

ITAT explains interplay between Article 7 and Article 13 of India-UK DTAA

Summary – The Delhi ITAT in a recent case of JC Bamford Excavators Ltd., (the Assessee) held that where special provision 'sends subject back to general provision', it is the general provision that applies.

- The well-settled rule of *generalia specialibus non derogant* means that the special provision overrides the general provisions. If there is a particular subject which is governed both by a special provision as well as a general provision, then it is the special provision which will take the subject within its fold to the exclusion of the general provision. However, it is not the end of the road. If such original special provision again takes the particular subject, on fulfillment of certain conditions, back to the general provision or any other special provision, then it is such general or any other special provision which will rule that particular subject. In such a situation, by which the original special provision sent the subject back to the general provision or any other special provision, the subject will be governed by the general or such other special provision.
- A cursory look at para 1 of Article 7 of the India-UK treaty ('DTAA') manifests that the profits of an enterprise of a Contracting State shall be taxable only in the State of residence unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, then the profits of the enterprise may be taxed in the other State but only so much of them as are directly or indirectly attributable to that permanent establishment. In our context, it means that if the UK enterprise carries on business in India through its permanent establishment situated in India, then the income earned by such UK enterprise from business carried on through such PE in India is chargeable to tax in India within the meaning of para 1 of Article.
- The effect of para 9 of Article 7 is that if 'Business profits' include an item of income which falls under any of the specific Articles of the DTAA, such as Royalties and fees for technical services under Article 13, then such income shall be excluded from the 'Business Profits' under Article 7 and come up for consideration under such specific Articles such as Article 13. But when any para of Article 13 sends the subject back to Article 7, then it shall be administered by the mandate of Article 7 to the exclusion of Article 13.
- Para 6 of article 13 of DTAA provides that the provisions of paragraphs 1 and 2 of Article 13 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 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. In such case, the provisions of Article 7 (Business profits) of this Convention, as the case may be, shall apply.

- The nutshell is that once Article 7 has excluded royalty or fees for technical services to be considered under Article 13 but para 6 of Article 13 has sent the matter back to Article 7, it is the mandate of Article 7 which shall apply on the amount excluded by para 6 of Article 13.