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

[Coram: Pramod Kumar VP and Amarjit Singh JM]

ITA No. 155/Mum/2019
Assessment year: 2014-15

Technimont Pvt Ltd **…….....Appellant**
Technimont House, Chinchpokli Bunder,
504, Link Road, Malad West, Mumbai 400 064
[PAN: AAACI2628B]

Vs

Assistant Commissioner of Income Tax (IT)
Circle 13(3)(2), Mumbai **…….…….....Respondent**

Appearances by

M P Lohia, *along-with* **Nikhil Tiwari** *for the appellant*
Sanjay Singh *for the respondent*

Dates of hearing of the appeal : January 29, 2020
Date of pronouncing this order : February 14, 2020

O R D E R

Per Pramod Kumar, VP:

[1] This appeal challenges correctness of the order dated 31st October 2018 passed by the Assessing Officer under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2014-15.

[2] Core grievance of the assessee is that the Assessing Officer ought to have excluded a sum of Rs 11,91,18,391 from total income chargeable to tax in the hands of the assessee in India, as this amount represents aggregate of profits earned by assessee's branches in UAE and Qatar, and, as is the alleged settled legal position, once an income of an Indian assessee is

taxable in the treaty partner source jurisdiction under a treaty provision, the same cannot be included in its total income taxable in India as well i.e. the residence jurisdiction. The related grounds of appeal are being reproduced below for ready reference:

> **On the facts and in the circumstances of the case and in law, the learned AO/learned TPO/Hon'ble DRP**
>
> 1. erred in not reducing the income earned by the appellant's branch offices located in the United Arab Emirates (UAE) and Qatar, *[amounting to Rs 11,91,18,391]* from the appellant's total income chargeable to tax in India, as per Article 7 of the Double Taxation Avoidance Agreements between India and UAE/Qatar whereby only the UAE and Qatar Governments are entitled to levy tax on such income.
>
> 2. erred in not examining the taxability of income earned by appeallant's branch offices located in UAE and Qatar

[3] When this appeal was taken up for hearing, learned counsel for the assessee invited our attention to the fact that this aspect of the matter has not been examined, on merits, by the authorities below and the claim has been simply rejected on the ground of certain technicalities. These technical objections, as submitted by the learned counsel, are not sustainable in law. It was in this backdrop that we were urged to simply remit the matter to the file of the Assessing Officer, without any adjudication on merits, for taking a call on merits. That's a somewhat unusual request. More often than not, the prayer is for adjudication on merits so as to avoid delay in the matter reaching finality, but today learned counsel's vehement submission is for the matter being remitted to the file of the Assessing Officer for examination on merits, rather than we taking a call on the same. We are, however, not inclined to accept the request so made by the learned counsel for the assessee. For the reasons we will set out a little later, we deem it fit and proper to hear the matter on merits.

[4] To adjudicate on the issue on merits, only a few undisputed material facts need to be taken note of. The assessee before us is an Indian company with branch offices in UAE and Qatar. The assessee has earned profits aggregating to Rs 11,91,18,391 in these branches, which, for the purposes of the provisions of the respective tax treaties, constitute permanent establishments. The claim of the assessee, as noted by the DRP at page 10, is that "**the foreign branches create permanent establishments (PEs) in the foreign countries, the income from the same is liable to tax in these foreign countries, i.e. source states, and, hence, the income from aforesaid foreign branches should be exempt in India as per**

Article 7 of the tax treaties". The assessee has further contended that "**according to many judicial precedents cited below, it has been held that under a tax treaty, it has been provided that tax 'maybe' charged in a particular state in respect of specified income, it is implied that tax will not be charged by the other state in respect of such income**". As noted in the DRP's order, further at page 11, the contentions of the assessee have been that "**it has been held that once an income is held to be taxable in a particular jurisdiction under a tax treaty, unless there is a specific mention that it can be taxed in the other jurisdiction as well, the latter is denuded of the powers to tax such income**" and that "**accordingly, income earned by the foreign branches in UAE and Qatar where the assessee was forming PE should not be liable to tax in India based on relevant tax treaties".** The assessee has also relied upon a large number of judicial precedents, including the judicial precedents in the cases of **PAVL Kulandagan Chettiar [3 ITD 426 (SB)],** which has been upheld right upto Hon'ble Supreme Court **(267 ITR 654)** and a review petition has also been dismissed by Hon'ble Supreme Court **(300 ITR 5), CIT Vs Bank of India [64 taxmann.com 335 (Bom)], CIT Vs VRSRM Firm (208 ITR 401), CIT Vs R M Muthiah [202 ITR 508 (Karnataka)], DCIT Vs Patni Computer Systems Ltd [114 ITD 159 (Pune)], Apollo Hospitals Enterprises Limited [53 SOT 103 (Chennai)], DCIT Vs Turquoise Investments & Finance Ltd. (300 ITR 1), Pooja Bhatt Vs DCIT (26 SOT 574), DCIT Vs Mideast India Ltd [28 SOT 395 (Del)], CIT Vs Patni Computer Systems Limited (ITA No. 1148 of 2012; Hon'ble Bombay High Court) and Apollo Enterprises Limited s DCIT [23 taxmann.com 168 (Chennai- Tribunal)].**

[5] Learned counsel for the assessee has more armoury in store. He begins by inviting our attention to a coordinate bench decision in the case of **Bank of India Vs DCIT, *and vice versa*** (ITA Nos 5977 and 6016/Mum/2011; order dated 26th July 2017) wherein it has been held that the income of the foreign branches, covered by tax treaties with respective jurisdictions, is to be excluded from total income of the assessee and is to be held as not taxable in India. It is submitted that this decision is a binding judicial precedent and it is not open to us to deviate from the stand so taken by the coordinate bench. When learned counsel's attention was invited to the provisions of Section 90(3) read with notification no. 91/2008 dated 28th August 2008, and impact of this legal position on the claim of the assessee, he submits that section 90 was re-enacted with effect from 1st October 2009, and the notifications issued prior to re-enacted section 90 will not hold good in law. In support of this proposition, our attention is invited to a coordinate bench decision in the case of **Essar Oil Limited Vs ACIT [(2013) 28 ITR (Trib) 609 (Mum)]** wherein it is said to have been held, in paragraph no. 76, that notifications issued under earlier section 90 shall hold good till 1st October 2009. As a corollary to this observation, according to the learned counsel, the notifications issued under earlier section 90 will not hold good after 1st October 2009. He submits that in this view of the matter, nothing really turns on the notification no 91/2008 under section 90(3). He submits that the impact of notification having been nullified by re-

enactment of section 90, the law laid down by Hon'ble Supreme Court in the case of **CIT Vs PVAL Kulandagan Chettiar [(2004) 267 ITR 654 (SC)]** will hold the field, and, therefore, income taxable in the source jurisdiction under the treaty provisions cannot be included in total income of the assessee. He hastens to add, and rather curiously so, that he would once again urge us not to decide the matter on merits and simply remit the matter to the file of the Assessing Officer. Learned Departmental Representative, on the other hand, vehemently relies upon the stand of the authorities below, and leaves the matter to us.

[6] For the sake of completeness, we may also place on record that the fact that in assessee's own case for the assessment year 2012-13, the Dispute Resolution Panel has given relief of Rs 10,81,17,104 on this issue, and likewise for the assessment year 2013-14, the Dispute Resolution Panel has given relief of Rs 28,47,44,212 on the same issue. That is what probably explains the assessee's eagerness to go back to the assessment stage, and claim it as a covered issue before them. The reasoning adopted by the Dispute Resolution Panel, for example for the assessment year 2013-14 (at page 294 of the paper book, and internal page 15 of the respective order), is as follows:

> **9.1 We have gone through the core objection raised with respect to inclusion of foreign branches income in the hands of the assessee. It is a fact that the assessee has two foreign branches situated in UAE and Bahrain. It is also a fact that there exists a DTAA between India and UAE. Reference is made to the decision of Hon'ble Supreme Court in PAVL Kulandagan Chettiar's case (267 ITR 654) wherein Hon'ble Court has upheld the finding of the High Court which took the view that where there exists a provision to the contrary in the agreement, there is no scope for applying the law of any one of the respective contracting stares to tax paid on the liability to tax has to work doubt (*sic*- out) in the manner and to the extent permitted and allowed under the terms of the agreement. The AO is directed to verify the total income of the UAE branch and reduce the same from assessee's total income. The ground of objection is, accordingly, accepted.**
>
> **9.2 Similar views have been taken in the assessee's case by the DRP during the assessment year 2012-13.**

[7] Undoubtedly, as a result of Hon'ble Supreme Court's judgment in the case of PAVL Kulandagan Chetttiar's case *(supra)*, the legal position was that once an income is held to be taxable in a tax jurisdiction under a double taxation avoidance agreement, and unless there is a specific mention that it can also be taxed in the other tax jurisdiction, the other tax

jurisdiction was denuded of its powers to tax the same. To that extent, the worldwide basis of taxation in the scheme of the Indian Income-tax Act was no longer applicable in a situation provisions of a double taxation avoidance agreement entered into under section 90 apply. That was the scheme of law, as evident from the following observations, as settled by Hon'ble Supreme Court:

> 13. We need not to enter into an exercise in semantics as to whether the expression "may be" will mean allocation of power to tax or is only one of the options and it only grants power to tax in that State and unless tax is imposed and paid no relief can be sought. **Reading the Treaty in question as a whole when it is intended that even though it is possible for a resident in India to be taxed in terms of sections 4 and 5, if he is deemed to be a resident of a Contracting State where his personal and economic relations are closer, then his residence in India will become irrelevant. The Treaty will have to be interpreted as such and prevails over sections 4 and 5 of the Act.** Therefore, we are of the view that the High Court is justified in reaching its conclusion, though for different reasons from those stated by the High Court.

[8] We are, at this stage, not concerned about how the above legal position was at some variance with the first principles and what impact the aforesaid decision had on the workability of the double taxation relief mechanism. It would appear that the very scheme of tax credit, as envisaged in the international tax treaties, was perhaps rendered redundant. There was no question of tax credits being granted in India in view of the fact that any income taxed by source jurisdiction abroad was held to be exempted from taxation in India, and if these tax credits were to be granted it would have resulted in plain and simple refund of the taxes paid abroad since the incomes relating thereto were held to be not at all taxable in India. A double dip of losses abroad, howsoever inappropriate on the first principles, was actually possible, and was approved by the coordinate benches of this Tribunal, as in the case of Patni Computers (*supra*), wherein speaking through one of us (i.e. the Vice President), the legal position was respectfully followed nevertheless and it was also observed thus:

> **The law laid down by the Hon'ble Supreme Court in binding on us under Article 141 of the Constitution of India. The prevailing legal position, therefore, is that once an income is held to be taxable in a tax jurisdiction under a double taxation avoidance agreement, and unless there is a specific mention that it can also be taxed in the other tax jurisdiction, the other tax jurisdiction is denuded of its powers to tax the same. To that extent, the worldwide basis of taxation in the scheme of the Indian Income-tax Act is no longer applicable in a situation provisions of a double taxation avoidance agreement entered into under section**

> **90 apply. The law laid down by the Hon'ble Supreme Court in binding on us under Article 141 of the Constitution of India. The prevailing legal position, therefore, is that once an income is held to be taxable in a tax jurisdiction under a double taxation avoidance agreement, and unless there is a specific mention that it can also be taxed in the other tax jurisdiction, the other tax jurisdiction is denuded of its powers to tax the same. To that extent, the worldwide basis of taxation in the scheme of the Indian Income-tax Act is no longer applicable in a situation provisions of a double taxation avoidance agreement entered into under section 90 apply.**

[9] The development of law, however, did not stop at that.

[10] It may be recalled that, with effect from 1st April 2004, a new sub-section 3 was inserted in Section 90, and this new sub-section provided that "**(a)ny term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf**". In exercise of the powers so vested in the Central Government, vide notification no. 91 of 2008 dated 28th August 2008, it was notified as follows:

> **In exercise of the powers conferred by sub-section (3) of section 90 of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies that where an agreement entered into by the Central Government with the Government of any country outside India for granting relief of tax, or as the case may be, avoidance of double taxation, provides that any income of a resident of India "may be taxed" in the other country, such income shall be included in his total income chargeable to tax in India in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), and relief shall be granted in accordance with the method for elimination or avoidance of double taxation provided in such agreement.**

[11] The effect of Hon'ble Supreme Court's judgment in Kulandagan Chettiar's case *(supra)* thus was clearly overruled by the legislative developments. It was specifically legislated that the mere fact of taxability in the treaty partner jurisdiction will not take it out

of the ambit of taxable income of an assessee in India and that "**such income shall be included in his total income chargeable to tax in India in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), and relief shall be granted in accordance with the method for elimination or avoidance of double taxation provided in such agreement".** A coordinate bench of this Tribunal, in the case of **Essar Oil Ltd Vs ACIT [(2013) 28 ITR (Trib) 609 (Mumbai)],** also proceeded to hold that this notification was retrospective in effect inasmuch as it applied with effect from 1st April 2004 i.e. the date on which sub-section 3 was introduced in Section 90.

[12] When we invited learned counsel's attention to these legal developments, he submitted that as Section 90 has now been redrafted and a new Section 90 is in place, with effect from 1st October 2009, the notification issued under old section 90(3) ceases to be relevant. The legal position is, as he contended, that as on now there is no notification is in force under the present section 90, and, therefore, Hon'ble Supreme Court's judgment in the case of **Kulandagan Chettiar** *(supra)* still holds good in law. In support of this proposition, learned counsel for the assessee relies upon an observation by the coordinate bench, in the case of **Essar Oil Ltd** *(supra)* to the effect that "**We are, therefore, of the considered view that the substitution of Section 90, which has come into effect from 1st April 2004, and notification issued therein shall continue to hold at least upto 1st October 2009**". By implication, therefore, according to the learned counsel, the notification issued under old section 90(3) will not hold good in law after 1st October 2009, unless such notification is reissued on or after 1st October 2009.

[13] The argument of the learned counsel is only fit to be noted and rejected. It is only elementary that merely because a section is amended or even substituted, whether by repeal of the legislation itself or by amendment in the legislation, the notifications, circulars and instructions issued therein do not cease to hold good. Section 297(2)(k) of the Income Tax Act, 1961, specifically provides that notwithstanding the repeal of Income Tax Act, 1922, "**any agreement entered into, appointment made, approval given, recognition granted, direction, instruction, notification, order or rule issued under any provision of the repealed Act shall, so far as it is not inconsistent with the corresponding provision of this Act, be deemed to have been entered into, made, granted, given or issued under the corresponding provision aforesaid and shall continue in force accordingly**". On a similar note, under section 24 of the General Clauses Act, "**Where any Central Act or Regulation, is, after the commencement of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided any appointment notification, order, scheme, rule, form or bye-law, made or issued under the repealed Act or Regulation, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so**

re-enacted……." The scheme of law is thus unambiguous. Its only when an notification issued under the old statutory provision, whether repealed or modified, is inconsistent with the corresponding new statutory provisions, that such an notification ceases to hold good in law. In a rather recent judgment in the case of **Fibre Boards Pvt Ltd Vs CIT [(2017) 376 ITR 596 (SC)]**, Hon'ble Supreme Court has reiterated this principle, and, inter alia, observed as follows:

> **34. In CIT v. Venkateswara Hatcheries (P.) Ltd. [1999] 237 ITR 174/103 Taxman 503 (SC), this Court was faced with an omission and re-enactment of two Sections of the Income Tax Act. This Court found that Section 24 of the General Clauses Act would apply to such omission and re-enactment. The Court has stated as follows:**
>
> > **"As noticed earlier, the omission of Section 2(27) and re-enactment of Section 80-JJ was done simultaneously. It is a very well-recognized rule of interpretation of statutes that where a provision of an Act is omitted by an Act and the said Act simultaneously re-enacts a new provision which substantially covers the field occupied by the repealed provision with certain modification, in that event such re-enactment is regarded having force continuously and the modification or changes are treated as amendment coming into force with effect from the date of enforcement of the re-enacted provision. Viewed in this background, the effect of the re-enacted provision of Section 80-JJ was that profit from the business of livestock and poultry which enjoyed total exemption under Section 10(27) of the Act from Assessment Years 1964-65 to 1975-76 became partially exempt by way of deduction on fulfilment of certain conditions." (At para 12)**
>
> **35. For all the aforesaid reasons, we are therefore of the view that on omission of Section 280ZA and its re-enactment with modification in Section 54G, Section 24 of the General Clauses Act would apply, and the notification of 1967, declaring Thane to be an urban area, would be continued under and for the purposes of Section 54A.**

[14] When such are the views of Hon'ble Supreme Court in respect of validity of notifications in respect of amendment in law by re-enactment of the statutory provisions under the Income Tax Act, in which these provisions are of similar nature though by way of different provisions, it is futile to argue that when re-enactment of law has exactly the same provisions, so far as the related notification is concerned, the mere fact of re-enactment of law will be fatal to the notification. As regards learned counsel's reliance on observations

made by a coordinate bench, in the case of Essar Oil *(supra)*, to the effect "We are, therefore, of the considered view that the substitution of Section 90, which has come into effect from 1st April 2004, and notification issued therein shall continue to hold at least upto 1st October 2009", the import of words "at least" is being missed out. The issue for consideration by the coordinate bench was pre 1st October 2009 situation, and the coordinate bench was of the view that "at least" for this period, the validity of notification cannot be called into question. As held by Hon'ble jurisdictional High Court in the case of **CIT v. Sudhir Jayantilal Mulji [1995] 214 ITR 154 (Bom)**, a judicial precedent is only "**an authority for what it actually decides and not what may come to follow from some observations which find place therein**". The issue regarding validity of notification after 1st April 2009 was not before the coordinate bench, and these observations thus have no relevance on the proposition being canvassed before us. The law laid down by Hon'ble Supreme Court, as analysed above, is against the plea advanced by the learned counsel. In any case, the argument of the learned counsel, howsoever absurd, destroys his own case. If all the notifications under the old section 90 are to be held to be not good in law under the present section 90, the assessee cannot claim the benefits of the related tax treaties either since these treaties were also notified prior to 1st April 2009.

[15] Let us now turn to judicial precedents cited by the learned counsel.

[16] None of these judicial precedents take into account the developments with respect to the provisions of Section 90(3) and the notification issued thereunder. The only exception is a coordinate bench decision in the case of **Bank of India** *(supra)* wherein the issue of notification was specifically raised but then the coordinate bench, following Hon'ble jurisdictional High Court's judgment in assessee's own case for the assessment year 2003-04 and without realizing that the amendment in law was effective 1st April 2004 i.e. assessment year 2004-05, decided the issue in favour of the assessee. The impact of amendment with effect from 1st April 2004 not having been noted or having been brought to the notice of the coordinate bench, this decision is clearly *per incurium* and, as such, not a binding judicial precedent. As a matter of fact, when subsequent assessment years of this very assessee came up for consideration of another bench, the said precedent was not followed and, vide order dated 30th November 2018, it was observed that "**the decision of the Hon'ble High Court in assessee's own case pertained to the assessment years 2001-01 and 2003-04 and the Hon'ble High Court never had any occasion to examine the taxability of income of foreign branches in India keeping in view provisions of Section 90(3) read with the Government notification dated 28th August 2008**" and that **".....we are unable to accept the submission of the learned authorised representative that the issue is covered earlier decisions of the Tribunal**". The assessee, therefore, does not derive any benefit from this legal precedent relied upon. All other judicial precedents hold good in respect of the pre-

amendment law, but then the legal position, as analysed above, has changed, and, under the changed legal position, these judicial precedents donot hold good. As regards the DRP decisions for the immediately two preceding assessment years, we have noted that the post amendment legal position was not even brought to the notice of the Dispute Resolution Panel. There is not even a whisper of a suggestion that the amendment in law in Section 90(3) and the post amendment notification was brought to the notice of the DRP. Learned counsel's arguments before the DRP simply proceeded on the basis that there was no change in statutory provisions after the Kulangadan Chettiar's judgment. That is simply unacceptable. While we restrain from making any observations on the conduct of the representatives of the assessee, we find it difficult to believe that a big-4 accounting firm, as the assessee's representative before the DRP, as indeed before us, is, would really be oblivious of the correct legal position and it was anything less than a calculated ignorance, before the DRP, on the basic legal position. Advising the correct legal position and then making whatever aggressive claim one makes is one thing, but not explaining the correct legal position and then hoping to succeed with the claim, by keeping the adjudicator in dark about the statutory developments, is quite another. The path chosen by the assessee could have fallen in the first category if submissions were made before the DRP about the amendment in law by way of Section 90(3) and notification thereunder, and yet the exemption claim was to be justified due to no fresh notification being issued after the substitution of section 90(3) with effect from 1st October 2009. That is not the case. In any case, the DRP decisions cannot fetter our adjudication.

[17] We have also noted that, as per details furnished before us at pages 327 to 376 of the paper-book, the Assessing Officer has accepted the claim of the assessee, in the assessment year 2016-17, for exclusion of Rs 56,39,11,560 from its taxable income on the ground that it pertains to the profits of its branches in Italy, UAE, Qatar and Saudi Arab and India has DTAAs with these countries. This decision by the Assessing Officer, whatever its merits, certainly does not constitute any estoppel against the statute, and, in any case, there is no *res judicata* in the income tax proceedings. Just because the Assessing Officer himself has allowed a relief to the assessee, which, in our humble understanding of law- whatever is its worth, is patently inadmissible in law, we are not obliged to give the assessee the same relief. If at all the stand of the Assessing Officer indicates or explains anything, it explains the anxiety of the assessee to go back to the assessment stage on this issue. We are, however, not inclined to follow the plan so laid out.

[18] In the light of the above discussions, as also bearing in mind entirety of the case, we reject the claim of the assessee on merits. No matter how tempting is it to get a quick disposal by remitting the matter to the assessment stage, as the matter was not adjudicated on merits at

that stage, when, in our considered view, quite clearly it is a patently inadmissible claim, we have to hold so and thus decline to remit it to the assessment stage.

[19] Ground nos. 1 and 2 are thus dismissed.

[20] In ground nos. 3, 4 and 5, the assessee appellant is aggrieved of certain tax credits, foreign tax reliefs and tax deduction at source credits being partly declined. Learned counsel, however, fairly submits that it is only on account of certain factual verifications that these were so declined, and the matter has been taken up with the authorities concerned for rectification of related mistakes apparent on record. We, therefore, see no need to deal with these issues at this stage, and decline to interfere in the matter. The Assessing Officer is directed to deal with these rectifications, in accordance with the law, at an early date. Subject to these observations, the ground nos. 3, 4 and 5 are dismissed.

[21] In the result, the appeal is dismissed. Pronounced in the open court today on the 14th day of February, 2020.

Sd/-	**Sd/-**
Amarjit Singh	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 14th day of January, 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