraph 19 of the Tribunal order dated 1st May, 2012 for assessment year 2001-02 in

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Income Tax Appeal No.880/Mum/2005 together with Cross Objection No.118/Mum/2010. In such circumstances, the other two questions do not arise. Even with regard to those questions, the findings are that the amounts are not taxable in India. Therefore, none of the questions are substantial questions of law and the appeals deserve to be dismissed.

8. After hearing both sides and perusing with their assistance all the appeal paper-books, we are inclined to agree with Mr. Mistri. The Tribunal had before it the order passed on 8th November, 2004 by the Commissioner of Income Tax (Appeals). As far as that order is concerned, it is subject matter of the Revenue's Income Tax Appeal No.1599 of 2013. There, the Revenue raised the ground that the assessee was having a dependent agent viz. B4U and that the Commissioner erred in holding that it cannot be treated as such. Further, even if the B4U is held to be a dependent agent, it is being paid remuneration at arm's length. Therefore, further profits cannot be taxed in India. Insofar as these grounds are concerned, the admitted facts are that the assessee is a foreign company incorporated in

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Mauritius. As noted, it had filed its residency certificate and pointed out that its business is of telecasting of TV channels such as B4U Music, MCM etc. During the assessment year under consideration, its revenue from India consisted of collections from time slots given to advertisers from India. The details filed by the assessee revealed that there is a general permission granted by the Reserve Bank of India to act as advertisement collecting agents of the assessee. The permissions were granted to M/s. B4U Multimedia International Limited and M/s. B4U Broadband Limited. In the computation of income filed along with the return, the assessee claimed that as it did not have a permanent establishment in India, it is not liable to tax in India under Article 7 of the DTAA between India and Mauritius. The argument further was that the agents of the assessee have marked the ad-time slots of the channels broadcasted by the assessee for which they have received remuneration on arm's length basis. Thus, in the light of the Central Board of Direct Taxes Circular No.23 of 1969, the income of the assessee is not taxable in India. The conditions of Circular 23 are fulfilled. Therefore, Explanation (a) to section 9(1)(i) of the IT Act will have no application.

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9. The Assessing Officer did not accept the contentions of the assessee. He did not agree on both counts but the Tribunal noted that the DTAA and particularly paragraph 5 of Article 5 indicates that an enterprise of a contracting State shall not be deemed to have a permanent establishment in the other contracting State merely because it carries on business in that State through a broker, general commission agent, or any other agent of independent status, where such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted exclusively or almost exclusively on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph. The Tribunal noted the findings of the Assessing Officer and found that the Commissioner held that the assessee carries out the entire activities from Mauritius and all the contracts were concluded in Mauritius. The only activity which is carried out in India is incidental or auxiliary / preparatory in nature which is carried out in a routine manner as per the direction of the principal without application of mind and hence B4U is not an dependent agent. Nearly

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4.69% of the total income of B4U India is commission / service income received from the assessee company and, therefore, also it cannot be termed as an dependent agent. As far as the alternate contentions are concerned, the First Appellate Authority held that the assessee and B4U India were dealing with each other on arm's length basis. 15% fee is supported by Circular No.742. Thus it was held that no further profits should be taxed in the hands of the assessee.

10. This conclusion of the Commissioner has been upheld by the Tribunal. It noted the rival contentions and in great details. The Tribunal concluded that after referring to the clauses in the agreement between the assessee and B4U that B4U India is not a decision maker nor it has the authority to conclude contracts (see paragraph 29). Further, the Revenue has not brought anything on record to prove that agent has such powers and from the agreement any such conclusion could not have been drawn. Barring this agreement, there is no material or evidence with the Assessing Officer to disprove the claim of the assessee that the agent has no power to conclude the contract. This finding is rendered on a complete reading of the agreement.

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Thereafter Indo-Mauritius DTAA has been referred to and particularly paragraphs 5.4 and 5.5. and the Tribunal concludes that the requirement that the first enterprise in the first mentioned State has and habitually exercised in that State an authority to conclude contracts in the name of the enterprise unless his activities are limited to the purchase of goods or merchandise for the enterprise is a condition which is not satisfied. Therefore, this is not a case of B4U India being an agent with an independent status. This finding is rendered in paragraph 29 and 30 of the order under challenge. We do not find that the Tribunal's order and which also refers to the Hon'ble Supreme Court decision in *Morgan Stanley & Co.* (supra) can raise any substantial questions of law.

11. We are not agreement with Mr. Tejveer Singh when he submits that the Supreme Court judgment in the case of *Morgan Stanley & Co.* will not apply. In that regard he relies upon the conclusion rendered by the Hon'ble Supreme Court. That conclusion is that there being no need for attribution of further profits to the permanent establishment of the foreign company where the transaction between the two was

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held to be at arm's length but this was only provided that the associate enterprise was remunerated at arm's length basis taking into account all the risk taking functions of the multinational enterprise. Thus, Mr. Tejveer Singh's reliance on these observations in the Supreme Court judgment are strictly on the alternate argument canvassed by the assessee. That alternate argument was that assuming that B4U India is a dependent agent of the assessee in India it has been remunerated at arm's length price and, therefore, no profits can be attributed to the assessee. Mr. Tejveer Singh would submit that the Tribunal failed to note that the situation would be different if the transfer price analysis did not adequately reflect the functions performed and the risks assumed by the enterprise. In such a case, there would be need to attribute profits to the permanent establishment for those functions / risks that had not been considered. Mr. Tejveer Singh's argument is that the assessee had not subjected itself to the transfer price regime. Therefore, no assistance can be derived by it from this judgment.

12. In this regard, Mr. Mistri has rightly pointed out that the requirement and in relation to computation of income from

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international transactions having regard to arm's length price has been put in place in Chapter-X listing special provisions relating to avoidance of tax by substituting section 92 to 92F by the Finance Act of 2001 with effect from 1st April, 2002. Therefore, such compliance has to be made with effect from assessment years 2002-03 relevant to which is the previous year commencing from 1st April, 2002. In any event, we find that the Tribunal has rightly dealt with the alternate argument by referring to the Revenue Circular 742. There, 15% is taken to be the basis for the arm's length price. Nothing contrary to the same having been brought on record by the Revenue before the Commissioner as also the Tribunal, it rightly concluded that the judgment of the Hon'ble Supreme Court in *Morgan Stanley & Co.* and the principle therein would apply. Similarly, the Division Bench judgment of this Court in the case of *Set Satellite (Singapore) Pte. Ltd. vs. Deputy Director of Income Tax (IT) & Anr. (2008) 307 ITR 265* would conclude this aspect. Therefore, we are of the opinion that the Tribunal's conclusions and which are consistent with the factual materials and the principles of law laid down above are neither perverse nor vitiated by any error of law apparent on the face of the

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record.

13. Strictly speaking the answers on questions (1) and (2) and which are common for all the appeals disposes of all the appeals against the Revenue and in favour of the assessee. However, the argument of Mr. Tejveer Singh is that the Tribunal and equally the Commissioner has dealt with other two questions. They are being projected before us and in relation to the assessment years 2004-05. It is submitted that the assessee was obliged to deduct tax at source under section 195 and having not deducted the same, there has to be a disallowance under section 40(a)(i) of the IT Act. That is because the transponder charges being a consideration and process as clarified in terms of Explanation (6) to section 9 of the IT Act. We have found from the detailed reasoning in the Tribunal's order and assuming that such questions were indeed raised that in the light of the findings on the main issue, namely, on permanent establishment / dependent agent these grounds or questions were not required to be answered. They are not required to be answered separately but consistent with findings on Question Nos. (1) and (2). It is precisely applying that the Tribunal

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has concluded that even this ground would have to be answered against the Revenue. It was also doubtful and in the given facts and circumstances as to whether any payment which is stated to be made to a US based company by the assessee which is a Mauritius based company, can be brought to tax in terms of Indian tax laws. We are of the opinion that any wider question or controversy need not be addressed. Once consistent with the findings on the main issue even these questions have to be answered in the peculiar factual backdrop against the Revenue then, we can dispose of these appeals on these questions. We also clarify that the arguments of Mr. Tejveer Singh and based on whether the payments made could be brought within the meaning of the word "process" and within the explanation can be raised and are kept open for being considered in an appropriate case. Keeping them open and in such manner, we hold that none of the questions projected and proposed are substantial questions of law.

14. Each of the above appeals, therefore, fail and are dismissed but without any order as to costs.

A.K. MENON, J. ***S.C. DHARMADHIKARI , J.***

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